

3-2-2017

Johnson v. Crossett Clerk's Record Dckt. 44791

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs-Appellants,

vs.

DAVID CROSSETT, an individual,

Defendant-Respondent,

and

SCOTT H. LEE, an individual, DRUG
TESTING COMPLIANCE GROUP, LLC,
an Idaho limited liability company, VURV,
LLC, an Idaho limited liability company,
BO W. and KRYSTAL SCHMELLING, a
married couple,

Defendants.

Supreme Court Case No. 44791

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE D. DUFF McKEE

JAMES F. JACOBSON

ATTORNEY FOR APPELLANT

BOISE, IDAHO

MICHELLE R. POINTS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

David Johnson, Tessa Cousins §
vs. §
David Crossett, Scott H Lee, Drug Testing Compliance §
Group Llc, Unknown Vurv Llc, Bow Schmelling, Krystal §
Schmelling §

Location: Ada County District Court
Judicial Officer: Hoagland, Samuel
Filed on: 08/10/2015

CASE INFORMATION

Case Type: AA- All Initial District Court Filings (Not E, F, and H1)

DATE	CASE ASSIGNMENT
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Current Case Assignment

Case Number	CV-OC-2015-13887
Court	Ada County District Court
Date Assigned	08/10/2015
Judicial Officer	Hoagland, Samuel

PARTY INFORMATION

Plaintiff	Party Name	Lead Attorneys
	Cousins, Tessa	Jacobson, James Frederick <i>Retained</i> 208-884-1995(W)
	Johnson, David	McCubbins, James Stewart Neal <i>Retained</i> 208-908-4415 x5366(W)
Defendant	Crossett, David	Points, Michelle Renae <i>Retained</i> 208-287-3216(W)
	Drug Testing Compliance Group Llc	Points, Michelle Renae <i>Retained</i> 208-287-3216(W)
	Lee, Scott H	
	Schmelling, Bow	
	Schmelling, Krystal	
	Vurv Llc	Points, Michelle Renae <i>Retained</i> 208-287-3216(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
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08/10/2015	New Case Filed Other Claims <i>New Case Filed - Other Claims</i>	
08/10/2015	Complaint Filed <i>Complaint Filed</i>	
08/10/2015	Summons Filed <i>Summons Filed</i>	
08/20/2015	Notice of Service <i>Notice Of Service</i>	

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

08/20/2015 Answer
Answer (Points for Crossett)

08/20/2015 Motion to Disqualify
Motion To Disqualify Counsel

08/24/2015 Affidavit of Service
Affidavit Of Service 8.12.15

08/25/2015 Notice of Hearing
Notice Of Hearing

08/25/2015 Hearing Scheduled
Hearing Scheduled (Motion 09/15/2015 04:00 PM) to disqualify counsel

09/08/2015 Objection
Objection to Motion to Disqualify Counsel and Request for Attorneys Fees

09/09/2015 Objection
Objection to Motion to Disqualify Counsel and Request for Attoreny's Fees

09/14/2015 Notice
Notice Of Vacating Hearing

09/14/2015 Hearing Vacated
Hearing result for Motion scheduled on 09/15/2015 04:00 PM: Hearing Vacated to disqualify counsel

09/15/2015 **CANCELED Motion Hearing** (4:00 PM) (Judicial Officer: Hoagland, Samuel)
*Vacated
to disqualify counsel Hearing result for Motion scheduled on 09/15/2015 04:00 PM: Hearing Vacated*

09/18/2015 Notice of Service
Notice Of Service of Plaintiff's Answers to Defendant's First Set of Interrogatories, Requests for Production and Requests for Admission to Plaintiff

09/23/2015 Request
Request For Trial Setting

10/14/2015 Hearing Scheduled
Hearing Scheduled (Scheduling Conference 11/13/2015 03:00 PM)

10/14/2015 Notice
Notice of Scheduling Conference

10/20/2015 Notice of Service
Notice Of Service of Discovery

11/13/2015 DC Hearing Held: Court Reporter: # of Pages:
*Hearing result for Scheduling Conference scheduled on 11/13/2015 03:00 PM: District Court Hearing Held
Court Reporter: Christy Olesek
Number of Transcript Pages for this hearing estimated: less than 100*

11/13/2015 **Scheduling Conference** (3:00 PM) (Judicial Officer: Hoagland, Samuel)

11/19/2015 Notice of Service
Notice Of Service

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

12/15/2015	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 05/16/2016 09:00 AM)</i>
12/15/2015	Hearing Scheduled <i>Hearing Scheduled (Status Conference 05/16/2016 08:30 AM)</i>
12/15/2015	Hearing Scheduled <i>Hearing Scheduled (Pretrial Conference 05/04/2016 03:00 PM)</i>
12/15/2015	Order <i>Order Setting Trial, Pre-Trial Conference, and Scheduling Deadlines</i>
02/03/2016	Hearing Vacated <i>Hearing result for Pretrial Conference scheduled on 05/04/2016 03:00 PM: Hearing Vacated</i>
02/03/2016	Hearing Vacated <i>Hearing result for Status Conference scheduled on 05/16/2016 08:30 AM: Hearing Vacated</i>
02/03/2016	Hearing Vacated <i>Hearing result for Jury Trial scheduled on 05/16/2016 09:00 AM: Hearing Vacated</i>
02/03/2016	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 10/17/2016 09:00 AM) 5 days</i>
02/03/2016	Hearing Scheduled <i>Hearing Scheduled (Status Conference 10/17/2016 08:30 AM)</i>
02/03/2016	Hearing Scheduled <i>Hearing Scheduled (Pretrial Conference 09/30/2016 03:00 PM)</i>
02/04/2016	Motion <i>Motion To Consolidate</i>
02/04/2016	Memorandum <i>Memorandum In Support of Motion To Consolidate</i>
02/04/2016	Notice <i>Notice Of Motion To Consolidate</i>
02/04/2016	Motion <i>Motion For Leave To Amend Complaint And Join Party</i>
02/04/2016	Memorandum <i>Memorandum In Support of Motion For Leave To Amend Complaint And Join Party</i>
02/04/2016	Motion <i>Plaintiff's Motion To Compel Discovery Responses</i>
02/04/2016	Affidavit in Support of Motion <i>Affidavit Of James S Neal Mccubbins In Support Of Motion To Compel Discovery Responses</i>
02/10/2016	Notice of Hearing <i>Notice Of Hearing</i>
02/10/2016	Hearing Scheduled <i>Hearing Scheduled (Hearing Scheduled 03/08/2016 03:00 PM) Consolidate, Compel Discovery, And Amend Complaint And Join Party</i>
02/18/2016	Notice of Service <i>Notice Of Service of Plaintiff's First Supplemental Responses to Defendant's First Set of Interrogatories, Requests for Production and Requests for Admission to Plaintiff</i>

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

02/26/2016 Opposition to
Defendant's Opposition To Plaintiff's Motion To Compel

02/26/2016 Opposition to
Defendant's Opposition To Plaintiff's Motion To Consolidate

02/26/2016 Opposition to
Defendant's Opposition To Plaintiff's Motion For Leave To File An Amended Compliant

03/01/2016 Notice
Notice of Filing Memorandum in Opposition to Motion to Consolidate

03/03/2016 Reply
Reply to Defendants Memorandum in Opposition of Plaintiffs Motion for Leave to File an Amended Complaint

03/03/2016 Reply
Reply to David Crossetts Memorandum in Opposition of Motion to Consolidate

03/03/2016 Reply
Reply to Scott Lees Memorandum in Opposition of Motion to Consolidate

03/03/2016 Reply
Reply to Defendants Memorandum Opposition of Motion to Compel

03/04/2016 Notice
Notice of Attending Hearing Telephonically

03/08/2016 **Hearing Scheduled (3:00 PM)** (Judicial Officer: Hoagland, Samuel)
*Consolidate, Compel Discovery, And Amend Complaint And Join Party Hearing result for Hearing Scheduled scheduled on 03/08/2016 03:00 PM: District Court Hearing Held
Court Reporter: Christy Olesek
Number of Transcript Pages for this hearing estimated: less than 100*

03/11/2016 Stipulation
Stipulation for Scheduling

03/11/2016 Order
Order Setting Trial, Pre-Trial Conference, and Scheduling Deadlines

03/17/2016 DC Hearing Held: Court Reporter: # of Pages:
*Hearing result for Hearing Scheduled scheduled on 03/08/2016 03:00 PM: District Court Hearing Held
Court Reporter: Christy Olesek
Number of Transcript Pages for this hearing estimated: less than 100*

04/08/2016 Amended
First Amended Complaint

04/08/2016 Summons Filed
(4) Summons

04/27/2016 Stipulation
Stipulation for Order of Dismissal With Prejudice, Bo W and Krystal Schmelling

05/02/2016 Order
Order on Motions

05/04/2016 **CANCELED Pre-trial Conference (3:00 PM)** (Judicial Officer: Hoagland, Samuel)
Vacated

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

05/16/2016 **CANCELED Jury Trial** (9:00 AM) (Judicial Officer: Hoagland, Samuel)
Vacated

05/16/2016 **CANCELED Status Conference** (8:30 AM) (Judicial Officer: Hoagland, Samuel)
Vacated

06/23/2016 Notice
Amended Notice of Deposition of David Crossett

07/08/2016 Amended
Amended Notice of Deposition of David Crossett

07/08/2016 Stipulation
Stipulation for Entry of a Protective Order

07/18/2016 Miscellaneous
Lay Witness Disclosure

07/18/2016 PO Protection Order Granted
Protective Order

07/18/2016 Answer
Answer To First Amended Complaint (Points For David, Drug Testing Compliance Group, and Vurv)

07/19/2016 Affidavit of Service
Affidavit Of Service 6.1.16

09/06/2016  Motion
in Limine

09/12/2016  Motion
For Bifurcated Trial

09/12/2016  Notice of Hearing
Motion In Limine (9/30/16 @ 3 p.m)

09/19/2016  Notice of Service
of Discovery Responses

09/23/2016  Pretrial Memorandum

09/23/2016  Memorandum
In Opposition Of Defendants' Motion For Bifurcate Trial

09/23/2016  Memorandum
in Opposition of Defendant Crossett's Motion in Limine


09/23/2016  Pretrial Memorandum
Plaintiff's


09/30/2016 **Pre-trial Conference** (3:00 PM) (Judicial Officer: Hoagland, Samuel)
Motion In Limine And Motion To Bifurcate


09/30/2016  Witness and Exhibit List


ADA COUNTY DISTRICT COURT
CASE SUMMARY
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Defendant Crossett, Drug Testing Compliance Group, LLC And VURV


09/30/2016  Court Minutes

09/30/2016  Witness List
Plaintiffs' Witness and Exhibit List

10/05/2016  Pretrial Order
Memorandum and Order


10/11/2016  Findings of Fact and Conclusions of Law
Plaintiffs Proposed Findings of Fact and Conclusions of Law

10/11/2016  Findings of Fact and Conclusions of Law
Proposed Findings of Fact and Conclusions of law


10/15/2016  Exhibit List/Log
Defendants' Trial Exhibit List


10/17/2016 **Status Conference (8:30 AM)** (Judicial Officer: McKee, D. Duff)


10/17/2016 **Court Trial - Civil (9:00 AM)** (Judicial Officer: McKee, D. Duff)

10/17/2016  Court Minutes


10/18/2016 **Court Trial (9:00 AM)** (Judicial Officer: McKee, D. Duff)


10/18/2016  Court Minutes


10/18/2016  Exhibit List/Log


11/01/2016  Findings of Fact and Conclusions of Law
and Directions for Entry of Judgment


11/02/2016 **Final Judgment** (Judicial Officer: Hoagland, Samuel)
Party (Crossett, David; Drug Testing Compliance Group Llc)

11/08/2016  Declaration
Of Counsel Setting Forth Attorney Fees And Costs













11/08/2016  Notice of Hearing
(12/9/16 at 2pm)

11/22/2016  Objection
to Defendants' Request for Attorney Fees

11/23/2016  Affidavit
of David Johnson in Support of Motion for New Trial

11/23/2016  Affidavit
of James F. Jacobson in Support of Motion for New Trial

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

11/23/2016	 Motion <i>for New Trial</i>
11/23/2016	 Memorandum In Support of Motion <i>for New Trial</i>
11/23/2016	 Notice of Hearing <i>on Motion for New Trial (12/09/16@2pm)</i>
12/01/2016	 Reply <i>to Plaintiffs' Objection to Defendants' Motion for Attorney Fees</i>
12/01/2016	 Response <i>Defendant's Response to Plaintiffs' Motion for New Trial</i>
12/01/2016	 Declaration <i>Supplement Declaration of Counsel Setting Forth Attorney Fees and Costs</i>
12/09/2016	Motion Hearing (2:00 PM) (Judicial Officer: Hoagland, Samuel)
12/16/2016	 Decision or Opinion <i>Ruling on Objection to Defendant's Application for Attorney Fees</i>
12/21/2016	 Judgment
12/21/2016	 Miscellaneous <i>Attorney Fee Lien</i>
01/27/2017	 Notice of Appeal
01/27/2017	Appeal Filed in Supreme Court
02/03/2017	 Motion <i>for Posting of Security Pending Appeal</i>
02/08/2017	 Notice of Hearing <i>Scheduled (3/7/17 @ 3 p.m.)</i>
03/07/2017	Motion Hearing (3:00 PM) (Judicial Officer: Hoagland, Samuel) <i>For Posting Of Security Pending Appeal</i>

DATE

FINANCIAL INFORMATION

Defendant Crossett, David	
Total Charges	136.00
Total Payments and Credits	136.00
Balance Due as of 3/2/2017	0.00
Other Party Unknown Payor	
Total Charges	16.00
Total Payments and Credits	16.00
Balance Due as of 3/2/2017	0.00
Plaintiff Johnson, David	
Total Charges	353.00
Total Payments and Credits	353.00

000008

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-13887

Balance Due as of 3/2/2017

0.00

NO. _____ FILED _____
A.M. _____ P.M. 440

AUG 10 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

James F. Jacobson [ISB No. 7011]
James S. Neal McCubbins [ISB No. 9463]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
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Email: james@jlawidaho.com
Email: mccubbins@jlawidaho.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual,

Defendant.

CASE NO. CV 0C 1513887

COMPLAINT

**Filing Fee: \$221.00
A.A.**

COMES NOW the above-named Plaintiff, DAVID JOHNSON, an individual, in the above matter, by and through its counsel of record, Jacobson & Jacobson, PLLC, and for its cause of action under Idaho Code Section 30-25-801 against the above-named Defendant, states and alleges as follows:

8/1/15

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to I.C. §1-705 and I.C. §5-514. The amount in controversy is in excess of jurisdictional minimum of this Court of \$10,000.
2. Venue is proper in this District pursuant to I.C. § 5-404.

PARTIES

3. At all times relevant hereto, Plaintiff, David Johnson, is and was a resident of the Ada County, state of Idaho.
4. At all times relevant hereto, Defendant, David Crossett, is and was a resident of the Ada County, state of Idaho.

GENERAL ALLEGATIONS

5. In or about May of 2013, Plaintiff and Defendant began discussions on developing a drug testing compliance business for Commercial Drivers License holders seeking compliance with Department of Transportation rules and regulations.
6. On or about ___ of 2013, Plaintiff provided investment monies of \$3,000 to get the business up and running.
7. On or about June 5, 2013, Defendant filed, on behalf of the business that Plaintiff and Defendant had formed, articles of organization for an Idaho limited liability company, listing himself as a Member or Manager and as the registered agent. The limited liability company was named "Drug Testing Compliance Group, LLC" (hereinafter "DTC Group").
8. Plaintiff was of the understanding that Defendant was to be the Manager,

President, or Chief Executive Officer of the DTC Group.

9. On or about June 13, 2013, Plaintiff retained the services of James F. Jacobson of the firm Jacobson & Jacobson, PLLC to draft an operating agreement for DTC Group. At all times relevant to the formation of DTC Group and the development of the operating agreement, Defendant considered Plaintiff and Tessa Cousins members of DTC Group.

10. On or about July 12, 2013, Defendant identified the membership interests of David Johnson at forty-four percent (44%) with a cash infusion of \$3,000, the membership interest of Defendant at forty-six percent (46%) for management services and \$1,000 cash, and the membership of Tessa Cousins at ten percent (10%) for formation and management activities when editing the draft version of the operating agreement provided by James F. Jacobson of the firm Jacobson & Jacobson, PLLC.

11. On or about July 12, 2013, Defendant identified that Plaintiff's Position with DTC Group would be "Vice President."

12. On or about July 12, 2013, Defendant and DTC Group were sued by a competitor company, CDL Compliance Testing, LLC.

13. Based upon information and belief, during that lawsuit, Defendant did not want to disclose all individuals involved in DTC Group, and, therefore, did not sign the Operating Agreement for DTC Group. At all times during the litigation, Defendant avoided identifying the actual members of DTC Group.

14. At no point during the lifetime of DTC Group, did Defendant as Manager or President of DTC Group cause proper tax documentation to be sent to Plaintiff representing his interest in DTC Group.

15. In or about the end of September of 2014, Defendant unilaterally removed both Plaintiff and Tessa Cousins from DTC Group, wrongfully claiming that by virtue of his “majority interest” he could unilaterally remove them.

16. In or about September 2014, Defendant wrongfully “gave” Plaintiff’s and Tessa Cousins’ interest to himself and/or to Scott Lee, a third party consultant brought in by Defendant to increase DTC Group Sales.

17. On or about November 3, 2014, Defendant formed Verve, LLC and TruGuard, LLC, and on or about November 7, 2014 renamed the Verve, LLC entity as Vurv, LLC and added Scott Lee as a member or manager to the organization. TruGuard, LLC already had Scott Lee named as a member or manager.

18. Based upon information and belief, Plaintiff asserts that all business opportunities that should be going to DTC Group have been wrongfully diverted to either Vurv, LLC or TruGuard, LLC, or both.

COUNT I - DECLARATORY JUDGMENT - EXISTENCE OF LLC

19. Plaintiff incorporates paragraphs 1 - 18 as if fully set forth herein.

20. Idaho law does not require that all members of an LLC be listed in its organizational documents, nor is the organizational filing with the Idaho Secretary of State conclusive as to all Members of an LLC.

21. At all times since the organization of DTC Group, Plaintiff was and is a member of DTC Group.

22. Plaintiff is entitled to a declaration that he is a Member of the DTC Group limited

liability company.

COUNT II - DECLARATORY JUDGMENT - INTEREST IN LLC

23. Plaintiff incorporates paragraphs 1 - 22 as if fully set forth herein.
24. Idaho Law recognizes the existence of Oral Operating Agreements. (See Estate of E.A. Collins v. Geist, 153 P.3d 1167 (Idaho 2007))
25. Plaintiff is entitled to a declaration that absent a signed operating agreement his interest was forty-four percent (44%) of DTC Group, as identified by Plaintiff in or about July of 2013.
26. In the alternative, Plaintiff is entitled to a declaration that he is an equal interest Member with Defendant in DTC Group.

COUNT III - BREACH OF FIDUCIARY DUTIES - LOYALTY

27. Plaintiff incorporates paragraphs 1 - 26 as if fully set forth herein.
28. Based upon information and belief, Plaintiff asserts that Defendant has breached his duty of loyalty to Plaintiff by failing to account to Plaintiff regarding the property, profit, and benefit derived by its members, including:
 - A. Failure to properly distribute income and distributions properly;
 - B. Appropriating and/or subverting company opportunities to other businesses owned by Defendant;
 - C. Dealing with the Company and its other members in conduct as or on behalf of a person not a member of the company;
 - D. Competing with the Company by diverting all business to Vurv, LLC or

TruGuard, LLC, or both.

29. Plaintiff has, as a result, been damaged in an amount to be proven at trial.

COUNT IV - BREACH OF FIDUCIARY DUTIES - CARE

30. Plaintiff incorporates paragraphs 1 - 29 as if fully set forth herein.

31. Based upon information and belief, Plaintiff asserts that Defendant has breached his duty of care by engaging in willful and intentional misconduct to attempt to force Plaintiff and Tessa Cousins out of DTC Group.

32. Based upon information and belief, Plaintiff also asserts that Defendant knowingly violated law by failing to provide proper tax documentation and statements to Plaintiff.

33. Plaintiff further asserts that Defendant has knowingly failed in his obligations as Manager of DTC Group to properly hold meetings, provide notice of meetings, keep records, or other governance requirements, and that such actions constitutes grossly negligent conduct, and/or willful or intentional misconduct in Defendant's management of DTC Group.

34. Plaintiff has, as a result, been damaged in an amount to be proven at trial.

COUNT V - BREACH OF FIDUCIARY DUTIES - GOOD FAITH/FAIR DEALING

35. Plaintiff incorporates paragraphs 1 - 34 as if fully set forth herein.

36. Defendant, through his actions, breached his duties and obligations owed to Plaintiff and other Members of DTC Group by failing to execute his obligations created

either by statute of Idaho Law or by the oral operating agreement, consistent with the contractual obligation of good faith and fair dealing.

37. Plaintiff has, as a result, been damaged in an amount to be proven at trial.

COUNT VI - IMPROPER DISTRIBUTIONS

38. Plaintiff incorporates paragraphs 1 - 37 as if fully set forth herein.

39. Based upon information and belief, Plaintiff asserts that Defendant has provided distributions to himself and others in violation of Idaho Code 30-25-406, and in violation of the oral operating agreement.

40. Plaintiff has, as a result, been damaged in an amount to be proven at trial.

COUNT VII - IMPROPER TERMINATION/EXPULSION OF MEMBER

41. Plaintiff incorporates paragraphs 1 - 40 as if fully set forth herein.

42. Defendant's actions in attempting to remove both Plaintiff and Tessa Cousins from DTC Group based upon his "majority interest" constitutes an improper termination and/or expulsion of members.

43. Plaintiff has, as a result, been damaged in an amount to be proven at trial.

COUNT VIII - REMOVAL OF DEFENDANT AS MEMBER

44. Plaintiff incorporates paragraphs 1 - 43 as if fully set forth herein.

45. Based upon information and belief, Plaintiff asserts that Defendant is engaging in wrongful conduct that has affected adversely and materially the company's activities and

affairs.

46. Based upon information and belief, Plaintiff asserts that Defendant has willfully and persistently committed material breach of the oral operating agreement or a duty or obligation under section 30-25-409 of the Idaho Code.

47. Based upon information and belief, Plaintiff asserts that Defendant has engaged and is engaging in conduct relating to the company's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with Defendant as a member.

48. Plaintiff, therefore, is entitled to relief under Section 30-25-601(6) to have a judicial order expelling Defendant as a member of DTC Group.

PRAYER FOR RELIEF

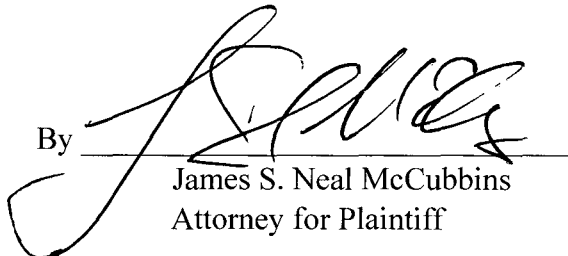
WHEREFORE, based on the foregoing, Plaintiff prays for relief as follows:

1. That the Court adjudge and decree that DTC Group is a three-member LLC existing under the laws of Idaho;
2. That the Court adjudge and decree that Plaintiff is a Member of DTC Group, with an interest of forty-four percent (44%) or in the alterantive, an interest of thirty-three percent (33%);
3. That the Court adjudge and decree that Defendant has breached his fiduciary duty of loyalty;
4. That the Court adjudge and decree that Defendant has breached his fiduciary duty of care;

5. That the Court adjudge and decree that Defendant has breached his fiduciary duty of good faith and fair dealing;
6. That the Court adjudge and decree that Defendant has engaged in the conduct complained herein and/or proven at trial, and is liable to Plaintiff for that conduct;
7. That Plaintiff be awarded actual damages, compensatory damages, special damages, punitive damages, attorneys' fees, and any and all other remedies as determined by the Court in an amount to be proven at trial;
8. That Defendant be enjoined from further wrongful and acts as set forth herein and as shall be proven at trial, including but not limited to preventing Plaintiff from having access to business records;
9. That Defendant be expelled from DTC Group, LLC, forthwith, and control returned to the remaining members, pursuant to 30-25-602(6);
10. That Plaintiffs recover from Defendant their costs, including reasonable attorney fees, pursuant to I.R.C.P. and any other applicable rules, statutes, or provisions of Idaho law, and a reasonable attorney fee in the amount of \$8,000 in the event of default; and,
11. For such other and further relief as the Court deems just and equitable under the circumstances.

DATED this 10th day of August, 2015.

JACOBSON & JACOBSON, PLLC

By 
James S. Neal McCubbins
Attorney for Plaintiff

NO. _____
A.M. _____ P.M. 205
AUG 20 2015
CHRISTOPHER D. RICH, Clerk
By TENILLE GRANT
DEPUTY

Michelle R. Points, ISB No. 6224
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Telephone: 208.287.3216
Facsimile: 208.336.2088
Email: mpoints@pointslaw.com

Attorney for David Crossett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON,
Plaintiff,
vs.
DAVID CROSSETT,
Defendants.

Case No. CV OC 1513887
ANSWER

Defendant David Crossett, by and through his counsel of record Michelle R. Points of Points Law, PLLC, and by way of answer to the Complaint filed by Plaintiff David Johnson, admits, denies and alleges as follows:

1. Defendant denies the allegations set forth in paragraphs 1 and 2 of the Complaint as those allegations set forth conclusions of law to which no response is required.
2. Defendant admits the allegations set forth in paragraphs 3, 4 and 5 of the Complaint.
3. Defendant denies the allegations set forth in paragraph 6 of the Complaint.

TG

4. Defendant denies the allegations set forth in paragraph 7 of the Complaint; Plaintiff did not “form” DTC Group.
5. Defendant denies the allegations set forth in paragraph 8 of the Complaint based upon a lack of knowledge.
6. Defendant denies the allegations set forth in paragraphs 9, 10, and 11 of the Complaint, as stated.
7. Defendant admits the allegations set forth in paragraph 12 of the Complaint.
8. Defendant denies the allegations set forth in paragraphs 13, 14, 15, and 16 of the Complaint.
9. Defendant admits the allegations set forth in paragraph 17 of the Complaint.
10. Defendant denies the allegations set forth in paragraph 18 of the Complaint.
11. With respect to paragraph 19, Defendant reasserts all admissions and denials previously set forth.
12. Defendant denies the allegations set forth in paragraph 20 of the Complaint as those allegations set forth conclusions of law to which no response is required.
13. Defendant denies the allegations set forth in paragraphs 21 and 22 of the Complaint.
14. With respect to paragraph 23, Defendant reasserts all admissions and denials previously set forth.
15. Defendant denies the allegations set forth in paragraphs 24, 25 and 26 of the Complaint.
16. With respect to paragraph 27, Defendant reasserts all admissions and denials previously set forth.

17. Defendant denies the allegations set forth in paragraphs 28 and 29 of the Complaint.
18. With respect to paragraph 30, Defendant reasserts all admissions and denials previously set forth.
19. Defendant denies paragraphs 31, 32, 33 and 34 of the Complaint.
20. With respect to paragraph 35, Defendant reasserts all admissions and denials previously set forth.
21. Defendant denies the allegations set forth in paragraphs 36 and 37 of the Complaint.
22. With respect to paragraph 38, Defendant reasserts all admissions and denials previously set forth.
23. Defendant denies the allegations set forth in paragraphs 39 and 40 of the Complaint.
24. With respect to paragraph 41, Defendant reasserts all admissions and denials previously set forth.
25. Defendant denies the allegations set forth in paragraphs 42 and 43 of the Complaint.
26. With respect to paragraph 44, Defendant reasserts all admissions and denials previously set forth.
27. Defendant denies the allegations set forth in paragraphs 45, 46, 47 and 48 of the Complaint.

AFFIRMATIVE DEFENSES

The following defenses are not stated separately as to each claim for relief or allegation of Plaintiff. Nevertheless, the following defenses are applicable, where appropriate, to any and all of Plaintiff's claims for relief. In addition, Defendant, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon Defendant but, to the contrary, assert that by reason of denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse of the allegations contained in many of the defenses is upon Plaintiff. Moreover, Defendant does not admit, in asserting any defense, any responsibility or liability of Defendant, but, to the contrary, specifically deny any and all allegations of responsibility and liability in the Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiff is barred from maintaining this action against Defendant based upon the doctrine of collateral estoppel.

SECOND AFFIRMATIVE DEFENSE

Plaintiff is barred from maintaining this action based on the equitable theories of laches, waiver and estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks standing to assert the claims set forth in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is barred from maintaining this action against Defendant by reason of Plaintiff's release of claims, if any, upon which this action is based as against Defendant.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from maintaining this action against Defendant because Plaintiff, by failing to act reasonably, has failed to mitigate the damages to which Plaintiff may have been entitled, if any.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff should be denied any equitable relief herein on the ground of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

The claims contained in Plaintiff's Complaint are frivolous and the Complaint fails to state a claim upon which relief can be granted.

RULE 11 STATEMENT

Defendant has considered and believes that he may have additional defenses, but does not have enough information at this time to assert such additional defenses under Rule 11 of the Idaho Rules of Civil Procedure. Defendant does not intend to waive any such defenses and specifically asserts his intention to amend this Answer if, pending research after discovery, facts come to light giving rise to such additional defenses.

REQUEST FOR ATTORNEY FEES

Defendant has been required to retain the law firm of Points Law, PLLC, to defend him in this litigation. Defendants should be awarded their attorney fees and costs incurred in said defense pursuant to the parties' contract, I.C. § 12-120 (3) and other applicable law.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for entry of judgment, as follows:

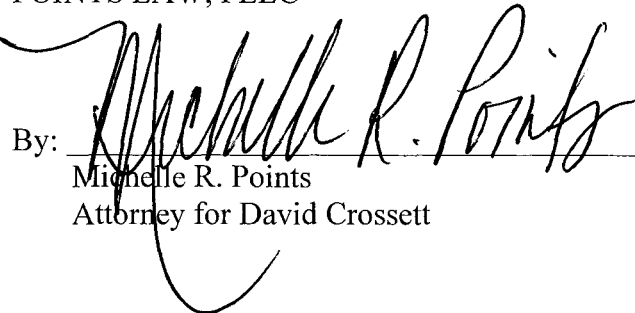
1. That Plaintiff's Complaint be dismissed and Plaintiff take nothing thereby;

2. That Defendant be awarded reasonable attorney fees and costs necessarily incurred in defending this action; and

3. For such other and further relief as the Court deems just and proper.

DATED this 20th day of August, 2015

POINTS LAW, PLLC

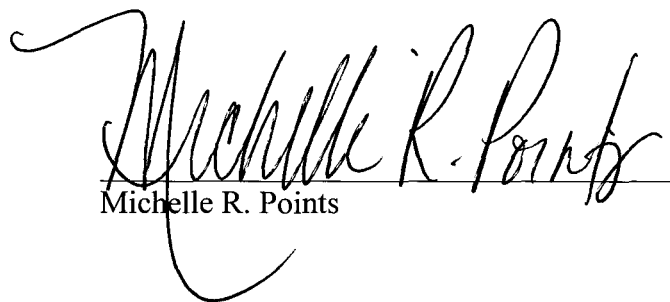
By: 
Michelle R. Points
Attorney for David Crossett

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2015, I caused to be served a true copy of the foregoing ANSWER by the method indicated below and addressed to each of the following:

James F. Jacobson
James S. Neal McCubbins
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, Idaho 83714

U.S Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Fax (208) 477-5210


Michelle R. Points

Hoagland
Stephanie
4.11.16
KH

NO. _____
FILED _____
A.M. _____ P.M. 1208

APR 08 2016

CHRISTOPHER D. RICH, Clerk
By TYLER ATKINSON
DEPUTY

James S. Neal McCubbins [ISB No. 9463]
James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
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Email: mccubbins@jjlawidaho.com
Email: james@jjlawidaho.com

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

FIRST AMENDED COMPLAINT

COMES NOW the above-named Plaintiffs, DAVID JOHNSON, an individual,
and TESSA COUSINS, an individual in the above matter, by and through their counsel of
record, Jacobson & Jacobson, PLLC, and for their causes of action against the above-
named Defendants, state and alleges as follows:

JURISDICTION AND VENUE

K

1. This court has jurisdiction over this action pursuant to I.C. §1-705 and I.C. §5-514. The amount in controversy is in excess of jurisdictional minimum of this Court of \$10,000.

2. Venue is proper in this District pursuant to I.C. § 5-404.

PARTIES

3. At all times relevant hereto, Plaintiff, David Johnson, is and was a resident of the Ada County, State of Idaho.

4. At all times relevant hereto, Plaintiff, Tessa Cousins, is and was a resident of the Ada County, State of Idaho.

5. At all times relevant hereto, Defendant, David Crossett, is and was a resident of the Ada County, State of Idaho.

6. At all times relevant hereto, Defendant, Scott Lee, is and was a resident of the Ada County, State of Idaho.

7. At all times relevant hereto, Defendant Drug Testing Compliance Group, LLC (hereinafter “DTC Group”), was and Idaho limited liability company doing business in the state of Idaho.

8. At all times relevant hereto, Vurv, LLC (hereinafter “Vurv”), was and Idaho limited liability company doing business in the state of Idaho.

9. At all times relevant hereto, Defendants, Bo W. and Krystal Schmelling (the “Defendants Schmelling”), are and were residents of the Ada County, State of Idaho.

10. Plaintiffs David Johnson and Tessa Cousins are referred herein as each a “Plaintiff” and together the “Plaintiffs.”

GENERAL ALLEGATIONS

11. In or about May of 2013, Plaintiffs and Defendant Crossett began discussions on developing a drug testing compliance business for Commercial Driver's License holders seeking compliance with Department of Transportation rules and regulations.

12. On or about May of 2013, Plaintiff Johnson provided investment monies of at least \$3,000 to get the business up and running.

13. Beginning on or around May of 2013, Plaintiff Cousins provided knowledge and subject matter expertise, as well as functioned as an administrator of the business DTC Group.

14. On or about June 5, 2013, Defendant filed, on behalf of the business that Plaintiffs and Defendant Crossett had formed, articles of organization for an Idaho limited liability company, listing himself as a Member or Manager and as the registered agent. The limited liability company was named "Drug Testing Compliance Group, LLC."

15. Plaintiffs were of the understanding that Defendant Crossett was to be the Manager, President, or Chief Executive Officer of the DTC Group and that Plaintiff Cousins was to act as an executive within DTC Group.

16. On or about June 13, 2013, Plaintiff Johnson retained the services of James F. Jacobson, of the firm Jacobson & Jacobson, PLLC, to review and edit an operating agreement for DTC Group that was provided to the Plaintiffs by Defendant Crossett. At all times relevant to the formation of DTC Group and the development of the operating agreement, Defendant Crossett considered Plaintiffs members of DTC Group, and/or that Plaintiff Cousins would become a member through her involvement.

17. On or about July 12, 2013, Defendant Crossett identified the membership interests

of Plaintiff Johnson at forty-four percent (44%) with a cash infusion of \$3,000, the membership interest of Defendant Crossett at forty-six percent (46%) for management services and \$1,000 cash, and the membership of Tessa Cousins at ten percent (10%) for formation and management activities when editing the draft version of the operating agreement provided by James F. Jacobson of the firm Jacobson & Jacobson, PLLC.

18. On or about July 12, 2013, Defendant Crossett identified that Plaintiff's Position with DTC Group would be "Vice President."

19. On or about July 12, 2013, Defendant Crossett and DTC Group were sued by a competitor company, CDL Compliance Testing, LLC.

20. Based upon information and belief, during that lawsuit, Defendant Crossett did not want to disclose all individuals involved in DTC Group, and, therefore, did not sign the Operating Agreement for DTC Group.

21. Based upon information and belief, at all times during the litigation, Defendant Crossett attempted avoided identifying the actual members of DTC Group, and only identified Plaintiff Johnson to Plaintiff Cousins before or during the course of a deposition regarding the lawsuit.

22. At no point during the lifetime of DTC Group, did Defendant as Manager or President of DTC Group cause proper tax documentation to be sent to Plaintiffs representing their interest in DTC Group.

23. In or about August of 2014, Defendant Crossett informed Plaintiff Cousins that he was having or had had a business meeting with Defendant Lee regarding the sale of a business owned entirely by Defendant Crossett called "Ready Receipts." Defendant Crossett further indicated to Plaintiff Cousins that such meeting had nothing to do with

DTC Group.

24. In or about August of 2014, Defendant Crossett unilaterally entered into an agreement with Defendant Lee to provide sales and marketing services for DTC Group in exchange for ownership in DTC Group.

25. Based upon information and belief, Plaintiffs allege that the terms of the agreement were such that Defendants Crossett and Lee agreed that if DTC Group could double sales within ninety (90) days, Defendant Crossett would grant Defendant Lee a fifty percent (50%) ownership interest in DTC Group, contrary to law.

26. In or about the end of September of 2014, Defendant unilaterally removed both Plaintiffs from DTC Group as members, wrongfully claiming that by virtue of his “majority interest” of forty-six percent (46%) he could unilaterally remove them.

27. In or about September 2014, Defendant Crossett wrongfully “gave” Plaintiffs’ interest to himself and/or to Defendant Scott Lee, a third party consultant brought in by Defendant to increase DTC Group Sales, without proper payment and agreement with Plaintiffs.

28. Defendant Lee began working with DTC Group and became aware of the ten percent (10%) ownership interest of Plaintiff Cousins.

29. On or before November of 2014, Defendant Lee was aware of the ownership interest that Plaintiff Cousins had in DTC Group and offered to buy her interest from her.

30. On or about November 3, 2014, Defendants Crossett and Lee formed Verve, LLC and TruGuard, LLC, and on or about November 7, 2014 renamed the Verve, LLC entity as Vurv, LLC and added Scott Lee as a member or manager to the organization. TruGuard, LLC already had Scott Lee named as a member or manager.

31. Based upon information and belief, Plaintiff asserts that all business opportunities that should be going to DTC Group have been wrongfully diverted to either Vurv, LLC or TruGuard, LLC, or both, without the authorization of Plaintiffs.

32. On or after November 7, 2014, Defendant Crossett repeatedly and consistently introduced Defendant Lee to customers, vendors, employees and other business associates as an equal owner in DTC Group.

33. Compensation for Defendant Lee for work performed on behalf of DTC Group was provided through monies allocated or funneled through Defendant Vurv by Defendants Crossett and Lee without the Plaintiffs' authorization.

34. On or about November 6, 2015, Defendant Crossett met with Defendant Bo Schmelling to discuss the sale of DTC Group to the Defendants Schmelling without prior authorization of the Plaintiffs.

35. Based upon information and belief, on or about December 10, 2015, Defendant Crossett unilaterally entered into an agreement to sell and transfer the assets, operations, and business of DTC Group to Defendants Schmelling.

COUNT I - DECLARATORY JUDGMENT - EXISTENCE OF LLC

36. Plaintiffs incorporate paragraphs 1 - 35 as if fully set forth herein.

37. Idaho law does not require that all members of an LLC be listed in its organizational documents, nor is the organizational filing with the Idaho Secretary of State conclusive as to all Members of an LLC.

38. At all times since the organization of DTC Group, Plaintiffs were and are members of DTC Group by virtue of their intention to carry on business with Defendant Crossett, and the filing of the articles of organization under Idaho law to operate their

business as a limited liability company and not as a general partnership.

39. Plaintiffs are entitled to a declaration that they are Members of the DTC Group limited liability company, and that no other persons or entities other than Plaintiffs and Defendant Crossett were and are Members.

COUNT II - DECLARATORY JUDGMENT - INTEREST IN LLC

40. Plaintiffs incorporate paragraphs 1 - 39 as if fully set forth herein.

41. Idaho Law recognizes the existence of Oral Operating Agreements. (*See Estate of E.A. Collins v. Geist*, 153 P.3d 1167 (Idaho 2007))

42. Plaintiffs are entitled to a declaration that absent a signed operating agreement, their interest was forty-four percent (44%) for Plaintiff Johnson and ten percent (10%) for Plaintiff Cousins of DTC Group, as identified by Defendant Crossett in or about July of 2013.

43. In the alternative, Plaintiffs are entitled to a declaration that they are equal interest Members with Defendant Crossett in DTC Group.

**COUNT III – DECLARATORY JUDGMENT –
UNAUTHORIZED COMPANY ACTION**

44. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

45. An actionable, justiciable controversy exists between the Plaintiffs and Defendants regarding the purported transfer of interest to i) Defendant Lee, and ii) the subsequent transfer of assets to Defendants Schmelling. These acts were not authorized pursuant to law or agreement by the Plaintiffs in this action, and therefore unauthorized.

46. Plaintiffs, together, comprise a fifty-five (55%) interest in the ownership of DTC Group, and as majority owners and members have the right to input and voting on the

sale of all or substantially all of the assets of the company, particularly where Defendant Crossett purports to transfer interest and assets either to himself or to others.

47. Defendant Crossett's and Defendant DTC Group's attempted or actual sale or transfer of interest to either Defendant Lee or to Defendant Vurv or to Defendants Schmelling or to any other buyers without the prior authorization of the Plaintiffs constitutes unauthorized company action by Defendant Crossett acting for himself or as an officer and member of Defendant DTC Group, pursuant to Idaho Code §30-25-407(c)(3)(A).

48. Upon information and belief, Defendants Schmelling were made aware of the ownership interest in Defendant DTC Group of parties other than Defendant Crossett, and that Defendant Crossett did not have actual or apparent authority to transact such exchange.

49. Upon information and belief, Defendant Lee had actual awareness and knowledge of the ownership interest of Plaintiff Cousins and Plaintiff Johnson in Defendant DTC Group.

50. As a result of Defendant Crossett and Defendant DTC Group's unauthorized acts of transfer and sale to Defendants Lee and Vurv, and then subsequently retransferred or sold to Defendants Schmelling, Plaintiffs have been forced to incur costs and attorney fees to protect their interest.

COUNT IV - BREACH OF FIDUCIARY DUTIES – LOYALTY

51. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

52. Based upon information and belief, Plaintiffs assert that Defendant Crossett has

breached his duty of loyalty to Plaintiffs by failing to account to Plaintiffs regarding the property, profit, and benefit derived by its members, including:

A. Failure to properly distribute income and distributions;

B. Appropriating and/or subverting company opportunities to other businesses owned by Defendant Crossett;

C. Dealing with the Company and its other members in conduct as or on behalf of a person not a member of the company;

D. Competing with the Company by diverting business to Vurv, LLC or TruGuard, LLC, or both; and

E. Attempting to remove Plaintiffs as a member of DTC Group, modifying records or otherwise attempting to misrepresent Plaintiffs' ownership in the company

F. Attempting to sell the company or all of the assets of the company without the authorization of Plaintiffs and without proper authority or compensation to Plaintiffs.

53. Plaintiffs have, as a result, been damaged in an amount to be proven at trial.

COUNT V - BREACH OF FIDUCIARY DUTIES - CARE

54. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

55. Based upon information and belief, Plaintiffs assert that Defendant Crossett has breached his duty of care by engaging in wrongful and/or willful and intentional misconduct to attempt to force Plaintiffs out of DTC Group.

56. Based upon information and belief, Plaintiffs also asserts that Defendant Crossett knowingly violated law by failing to provide proper tax documentation and statements to Plaintiffs.

57. Plaintiffs further assert that Defendant Crossett has knowingly failed in his obligations as Manager of DTC Group to obtain the proper authorization for disposition of company assets, to properly hold meetings, to provide notice of meetings, to keep records, or other governance requirements, and that such actions constitutes grossly negligent conduct, and/or willful or intentional misconduct in Defendant Crossett's management of DTC Group.

58. Plaintiffs have, as a result, been damaged in an amount to be proven at trial.

COUNT VI - BREACH OF FIDUCIARY DUTIES - GOOD FAITH/FAIR DEALING

59. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

60. Defendant Crossett, through his actions, breached his duties and obligations owed to Plaintiff and other Members of DTC Group by failing to execute his obligations created either by statute of Idaho Law or by the oral operating agreement, consistent with the contractual obligation of good faith and fair dealing.

61. Plaintiffs have, as a result, been damaged in an amount to be proven at trial.

COUNT VII - IMPROPER DISTRIBUTIONS

62. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

63. Based upon information and belief, Plaintiffs assert that Defendant Crossett has provided distributions to himself and others in violation of Idaho Code 30-25-406, and in violation of the oral operating agreement.

64. Plaintiffs have, as a result, been damaged in an amount to be proven at trial.

COUNT VIII - IMPROPER TERMINATION/EXPULSION OF MEMBER

65. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

66. Defendant Crossett's actions in attempting to remove both Plaintiffs from DTC Group based upon his "majority interest" constitutes an improper termination and/or expulsion of members.

67. Plaintiffs have, as a result, been damaged in an amount to be proven at trial.

COUNT IX - REMOVAL OF DEFENDANT AS MEMBER

68. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

69. Based upon information and belief, Plaintiffs assert that Defendant Crossett has and is engaging in wrongful conduct that has affected adversely and materially the company's activities and affairs.

70. Based upon information and belief, Plaintiffs assert that Defendant Crossett has willfully and persistently committed material breach of the oral operating agreement or a duty or obligation under section 30-25-409 of the Idaho Code.

71. Based upon information and belief, Plaintiff asserts that Defendant Crossett has engaged and is engaging in conduct relating to the company's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with Defendant Crossett as a member.

72. Plaintiffs, therefore, are entitled to relief under Section 30-25-601(6) to have a judicial order expelling Defendant Crossett as a member of DTC Group.

COUNT X – UNLAWFUL TRANSFER

73. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

74. Plaintiffs assert that the sale and transfer of their interest in DTC Group to Defendant Lee and the subsequent sale of the business or all or substantially all of the assets of Defendant DTC Group constitute voidable transactions or transfers under Idaho Code §55-910, *et seq.*

75. Plaintiffs assert that Defendant Lee and Defendants Schmelling were on notice of other persons who did not support or otherwise provide authority for such transfers to occur.

76. Plaintiffs assert that Defendant Crossett acting for himself and on behalf of Defendant DTC Group underwent the transfer with the actual intent to defraud Plaintiffs by: i) transferring membership interest to himself and/or Defendant Lee, ii) retaining possession or control of the business assets after the transfer to Defendant Lee or Defendants Schmelling; iii) concealing the transfer of interest to himself and/or Defendant Lee and subsequently Defendants Schmelling; iv) the transfer was for substantially all of Defendant DTC Groups assets; and for other such reasons as may be determined at trial

77. As a result of Defendants' combined actions Plaintiffs have been harmed in an amount to be proven at trial.

**COUNT XI – TORTIOUS INTERFERENCE WITH BUSINESS
EXPECTANCY**

78. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully set forth herein.

79. Plaintiffs, as members of DTC Group, had a valid business expectancy and financial interest in DTC Group.

80. Defendants Crossett, Lee, and Schmellings understood and appreciated that other parties other than themselves had such business expectancy and financial interest.

81. Defendants Vurv and DTC Group, by virtue of the understanding imputed to them through principals of the businesses, likewise appreciated and understood that Plaintiffs had such business expectancy and financial interest.

82. Notwithstanding this understanding, Defendants Crossett, Lee, Vurv, DTC Group, and Schmellings took improper and unauthorized action to interfere with Plaintiffs' business expectancy and interest.

83. As a result of Defendants Crossett's, Lee's, Vurv's, DTC Group's, and Schmellings' improper interference with Plaintiffs' business expectancy and interest, Plaintiffs have been damaged in amounts to be proven at trial, and have had to incur legal costs and fees to enforce their rights.

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs pray for relief as follows:

1. That the Court adjudge and declare that DTC Group was and is a three-member LLC existing under the laws of Idaho, with the Members identified as Defendant Crossett, Plaintiff Johnson, and Plaintiff Cousins;
2. That the Court adjudge and decree that Plaintiff Johnson is a Member of DTC Group, with an interest of forty-four percent (44%) or in the alternative, an interest of thirty-three percent (33%);
3. That the Court adjudge and decree that Plaintiff Cousins is a Member of DTC Group,

with an interest of ten percent (10%) or in the alternative, an interest of thirty-three percent (33%);

4. That the Court adjudge and decree that Defendant Crossett has breached his fiduciary duty of loyalty;
5. That the Court adjudge and decree that Defendant Crossett has breached his fiduciary duty of care;
6. That the Court adjudge and decree that Defendant Crossett has breached his fiduciary duty of good faith and fair dealing;
7. That the Court adjudge and decree that Defendants have engaged in the conduct complained herein and/or proven at trial, and are liable to Plaintiffs for that conduct;
8. That the Court adjudge and decree that the transfer of any interest in DTC Group to Defendant Lee by Defendant Crossett is void, and re-vest such transferred interests, if any, in Plaintiffs;
9. That the Court adjudge and decree that the transfer of any assets and interest in DTC Group by Defendants Crossett and DTC Group, and any assumption of assets and interest in the assets of DTC Group by Defendants Schmelling, or any business entity owned or controlled by the Defendants Schmelling, be void, and to retransfer, re-convey, or otherwise reinstate the transferred assets and business interests, if any, to DTC Group;
10. That Plaintiff be awarded actual damages, compensatory damages, special damages, punitive damages, attorneys' fees, and any and all other remedies as determined by the Court in an amount to be proven at trial;
11. That Defendants be enjoined from further wrongful and acts as set forth herein and as

shall be proven at trial, including but not limited to preventing Plaintiffs from having access to business records;

12. That Defendant Crossett be expelled from DTC Group, LLC, forthwith, and control returned to the remaining members, pursuant to 30-25-602(6);

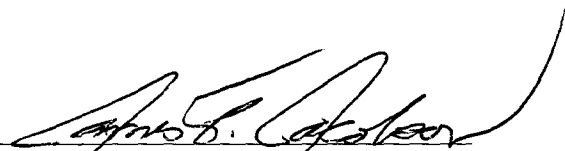
13. That Plaintiffs recover from Defendants their costs, including reasonable attorney fees, pursuant to I.R.C.P. and any other applicable rules, statutes, or provisions of Idaho law, and a reasonable attorney fee in the amount of \$8,000 in the event of default; and,

14. For such other and further relief as the Court deems just and equitable under the circumstances.

DATED this 7th day of April, 2016.

JACOBSON & JACOBSON, PLLC

By



James F. Jacobson
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of April, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile

Matthew K. Taylor
ATTORNEY AT LAW
802 W Bannock St
Boise, ID 83702
Facsimile: (208) 343-6608

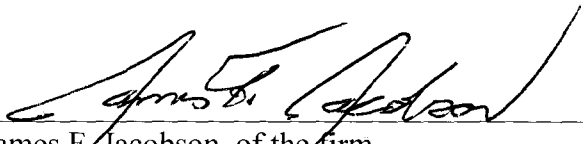
U.S. Mail, postage prepaid
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 Overnight Mail
 Facsimile

Tom C. Morris
Daniel W. Bower
STEWART TAYLOR & MORRIS, PLLC
12550 W Explorer Dr, Ste 100
Boise, ID 83713
Facsimile: (208) 345-4461

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile

DATED this 11th day of April, 2016.

JACOBSON & JACOBSON, PLLC

By 
James F. Jacobson, of the firm
Attorneys for Plaintiffs

NO _____
A.M. _____ FILED P.M. _____

JUL 18 2016

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

Michelle R. Points, ISB No. 6224
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Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLAINCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple

Defendants.

Case No. CV OC 1513887

ANSWER TO FIRST AMENDED
COMPLAINT

Defendant David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC, by and through their counsel of record Michelle R. Points of Points Law, PLLC, and by way of answer to the First Amended Complaint ("Complaint") filed by Plaintiffs David Johnson and Tessa Cousins, admits, denies and alleges as follows:

1. Defendants deny the allegations set forth in paragraphs 1 and 2 of the Complaint as those allegations set forth conclusions of law to which no response is required.

2. Defendants admit the allegations set forth in paragraphs 3, 4 and 5 of the Complaint.
3. Defendants deny the allegations set forth in paragraph 6 of the Complaint based upon a lack of knowledge.
4. Defendants admit the allegation set forth in paragraphs 7 and 8 of the Complaint.
5. Defendants deny the allegations set forth in paragraphs 9 of the Complaint based upon a lack of knowledge.
6. Paragraph 10 of the Complaint alleges no facts.
7. Defendants admit the allegations contained in paragraph 11 of the Complaint.
8. Defendants deny the allegations contained in paragraphs 12 and 13 of the Complaint.
9. Defendants admit the allegations contained in paragraph 14 of the Complaint.
10. Defendants deny the allegations contained in paragraph 15 of the Complaint as those allegations are not directed at Defendants.
11. Defendants deny the allegations contained in paragraphs 16, 17 and 18 of the Complaint, as stated.
12. Defendants admit the allegations contained in paragraph 19 of the Complaint.
13. Defendants deny the allegations contained in paragraphs 20, 21, 22, 24, 25, 26, and 27 of the Complaint.
14. Defendants deny the allegations contained in paragraphs 28 and 29 of the Complaint as those allegations are not directed at Defendants.
15. Defendants deny the allegations contained in paragraphs 30, and 31 of the Complaint as stated.

16. Defendants deny the allegations contained in paragraph 32 of the Complaint as stated.
17. Defendants deny the allegations contained in paragraphs 33, 34 and 35 of the Complaint.
18. In response to paragraph 36 of the Complaint, Defendants restate all admissions and denials previously set forth.
19. Defendants deny the allegations contained in paragraph 37 of the Complaint as those allegations set forth conclusions of law to which no response is required.
20. Defendants deny the allegations set forth in paragraphs 38 and 39 of the Complaint.
21. In response to paragraph 40 of the Complaint, Defendants restate all admissions and denials previously set forth.
22. Defendants deny the allegations contained in paragraph 41 of the Complaint as those allegations set forth conclusions of law to which no response is required.
23. Defendants deny the allegations contained in paragraphs 42 and 43 of the Complaint.
24. In response to paragraph 44 of the Complaint, Defendants restate all admissions and denials previously set forth.
25. Defendants deny the allegations contained in paragraph 45 of the Complaint as those allegations set forth conclusions of law to which no response is required.
26. Defendants deny the allegations contained in paragraphs 46, 47, 48, 49 and 50 of the Complaint on the basis that they are not true and/or on the basis that they are not directed at these Defendants.

27. In response to paragraph 51 of the Complaint, Defendants restate all admissions and denials previously set forth.
28. Defendants deny the allegations contained in paragraphs 52 and 53 of the Complaint.
29. In response to paragraph 54 of the Complaint, Defendants restate all admissions and denials previously set forth.
30. Defendants deny the allegations contained in paragraphs 55, 56, 57 and 58 of the Complaint.
31. In response to paragraph 59 of the Complaint, Defendants restate all admissions and denials previously set forth.
32. Defendants deny the allegations set forth in paragraphs 60 and 61 of the Complaint.
33. In response to paragraph 62 of the Complaint, Defendants restate all admissions and denials previously set forth.
34. Defendants deny the allegations set forth in paragraphs 63 and 64 of the Complaint.
35. In response to paragraph 65 of the Complaint, Defendants restate all admissions and denials previously set forth.
36. Defendants deny the allegations contained in paragraphs 66 and 67 of the Complaint.
37. In response to paragraph 68 of the Complaint, Defendants restate all admissions and denials previously set forth.
38. Defendants deny the allegations contained in paragraphs 69, 70, 71, 72.

39. In response to paragraph 73 of the Complaint, Defendants restate all admissions and denials previously set forth.
40. Defendants deny the allegations contained in paragraphs 74, 75, 76 and 77 of the Complaint.
41. In response to paragraph 78 of the Complaint, Defendants restate all admissions and denials previously set forth.
42. Defendants deny the allegations contained in paragraphs 79, 80, 81, 82, and 83 of the Complaint on the basis that they are not true and/or that they are not directed at these Defendants.

AFFIRMATIVE DEFENSES

The following defenses are not stated separately as to each claim for relief or allegation of Plaintiffs. Nevertheless, the following defenses are applicable, where appropriate, to any and all of Plaintiffs' claims for relief. In addition, Defendants, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon Defendants but, to the contrary, assert that by reason of denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse of the allegations contained in many of the defenses is upon Plaintiffs. Moreover, Defendants do not admit, in asserting any defense, any responsibility or liability of Defendants, but, to the contrary, specifically deny any and all allegations of responsibility and liability in the Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiff is barred from maintaining this action against Defendants based upon the doctrine of collateral estoppel.

SECOND AFFIRMATIVE DEFENSE

Plaintiff are barred from maintaining this action based on the equitable theories of laches, waiver and estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs lacks standing to assert the claims set forth in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from maintaining this action against Defendants by reason of Plaintiffs' release of claims, if any, upon which this action is based as against Defendants.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from maintaining this action against Defendants because Plaintiffs, by failing to act reasonably, have failed to mitigate the damages to which Plaintiffs may have been entitled, if any.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff should be denied any equitable relief herein on the ground of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

The claims contained in Plaintiffs' Complaint are frivolous and the Complaint fails to state a claim upon which relief can be granted.

RULE 11 STATEMENT

Defendants have considered and believe that they may have additional defenses, but does not have enough information at this time to assert such additional defenses under Rule 11 of the Idaho Rules of Civil Procedure. Defendants do not intend to waive any such defenses and specifically assert their intention to amend this Answer if, pending research after discovery, or following evidence presented at trial, facts come to light giving rise to such additional defenses.

REQUEST FOR ATTORNEY FEES

Defendants have been required to retain the law firm of Points Law, PLLC, to defend them in this litigation. Defendants should be awarded their attorney fees and costs incurred in said defense pursuant to I.C. § 12-120 (3) and other applicable law.

PRAYER FOR RELIEF

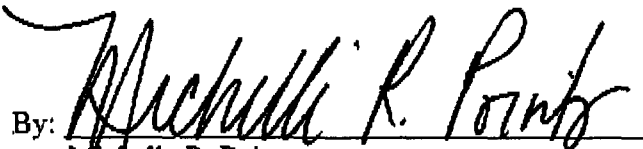
WHEREFORE, Defendants pray for entry of judgment, as follows:

1. That Plaintiffs' Complaint be dismissed and Plaintiffs take nothing thereby;
2. That Defendants be awarded reasonable attorney fees and costs necessarily incurred in defending this action; and
3. For such other and further relief as the Court deems just and proper.

DATED this 18th day of July, 2016

POINTS LAW, PLLC

By:



Michelle R. Points

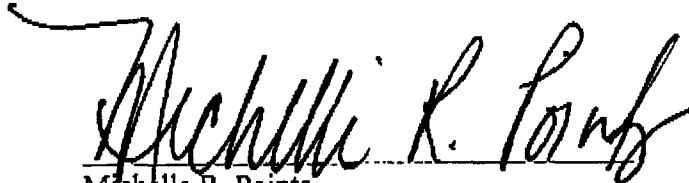
Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of July, 2016, I caused to be served a true copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT by the method indicated below and addressed to each of the following:

James F. Jacobson
James S. Neal McCubbins
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, Idaho 83714

- U.S Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Fax (208) 477-5210



Michelle R. Points

NO. _____ FILED _____
A.M. _____ P.M. 358

SEP 23 2016

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Michelle R. Points, ISB No. 6224
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Telephone: 208.287.3216
Facsimile: 208.336.2088
Email: mpoints@pointslaw.com

Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLAANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

PRE-TRIAL MEMORANDA

A. Summary of Defense

Plaintiffs assert an ownership interest in Drug Testing Compliance Group, LLC (DTC),
the assets of which were later sold to Vurv, LLC. Both entities are now dissolved and their
financial matters wound up.

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PTME
Pretrial Memorandum
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Mr. Crossett did have discussions with both Mr. Johnson and Ms. Cousins about having an ownership interest in DTC, however, neither of the Plaintiffs were willing to assume any of the risks or debts associated with the ongoing operation of DTC. Ms. Cousins terminated her relationship with DTC and Mr. Johnson simply walked away. Mr. Crossett continued to own and operate DTC and assumed all the risk and debt associated with those operations.

Plaintiffs did not ever consummate any ownership interest in DTC, and quite the opposite, left Mr. Crossett "holding the bag" when the operation of DTC became difficult, including being sued within the first week of operation.

Through this litigation, it appears that Plaintiffs are now asserting an ownership interest in DTC and seek a portion of any profits that they would have been entitled to as an owner. However, as set forth above, DTC is now dissolved and wound up, and Mr. Crossett covered its debts, to his extreme financial detriment.

B. Statement of Uncontested and Contested Facts and Issues of Law

These Defendants do not contest that Plaintiffs' ownership was discussed and even acted upon by way of purchasing company phones, drafting an operating agreement and similar actions. It is not disputed that Mr. Johnson contributed money to the start-up of DTC, which monies were paid back. It is not disputed that both Mr. Johnson and Ms. Cousins refused to take on any debt or risk associated with the operation of DTC.

These Defendants dispute that Plaintiffs ever had an actual ownership interest in DTC. Plaintiffs appear to take the position that there was some type of oral contract pertaining to ownership that was reduced to writing in an operating agreement drafted by Plaintiffs' current counsel. However, Mr. Johnson and Ms. Cousins never signed any operating agreement, and Mr. Johnson specifically refused on several occasions to sign the drafted operating agreement.

It is the position of these Defendants that if there was some "handshake" agreement that the Plaintiffs would gain an ownership interest in DTC, that agreement was breached by the actions of Plaintiffs.

C. Evidentiary Issues

These Defendants currently have a pending motion in limine and motion to bifurcate, that are set for hearing on September 30, 2016, which address the summary of evidentiary issues.

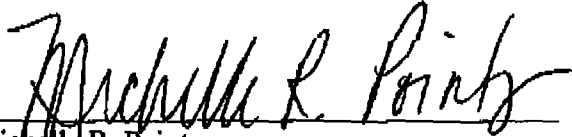
It is unclear at this juncture how Plaintiffs intend to establish damages. However, as set forth in the motion to bifurcate, it is the position Defendants that they must first establish ownership and if and when they establish ownership, they can then move on to establish damages. To proceed otherwise would be unduly prejudicial; i.e. showing that Defendants made a profit that they did not allocate to Plaintiffs prior to establishing that Plaintiffs are entitled to such an allocation.

The other area of concern for Defendants is presentation any evidence pertaining to Mr. Crossett's relationship with Scott Lee. Mr. Lee asserted that he was an owner of Vurv, LLC, not dissimilar to the claims being asserted by Plaintiffs. Any evidence of Mr. Crossett's interactions or agreements with Mr. Lee are irrelevant to the issue at trial and should not be allowed into evidence via documents or testimony.

Because it is not clear how Plaintiffs will establish damages, evidentiary objections will have to be made as evidence is presented.

DATED this 23rd day of September, 2016

POINTS LAW, PLLC

By: 
 Michelle R. Points
 Attorney for David Crossett, Drug Testing Compliance
 Group, LLC and Vitr, LLC

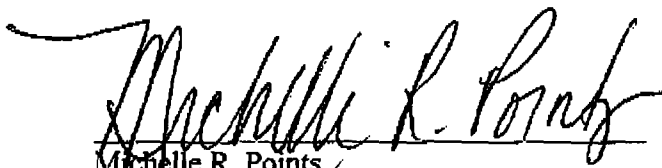
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2016, I caused to be served a true copy of the foregoing PRE-TRIAL MEMORANDA by the method indicated below and addressed to each of the following:

James F. Jacobson
 James S. Neal McCubbins
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 7655 W. Riverside Drive
 Boise, Idaho 83714

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Email


 Michelle R. Points

James F. Jacobson [ISB No. 7011]
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Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W.
and KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

**PLAINTIFFS' PRE-TRIAL
MEMORANDUM**

COMES NOW the above-named Plaintiffs, DAVID JOHNSON, an individual,
and TESSA COUSINS, an individual in the above matter, by and through their counsel of
record, Jacobson & Jacobson, PLLC, and hereby submits this Pre-Trial Memorandum:

I.

STATEMENT OF PLAINTIFFS' CASE

Plaintiffs expect the evidence at trial to show the following: (1) that Plaintiffs were and are Members of DTC Group, LLC (hereafter "DTC") with a combined ownership interest of fifty-five percent (55%); (2) that Defendant Crossett breached his fiduciary duties of loyalty, care, and good faith and fair dealing; (3) Defendant Crossett provided improper distributions to himself and others in violation of Idaho Code 30-25-404; and (4) Defendant Crossett improperly expelled Plaintiffs as Members of DTC, and sold or otherwise transferred such interests to Defendant Lee.

A. Plaintiffs were and are Members of DTC.

Under Idaho law, an individual can be a member of a limited liability company (LLC) either (1) upon formation of the LLC, or (2) after formation of the LLC through various ways, including the "affirmative vote or consent of all the members." I.C. § 30-25-401(b), (c)(3). Section 30-25-102 defines a Member as one who has become a member as provided in Idaho Code § 30-25-401 and has not dissociated through one of the events of dissociation. I.C. § 30-25-102(a)(7). Section 30-25-102 also provides the definition for "Contribution" as "property or a benefit . . . that is provided by a person to a limited liability company to become a member or in that person's capacity as a member." I.C. § 30-25-102(a)(2). Such a contribution can be in the form of "property transferred to, services performed for, or another benefit provided to the limited liability company." I.C. § 30-25-402.

The evidence at trial will show that both Plaintiffs Johnson and Cousins have been members of DTC since its early days in June of 2013. Plaintiff Johnson has been a member since the formation of DTC. He approached Defendant Crossett with the idea to create DTC in May of 2013. Together, they formed DTC in early June of 2013 by filing a Certificate of Organization with the Idaho Secretary of State. During the inception of DTC, Plaintiff Johnson made a contribution of \$3,000, the purpose for which was clearly “to become a member or in [his] capacity as a member.” I.C. § 30-25-102(a)(2). Defendant Crossett erroneously tried to label this contribution as a loan to DTC, rather than capital that Plaintiff Johnson provided to DTC as a member. The evidence will clearly show that Plaintiff Johnson was one of the initial members of DTC.

The evidence will also show that Plaintiff Cousins was either (1) an initial member of DTC, or (2) awarded membership by “consent of all the members.” I.C. § 30-25-401. Defendant Crossett and Plaintiff Johnson approached Plaintiff Cousins in early June of 2013 for the purpose of bringing her expertise into the business as neither Plaintiff Johnson nor Defendant Crossett had any substantial experience in the field of drug testing compliance for commercial driver’s license holders. Therefore, Plaintiff Cousins contribution to DTC was to be her “services performed for” DTC. I.C. § 30-25-402. This contribution, like that of Plaintiff Johnson, was clearly “to become a member or in [her] capacity as a member.” Therefore, she was also an initial member of DTC upon its formation, and such membership continues today since she has not dissociated her membership.

Furthermore, even if Plaintiff Cousins was not an initial member, she was certainly made a member by “consent of all the members.” I.C. § 30-25-401. Defendant Crossett met with Plaintiff Cousins to offer her a place in the business because her expertise was necessary for DTC to get off the ground. During these negotiations, she was offered a 10% ownership interest in DTC for her contribution of services. Both Plaintiff Johnson and Defendant Crossett agreed to award her membership in exchange for her services. Therefore, if Plaintiff Cousins was not an initial member of DTC, she was later awarded membership by consent of all the members of DTC (i.e., Plaintiff Johnson and Defendant Crossett). In either scenario, Plaintiff Cousins was a member from the early stages of DTC and continues to be so as she has not dissociated her membership.

B. Plaintiffs have a combined membership interest in DTC totaling fifty-five percent (55%).

Under Idaho law, an operating agreement for a limited liability company can be “oral, implied, in a record, or in any combination thereof” so long as it is an agreement between all the member of the limited liability company. I.C. § 30-25-102(a)(9); *see also Estate of E.A. Collins v. Geist*, 143 Idaho 821, 153 P.3d 1167 (2007) (validating the existence of an oral operating agreement between the members of an LLC). Idaho law further explains:

[A]s soon as a limited liability company has any members, the limited liability company perforce has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC; (ii) they form the LLC or cause it to be formed; and (iii) without further ado or agreement, they become the LLC’s initial members. *An operating agreement exists.*

I.C. § 30-25-102(a)(9), cmt. (emphasis added). In sum, Idaho law reflects the fact that an LLC cannot exist without an operating agreement. I.C. § 30-25-105, cmt. (“Accordingly, this act refers to ‘the operating agreement’ rather than ‘an operating agreement.’”).

The operating agreement of an LLC is “the map to the parties’ deal.” I.C. § 30-25-105, cmt. This map includes the “[r]elations among the members as members and between the members and the limited liability company,” including the division of ownership interests among the members, and their contribution for that ownership interest. I.C. § 30-25-105(a)(1).

Whether Plaintiff Cousins was an initial member, or became a member promptly after formation of DTC, there was an oral agreement between Plaintiff Johnson, Plaintiff Cousins, and Defendant Crossett that the ownership interests of DTC would be, respectively, 45%, 10%, and 45%. The contributions for Plaintiffs’ interest was agreed as described in the previous section. Therefore, there was an oral agreement for DTC reflecting ownership interests for the Plaintiffs that combine to equal 55%. Not only was this agreed to at the time that all three parties became members of DTC, but it was echoed throughout the following year as they ran the operations of DTC. As such, the evidence shows that the Plaintiffs have a combined membership interest in DTC totaling 55%.

C. Defendant Crossett breached his fiduciary duty of loyalty as a member of DTC.

In Idaho, a limited liability company is a member-managed limited liability company by default, unless the operating agreement explicitly states otherwise. I.C. §

30-25-407(a). In a member-managed LLC, all members owe both the company and their fellow members a fiduciary duty of loyalty. This duty of loyalty includes the duties: (1) “to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member” in the winding up activities, from use of company property, or from appropriation of a company opportunity; (2) to refrain from dealing with the company on behalf of those having an interest adverse to the company in either the conduct of the business activities, or during the winding up of the company; and (3) to refrain from competing with the company. I.C. § 30-25-409(b)(1)-(3).

The evidence at trial will show that Defendant Crossett breached this duty by failing to account to Plaintiffs regarding the property, profit, and benefit derived as a member. He failed to properly distribute income and distributions to all members. He appropriated and subverted company opportunities to other businesses owned by himself, particularly in his dealings with Defendant Vurv, LLC. He dealt with DTC on behalf of persons who were not a member of DTC. He attempted to remove Plaintiffs as members of DTC, and modified records in an attempt to misrepresent Plaintiffs’ ownership in DTC. And he attempted to sell the DTC without the authorization of Plaintiffs and without proper compensation to Plaintiffs. Each of these acts represents a breach in Defendant Crossett’s fiduciary duty of loyalty to both DTC and Plaintiffs as members of DTC.

D. Defendant Crossett breached his fiduciary duty of care to DTC.

In a member-managed LLC, all members owe a fiduciary duty of care to both the company and to their fellow members. *See* I.C. § 30-25-409(c), cmt. (stating that, although the statute does not refer to the duty of care as a fiduciary duty, it is still

substantively a fiduciary duty). This duty requires that a member “refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of the law.” I.C. § 30-25-409(c).

The evidence at trial will show that Defendant Crossett engaged in wrongful, willful, and intentional misconduct. An example of such misconduct includes Defendant Crossett’s attempt to force Plaintiffs out of DTC. Defendant Crossett also knowingly violated the law by failing to provide proper tax documentation and statements to Plaintiffs as members of DTC. Defendant Crossett also knowingly failed in his obligations as member-manager of DTC to obtain the proper authorization for disposition of company assets, to properly hold meetings with the other members, to provide notice of such meetings, to keep accurate records, or other governance requirements. Such actions constitute grossly negligent conduct, and/or willful or intentional misconduct on the part of Defendant Crossett. As such, Defendant Crossett has breached his fiduciary duty of care to both DTC and Plaintiffs as members of DTC.

E. Defendant Crossett breached the implied duty of good faith and fair dealing.

Members in a member-managed LLC also have a duty to “discharge the duties and obligations under this chapter or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.” I.C. § 30-25-409(d). Unlike the duties of care and loyalty, the contractual obligation of good faith and fair dealing is not a fiduciary duty. I.C. § 30-25-409(d), cmt. “It is rather a commitment to deal ‘fairly’ in the sense of consistently with the terms of the parties’ agreement and its purpose.” *Gerber v. Enter. Products Holdings, LLC*, 67 A.3d 400,

418-19 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012). Courts should use the obligation to “protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.” I.C. § 30-25-409(d), cmt.

Evidence will show that Defendant Crossett’s actions with regards to Plaintiffs as members of DTC indicate a failure to discharge his duties consistently with his obligation of good faith and fair dealing. In particular, his perspective that Plaintiffs were never members and that he had the right and authority to sell their ownership interest to another party are “manifestly beyond what a reasonable person could have contemplated” when the oral operating agreement was made. I.C. § 30-25-409(d), cmt. Therefore, Defendant Crossett’s actions demonstrate that he breached his contractual obligation of good faith and fair dealing towards Plaintiffs.

F. Defendant Crossett did not properly share distributions with Plaintiffs.

Idaho Code Section 30-25-404 states that “[a]ny distributions made by a limited liability company before its dissolution and winding up must be in equal shares among members.” I.C. § 30-25-404(a). The Code further states “[i]f a member . . . becomes entitled to receive a distribution, the member . . . is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution.” I.C. §30-25-404(d).

The evidence at trial will not only show that Defendant Crossett made distributions to himself from DTC’s formation in 2013 through to the present, but that these distributions

were never shared with Plaintiffs. The Idaho Code, along with the operating agreement of DTC, give Plaintiffs Johnson and Cousins a right to 45% and 10% of these distributions, respectively. The facts show that either: (1) Defendant Crossett took nearly all of the distributions, so he owes Plaintiffs their share of what he took, plus interest added over time; or (2) Defendant Crossett only took his share of the distributions, and DTC owes Plaintiffs both their share of each of these distributions and added interest as they are considered creditors of DTC.

G. Defendant Crossett improperly expelled Plaintiffs as members of DTC.

The Idaho Code only provides three ways in which a member can be expelled as a member from an LLC. *See* I.C. §30-25-602(4)-(5). First, a member may be expelled as a member of an LLC pursuant to any such clause of the operating agreement. I.C. § 30-25-6032(4). Second, a member can be expelled if it is “unlawful to carry on the limited liability company’s activities and affairs with the person as a member.” I.C. § 30-25-602(5)(A). And third, a member can be expelled if all of that person’s transferable interest in the LLC has been transferred, other than a transfer for security purposes or a charging order in effect that has not been foreclosed. I.C. § 30-25-602(5)(B). In other words, that member no longer has any “skin in the game.” I.C. § 30-25-602(5)(B), cmt.

In the present case, none of these three events occurred with regards to Plaintiffs. The oral operating agreement does not specify events that warrant expulsion of a member as no such term was ever agreed to by the parties. It was not unlawful for DTC to continue its affairs with Plaintiffs as members. And neither Plaintiff transferred any of their interest to another party, let alone all of their transferrable interest. Therefore, Defendant

Crossett had no right to attempt to expel Plaintiffs as members of DTC, and such actions have resulted in damages suffered by Plaintiffs.

II.

CONTESTED AND UNCONTESTED FACTS

At this time, all facts of this case are contested. Plaintiffs are unaware of any uncontested facts.

III.

EVIDENTIARY ISSUES

Certain evidentiary issues have been addressed in Defendant Crossett's Motion in Limine. All the evidentiary issues related to that Motion are either in the Motion itself or in Plaintiffs' Memorandum in Opposition to Defendant Crossett's Motion in Limine.

Plaintiffs have one additional issue that was not addressed in the Motion in Limine. That is, Defendant Crossett should not be allowed to testify to financial documents that have not been produced to Plaintiffs.

DATED this 23rd day of September, 2016.

JACOBSON & JACOBSON, PLLC

By /s/ James F. Jacobson
James F. Jacobson
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088

U.S. Mail, postage prepaid
 Hand-Delivered
 iCourt/email
 Facsimile

DATED this 23rd day of September, 2016.

JACOBSON & JACOBSON, PLLC

By /s/ James F. Jacobson
James F. Jacobson, of the firm
Attorneys for Plaintiffs

FILED By: Shaitha Lyke Deputy Clerk
Fourth Judicial District, Ada County
CHRISTOPHER D. RICH, Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual,
SCOTT H. LEE, an individual,
DRUG TESTING COMPLIANCE
GROUP, LLC, an Idaho limited liability
company, VURV, LLC, an Idaho limited
liability company, BO W. and KRYSTAL
SCHMELLING, a married couple,

Defendants.

Case No. CV OC 15 13887

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DIRECTIONS FOR ENTRY
OF JUDGMENT

This matter came before the Court for trial without a jury on Monday and Tuesday, October 16 and 17, 2016. James F. Jacobsen, of Jacobsen & Jacobsen, PLLC, Boise, appeared for the plaintiffs, David Johnson and Tessa Cousins. Michelle R. Points, Points Law, PLLC, Boise, appeared for the defendants David Crossett, Drug Testing Compliance Group, LLC, and Vurv, LLC.

From the record, it appears that of the above named defendants in this matter, Scott H. Lee, was never served and the defendants Bo W. and Krystal Schmelling were dismissed by stipulation. The Court will note by minute entry that the defendant Scott H. Lee is dismissed.

Whereupon, the Court proceeded to receive the testimony and exhibits from the parties appearing in this matters. At the conclusion thereof counsel presented their final arguments to the Court and advised that all matters were thereupon submitted for decision.

Now therefore, being duly advised in the premises, the Court now makes and enters the following Findings of Fact, Conclusions of Law and Directions for Entry of Judgment.

FINDINGS OF FACT

There is little dispute over the following chronology:

1. David Johnson learned of a business opportunity from his brother-in-law. The inference from the evidence is that the brother-in-law may not have been aware that he was providing Johnson with this insight into his business, but nevertheless, Johnson came away with enough knowledge to get his interest aroused. The business was aimed at a niche market created by federal regulations requiring independent owner-operators of over-the-road trucks to establish and maintain drug and alcohol compliance plans for their trucking operation, which included the requirement for the operators and all employees to obtain drug and alcohol test at random times when required to do so by federal regulation. The business opportunity called for a service company to handle all the details of establishing and maintaining a qualified compliance plan for small operators, arranging for drug and alcohol testing at facilities throughout the country, and maintaining all required records.

2. Johnson got David Crossett interested, and the two then investigated the specifics of getting the company up and operating during the early months of 2013. Crossett was a friend of Johnson from their neighborhood and from their church, and was introduced to the opportunity by Johnson sometime after he learned of it from his brother-in-law. The two men worked both

together and independently to investigate the feasibility of the business during the February through March time frame.

3. By April, they had decided on their general plan. There is no dispute that the venture was to have at least two members at the outset – David Crossett with 46% and David Johnson with 44% membership interests. The plan was for Crossett to run the company. He was to be the sole agent and manager, and was to receive a fixed salary for his services. Crossett testified that this was to be \$65,000 per annum, although in his deposition he estimated the amount to be \$60,000. There was no dispute that he was to receive a fixed amount for being the one involved in the day to day operations, which would be before any division of profits between the members.

4. Johnson owned and operated a separate company involved in the installation and servicing of overhead doors, which was his full time occupation, so he was not to be involved in the daily operations of the new company, and was not to receive any fixed compensation. Johnson knew of Tessa Cousins, who was an employee of the brother-in-law's company, and after discussion with Crossett, they decided that Crossett would approach Cousins with a proposal for her to join their new company. They felt that her familiarity with the business operation of the brother-in-law's business would be valuable.

5. Crossett approached Cousins in April with a proposal for employment, and she expressed interest. After discussing it with her husband, she replied in May that she would accept. She was to receive a regular salary for her position, and was to receive an interest in the company. It is not clear whether she was to receive the 10% interest immediately upon her employment, or was to earn her way into it, but it is not disputed that Johnson and Crossett had agreed upon Cousins becoming a 10% member of the company at some point in time.

6. The limited liability company Drug Testing Compliance Group, LLC, hereafter DTC, was formed by David Crossett in June of 2013 as a single member entity, with David Crossett being the sole member upon filing, and with the documentation not stating anything about other members, and not identifying Johnson or Cousins.

7. A complete, written operating agreement was prepared and approved by both men by the end of July 2013. The basic agreement was taken from a written operating agreement Crossett had for another company, which was revised by the two men and approved by Johnson's attorneys to meet the requirements of the new company. A final version of the agreement was prepared and was available to the parties for signature by the end of July 2013. However, the written agreement was never signed.

8. The company had opened for business earlier in July without waiting for the execution of the operating agreement. By opening for business, the company opened a web site and call center and began accepting business subscriptions for the compliance plan from trucker-operators. Once the operation declared itself open for business, things very quickly turned away from whatever the two men had planned upon.

9. Within a few days of the company's announcing itself open for business, the company owned by Johnson's brother-in-law filed a lawsuit against DTC Group and Tessa Cousins. This litigation was eventually settled in the summer of 2014, at a huge cost in legal fees.

10. Johnson announced that he did not want to sign the operating agreement in 2013 because he did not want his in-laws to know that he was connected to the new company. He signed a statement for his brother in-laws' attorneys that, although he had supplied information about the in-laws' business to Crossett, he did not have any interest in the entity that Crossett had formed. (Exhibit B) Although this statement was not under oath, Johnson knew that his

brother-in-law and the attorneys were relying upon the statement in litigation. He told his wife that he planned to keep his ownership interest a secret. He told Crossett that he did not want to sign the operating agreement “until the dust settled.”

11. Johnson indicated that there was an oral agreement that he did not need to sign the operating agreement. Crossett disagreed that there was such agreement, and continued to press Johnson to sign the operating agreement.

12. Cousins was not a party to any of the discussions between Johnson and Crossett concerning the formation of the company. She did not even know of Johnson’s involvement when she joined the company in June of 2013, and did not meet him until later. She was not party to any oral operating agreement. She supervised office administration and sales. She had worked with DOT Group for about four months. She remained with DTC from June of 2013 until October of 2014, when she tendered her resignation. She was paid a salary, and testified that she had been paid in full for all the time she was with the company. She indicated in the letter of resignation to the company that disagreements over ownership interests were the reason for her decision to resign. She testified that she expected to receive a 10% interest, but was told by Crossett that he intended to give that interest to Scott H. Lee. Crossett said she was asked to sign the operating agreement, but declined because of all the legal entanglements that were going on. It is not disputed that she did not sign the operating agreement.

13. Crossett got the company started off quickly. By the end of 2013, it had grossed close to \$200,000. In 2014, it grossed close to \$1,100,000. Crossett’s testimony indicated that with this rapid growth came a flood of management problems. The company had no capital reserves, and the relatively tiny amount of capital that was supplied by Johnson was returned to him. Cash management was a constant problem. Crossett testified that financial problems plagued the

company almost from the outset, with huge legal fees accruing, and with problems making payroll and problems keeping their merchant accounts with the banks intact. The merchant accounts were the accounts with the bank for handling credit card payments from sales – an essential ingredient to the call center sales effort. The problems were with sales returns, and the common bank rule that if the returns reached a certain level, the merchant bank would close the account. Crossett explained that without any cash reserves, because of legal difficulties the company found itself in, because of the litigation from and against competitors, and because of bad publicity the company was receiving, the level of returns became very high and was constantly causing banks to close their accounts meaning they were constantly looking around for new banks to open merchant accounts.

14. Although details were not explored in this trial, it was explained generally that the company had attracted many legal problems, including investigations by the Idaho Attorney General over customer complaints, the Federal Trade Commission for suspected price fixing, the Department of Justice and others. The legal entanglements were affecting sales, and the company was incurring huge legal expenses. Although one lawsuit between DTC and the DOT Group was settled in early 2014, another lawsuit was started later 2014. Johnson testified that he disagreed with this lawsuit and wanted nothing to do with it.

15. Matters between Johnson and Crossett came to a head in the summer and early fall of 2014. Crossett insisted that Johnson sign the operating agreement and join him in personally guaranteeing something in excess of \$200,000 that was due from DTC to the Perkins Coie law firm. Johnson refused. Johnson indicated that he considered all of the legal problems and management issues to be Crossett's problem to solve, and he was not willing to sign the operating agreement until the problems were resolved.

16. At one point, in October of 2014, Crossett texted to Johnson, “[N]othing worked out like you said it would and I’ve incurred massive risk and costs. You only want the possible upside of the business without the work or the risk. It doesn’t work like that” In next text segment, Crossett texts to Johnson, “We made an agreement under certain terms and conditions. You are deluded if you don’t agree those terms and conditions changed and this is nothing like we expected.” (Exhibit 6)

17. Johnson and Crossett could not come to terms over this, and Crossett finally declared that he would continue with DTC as a single member company and do what he had to do to salvage what he could. Johnson asked that the company repay all the money he had provided at the outset for office equipment, computers and supplies. During the late fall and early winter of 2014, Crossett caused the company to repay all of the money that Johnson had provided, being approximately \$10,000. Johnson acknowledged that this was all the money he had invested in the company, and that he had been fully repaid what he had provided to the company by December of 2014.

18. Crossett brought Scott Lee in to consult on the lagging sales problem. Lee was familiar with call center operations, and thought that he could dramatically increase sales. Lee wanted nothing to do with DTC because of the legal problems, the pending lawsuit with DOT Group and the mounting legal fees. Lee’s recommendation was that Crossett bankrupt DTC and start with a brand new company. Crossett entered into an arrangement with Lee to outsource sales to a separate call center company Lee would run. Lee said he never worked “for” anybody and wasn’t for hire. Lee’s efforts would have to come through the operations of a new company that Lee had an interest in, as it was the only way he would participate. He (Lee) wanted nothing to do with DTC.

19. Crossett and Lee formed Vurv, LLC, that was to be run by Lee and would handle sales. This was a call center operation that would handle a number of products and services suitable for call center solicitation and sales, which was Lee's forte. The trucker drug compliance service offered by DTC was only one of the services to be sold by the Vurv call center operation.

20. For a time in 2014 and into 2015, Crossett continued to operate DTC as a separate company, with the sales operation outsourced to Vurv. However, with cash flow still a critical problem, and with the huge legal debt over his head, Crossett and Lee struck a deal whereby Vurv would acquire all of the assets of DTC in exchange for Vurv assuming and paying all of the debts of DTC, including specifically all legal fees due Perkins Coie. This transaction closed in December of 2015. As a result of this, beginning January 1, 2016, all operations of DTC were taken over by Vurv, and DTC essentially ceased to exist.

21. The evidence is clear that Crossett did not close the asset sale to Vurv until after Cousins had resigned from the company, and after Crossett had exhausted his efforts to get Johnson to sign the operating agreement and help him with the obligation due Perkins Coie. He did not take this step until it became clear that Johnson would not sign the operating agreement and would not assist Crossett in the guarantee of the legal fees to the law firm.

22. A full set of financial statements was not presented at trial. A schedule that contained cash basis income statements for DTC for the three years of its life, being 2013 through calendar 2015, was offered. According to this statement, being the only evidence offered on this issue, the company produced cash net income of \$67,600 on gross sales of \$197,900 in 2013; \$63,400 net income on gross sales of \$1,099,400 in 2014; and a loss of -\$25,900 on gross sales of \$800,500 in 2015; According to the exhibit, the total accumulated profit for the three years was \$105,200 on total gross sales of \$2,097,800. (Exhibit H).

23. Crossett maintains that his compensation did not appear in the profit and loss statements as an expense to the company because his compensation from an accounting standpoint was a distributions of profit to an owner, and would have come after net profit was determined. He testified that his withdrawals against his guaranteed distribution absorbed all of the net income of the company. On cross-examination, it was brought out that in his deposition, he testified that his salary was posted to the salary expense column which would already be included in the profit and loss statement under salaries. The point was not clarified by bringing in the original postings, or by testimony from the outside accountants. From the evidence that was presented, the point is irrelevant, because under either approach, after taking into account the unposted liabilities for accounts payable and the debt due the lawyers, the company appears to have had unposted liabilities for general accounts in excess of \$30,000 and the legal fees due Perkins Coie in excess of \$200,000, with no unposted revenues. Apparently all the revenues were by customer debit or credit card through the merchant accounts, meaning essentially cash, and were fully recognized on the financial statements. This meant that the company had become insolvent by the end of 2015, which means it would have had no undistributed earnings available to distribute in any case, whether Crossett's distributions to himself were before or after the accrued net income was determined.

24. A spread sheet was provided that purported to present balance sheet accounts at month-end for October, November and December of 2015, determined on a cash basis. (Exhibit I) These balance sheets are meaningless without the connected profit and loss statements or statements of source and application of funds to show what and how the differences were accounted for, and without converting them to accrual statements to pick up the unposted accounts payable and long term debt. Although the last of the statements on Exhibit I is dated December 31,

2015, it does not tie to the profit and loss statement for the year then ending (Exhibit H). No meaningful conclusions can be drawn from these balance sheets other than identification of some of the balance sheet accounts. The sheets would show that, if the unposted liabilities were added to the statements, the company was insolvent by year end, 2015.

25. Crossett testified that the trade accounts payable that Vurv took over totaled approximately \$30,000, which are not reflected on any exhibit. Since expenses are not realized until paid, they do not show up in the profit and loss statements, and since the balance sheets are on a cash basis, they do not show up there, either. There was no dispute that the Perkins Coie bill was outstanding, although it is not reflected on any of the exhibits either. Crossett said the amount was approximately \$200,000, while Lee testified that he understood the outstanding legal fees to be approximately \$240,000.

26. By the end of 2015, the total assets of the company consisted of office furniture and computers, which appears to have been depreciated out, and the balances in the merchant accounts reserves, which after offsets did not appear to exceed \$50,000. The liabilities of the company are not correctly set forth in the cash basis statement, but would have been any payroll and payroll tax liabilities, negative reserves (if any) on merchant accounts, the general accounts payable and the legal debt. There was no bank debt or long term financing, and the leasehold interest was on an annual basis. Since the legal debt and general accounts payable were at least in the range of \$240,000 and may have exceeded \$280,000, this alone far exceeded the book value of the assets. It would appear from an accounting standpoint that the company would have been insolvent from an accounting standpoint at year end 2015.

27. After January 1, 2016, the acquisition by Vurv left no assets in DTC to account for or distribute. It became an asset-free, debt-free shell of a company.

28. From all of this, I find as a fact that the only oral agreement between Johnson and Crossett which could have stood in for an operating agreement for the company was their agreement to operate the company until the written agreement was finished and could be signed.

29. Insofar as there being an oral operating agreement, such was only to cover and ratify the actions actually taken by the individuals on behalf of the company until such time as the written agreement could be signed. As such, it was sufficient to ratify that Crossett was to be the manager of the venture with full authority to run the business as he saw fit, and that he was to receive a guaranteed distribution ahead of any distribution to members. It was not sufficient to cover the passive investment of Johnson. There was no meeting of the minds that Johnson could become a passive investor in the company without signing the operating agreement. Nor were the oral agreements between Crossett and Johnson sufficient to support the introduction of Cousins to membership in the company, as she had not been a party to any of the oral agreements between Crossett and Johnson. I find as a fact that the oral agreement with regard to Cousins and Johnson was that they would become members upon signing the operating agreement.

30. It was not the mutual intent of the parties that the executory provisions of any oral agreement would substitute for the written operating agreement; it was not the mutual intent of the parties that either Johnson or Cousins could decline to sign the written operating agreement that Crossett and Johnson had agreed upon and approved, and still continue as members of the limited liability company.

31. The written agreement was finished by the lawyers, and was ready to be signed by mid-July of 2013, but Johnson would not sign. Conditions had changed. The lawsuit by the DOT Group had been filed, and Johnson no longer wanted his name associated with DTC. He did not

want his in-laws to learn of his connection with DTC, he did not want to be deposed or to be included in the lawsuit. He wanted his involvement with DTC to be a secret.

32. I find as a fact that Johnson unilaterally attempted to change the oral agreement, by then saying that he wanted to “wait until the dust settled” before he signed the operating agreement. This was not a mutual agreement, and clearly was not agreed to by Crossett. This left Crossett holding the bag as the sole member of the LLC, and left Crossett with all the risk of carrying the company’s operations forward.

33. Once the first DOT lawsuit was resolved, at a huge legal expense to the company, Crossett again insisted that the operating agreement be signed, and also insisted that Johnson join Crossett in guaranteeing the legal bill to Perkins Coie. The expense had been incurred in defending the lawsuit that was brought by Johnson’s brother-in-law.

34. In addition to the accrued legal fees, other legal problems with the state and federal authorities had cropped up and a second lawsuit against DOT Group was in the offing. Johnson again declined to sign. Johnson’s actions were contrary to what the two had agreed upon – that there would be a signed operating agreement.

35. Furthermore, it became apparent to Crossett that some fundamental changes needed to be made if the company was to go forward. It was seriously undercapitalized, and the consequences of that were becoming apparent to Crossett. He was having to individually shore up the operations, without assistance from Johnson, and apparently could not get a handle on the cash flow requirements for the burgeoning sales. In the late summer of 2014, Crossett brought in Scott Lee, initially as a consultant, to see what could be done to increase revenues. Lee had experience in running call centers, which had turned out to be the crux of DTC’s sales effort and, apparently, the foci of its legal troubles with both state and federal authorities.

36. Lee testified that after he looked over the situation, he wanted nothing to do with DTC. He said that he would be interested in a program that he would set up to run the sales. There were discussions during this time about whether Lee would become a member of DTC. Johnson was aware that Crossett was meeting with Lee in an effort to improve sales. Johnson indicated to Crossett that he should do what he had to do to increase sales.

37. Cousins learned of Crossett's meetings with Lee. Cousins said that from what she was told, she understood that Crossett was going to give her interest in the DTC to Lee, although this was not true as Lee was not interested in acquiring any interest in DTC. Crossett said he was reluctant to grant an immediate 10% interest to Cousins, as he thought she ought to earn her way into the interest. In any event, Cousins declined to sign the operating agreement because she was leery of all the litigation and legal troubles. In her deposition in the lawsuit filed against DTC, and when asked if she was a member, she testified that she had never signed any documentation. She further became disenchanted with the deal when Scott Lee appeared on the scene and appeared to be headed towards receiving some sort of interest in the operation. In October of 2104, Cousins resigned from the company. She testified that she had been paid all of the salary that was due and she had no claim against the company for any unpaid compensation. All of Cousins' legal fees at Perkins Coie were paid by DTC.

38. There is no dispute that Cousins was paid \$58,205.92, which included \$320 marked "bonus" paid in July of 2014. The rest of the disbursement was for regular salary, paid throughout the period. David Johnson was paid \$11,201.87. This consisted of a check for \$1,411 paid in July of 2014 and the balance paid over from October through years' end in 2014, which consisted of a return of all the money Johnson had contributed to the start-up of the company. Johnson testified that he has received back all of the money he paid into the company. Crossett withdrew a total of

\$169,151.11. This included money to specifically reimburse Crossett for expenses advanced, with the balance being charged against the profits of the company. Crossett testified that he was to receive a guaranteed disbursement of \$65,000 per year. (In his deposition, he recalled the understanding to be “approximately \$60,000 per year.”) There was no evidence to dispute this understanding. Crossett’s guaranteed draw would have been \$155,000 at \$60,000 and \$167,800 at \$65,000 for the 32 months from June of 2013 through year end 2015. It appears the expense reimbursement to Crossett was at least \$15,300. Therefore, I find as a fact that the total withdrawals by Crossett would not have exceeded the reimbursements for expenses and the amount he was entitled to withdraw as his guaranteed disbursement.

39. DTC has been fully wound up and has no assets and no liabilities. Neither Johnson nor Cousins were or are involved in Vurv in any way, and neither have any claim against Vurv for anything.

Analysis and Conclusions of Law

A limited liability company requires an operating agreement to breathe life into the venture, which can be an oral agreement. Typically, reliance upon an oral operating agreement is usually used where there is only one member, and therefore anything done by the member can be said to be done under an unwritten oral agreement with himself, or is used to ratify start-up actions taken until a formal agreement can be executed. Oral agreements may also be found where the members are all active in the day to day operations, and fully conversant with operating decisions. Many partnerships, for example, operate upon consensus decisions of the partnership on a day to day basis, which can serve as the equivalent of an oral operating agreement.

In the instant case, almost the only element of an agreement between the parties here that was not constantly shifting and moving as events unfolded, is the understanding that there would be a written operating agreement that everyone would sign.

The law on limited liability companies is seriously underdeveloped. The limited liability company is a hybrid of partnership and corporate law, with elements of each. When the entities are completely formed, there is machinery to handle unforeseen circumstances. It can be said of a limited liability company, as can be said of most arrangements between individuals, that there is no need for a written agreement when things are going well. The need for the written agreement comes when things do not go as planned, and when disagreement begin to arise. In written agreements, there are dispute resolution mechanisms and executory provisions to drop in place when things go wrong, etc.

What is not clear in the law is what is to happen when things go wrong and the formation or the company is imperfectly carried out.

In partnership law and corporate law, these areas are covered by statutory provisions. Situations that are not covered by the agreement of the partners (in partnership law) or by action of the shareholders or directors (in corporate law) are covered by statutory provisions. When the partners disagree, their partnership ends and the law requires that it be wound up with statutory guidance at each step. When shareholders disagree, the law spells out the rights of majority and minority shareholders, specifies the actions that must be taken and the rights that are to be protected.

However, in the case of an LLC, the only guidance in the statutes is that these areas are to be handled as agreed in the operating agreement. But what happens when the formation is incomplete?

With respect to Cousins, I think the law is clear. She was never a party to any of the oral agreements, and she never signed the written agreement, although it was ready and available to be signed. Cousins never became a member of the company. She indicated that she has been fully compensated for all of her services, and therefore, she has no claim against any of the defendants in this litigation.

With respect to Johnson, plaintiff contends that an operating agreement essential to the existence of an LLC can be an oral agreement, with which I agree as far as it goes. But this only works when things go as intended by the agreement of the parties, where the members of the LLC agree upon the existence of the entity and are concerned only with the day to day operating decisions, or where the terms of the oral operating agreement necessary to the issue can be established by the evidence. Trouble comes, and the statutes do not help, when there is disagreement over the fundamental terms of the oral operating agreement, or where conditions upon which the oral agreements were founded change, and/or where events arise that are not covered in the oral agreement.

The plaintiff has the burden of proof, and this means that plaintiff has the burden of proving an operating agreement sufficient to cover the issues to be resolved in this case. However, here, in this case, the only conclusion that can be established by the evidence is that the oral agreement was an agreement to sign a written agreement. When Johnson declined to sign the written agreement when it was ready, the formation of the LLC fell apart. Crossett attempted to keep it together, and tried for a year to get things back on track, but when Johnson continued to refuse to sign the written agreement in the fall of 2014, Crossett abandoned the effort to bring Johnson on board, and took the entity in a different direction.

I fully accept that Crossett was acting on behalf of both parties when he formed the LLC and became its sole member. But Johnson did not become a member upon formation. Crossett's agreement with Johnson was that he and Johnson would control the LLC when formed by means of a written operating agreement. The written agreement was prepared, and both Johnson and Crossett approved of its terms. All was ready to go, but Johnson would not sign.

There is not a clear answer in the law as to what happens in a situation like this. The defense argument is that the formation of the LLC was incomplete and it never actually came into being. The plaintiff's argument seems to be that Johnson was a member from the outset, and that the company can go forever on an oral agreement, but without specifying what that agreement is or was, other than as to ownership interests, and without any requirement for a written agreement.

From a practical standpoint, it does not make any difference which way it goes. Even if I accept the plaintiff's theory, there is no dispute that throughout its life, DTC was managed by Crossett. His decision to outsource the sales to Vurv, and his decision to eventually transfer the assets to Vurv were business decisions within the scope of his authority as the manager of the LLC. Furthermore, by the time he made the decision to transfer the assets, the company was technically insolvent. Crossett's decisions served to satisfy all of the debt remaining in DTC and close it out debt free. This is akin to the acts of the directors without the consent of the shareholders to liquidate an insolvent corporation, or actions of the liquidating partner to wind up an insolvent partnership. All of the money that Crossett had drawn from the company was either in reimbursement to him of expenses advanced or as part of the agreed-upon compensation for his services as manager. Cousins had been paid all compensation due her and Johnson had been paid all the money he had advanced. A small disbursement had been made in July of 2014 to the three individuals in the ratio alleged, of 46%, 44%, and 10%, but other than that no other moneys were

distributed and no funds or assets are available for distribution under the alleged ownership ratio. Under their oral agreement, there is no dispute that Crossett was to work for the venture and have sole control over the management of it, Johnson was not. Crossett was to receive a guaranteed distribution of \$60,000 or \$65,000 per year for his direct services to the venture. The exact amount of his guaranteed distribution does not matter because the company did not earn enough to pay even the lesser amount. There is no obligation on Crossett's part to return or divide up any of the compensation he took, any more than there would be any obligation on the part of Cousins to return any part of her salary, since it did not at any time exceed the minimum guaranteed amount.

This means that even if the company is deemed to have survived with Johnson and Cousins as members, it is an empty shell, with no assets and no liabilities, and no claim upon Crossett to account or return anything. If I accept the plaintiffs' argument, the result would be that there are no assets to distribute, and no money due or owing from Crossett.

I think the simpler and more correct result is that argued by defense counsel. Therefore, I conclude from the facts of this case as found above that the circumstance presented here was the imperfect organization of an LLC that was never consummated. Although the plan was for common ownership between Johnson and Crossett to be as alleged, with Cousins to be included at some stage, and although Crossett formed the company as a single member but with the intent that both Johnson and Cousins would be joining him as members as soon as the operating agreement was approved and signed, neither Cousins nor Johnson completed the essential step in the organization of the LLC necessary for them to become members of it, that being to sign the operating agreement. This was not merely an overlooked step in the process, or a step that the parties simply did not get around to accomplishing. The preparation and approval of an operating agreement was a clear understanding of Johnson and Crossett in their oral agreement. Johnson's

decision not to sign the essential document necessary to the existence of a limited liability company in Idaho was a conscious and deliberate decision on his part.

Once the written agreement was vetted by counsel and approved by the parties, the oral agreements between Crossett and Johnson were insufficient to stand as an oral operating agreement, at least with respect to the admission of Cousins and Johnson as members. Cousins was never a party to the oral agreements between Johnson and Crossett. She was not even aware of Johnson until she had been employed for some months. By the time she became aware of Johnson, the operating agreement had been vetted by counsel and approved by both men, and Johnson had already refused to sign. There is no good argument that Cousins could become a member of the company without signing the operating agreement.

Crossett formed the company as the sole member on behalf of Johnson with the expectation that he and Johnson would sign the operating agreement and become members. Under Idaho law, “If a limited liability company is to have more than one (1) member upon formation, those persons become members *as agreed by the persons before the formation of the company.*” Idaho Code § 30-25-401(b). [Emphasis added.] Here, I think the only conclusion that can be drawn from the evidence was that the agreement between Johnson and Crossett was that Johnson, and eventually Cousins, would become members upon signing the operating agreement.

There might have been some weight to plaintiff’s argument if the operating agreement had never been prepared and agreed upon. If the step had actually been overlooked or forgotten, there might be some basis to argue that the company continued on based upon the oral agreements as to ownership. But when the agreement that is contemplated by the parties and required by law is fully prepared, vetted by counsel, approved by both parties, and presented for signature, and then one party unilaterally declines to sign, I think that is clear indication that there is not a meeting of

the minds on a fundamental step in the formation of the company. Plaintiffs failed to sustain their burden of proof that any oral agreements existed that were sufficient to overcome their refusal to sign the written operating agreement.

Crossett attempted to revive the deal a number of times, until finally, in the fall of 2014, he stopped. In the face of Johnson's intransigent refusal to sign the operating agreement, Crossett had no obligation to continue to encourage him to do so, or to wait until he changed his mind. The step of making the distribution in July was a unilateral good faith effort on Crossett's part. He later returned all of Johnson's money, and paid all the compensation otherwise due Cousins. Neither have any claim against the company for any money due. Crossett is not obligated to either for any claim in this litigation.

I conclude that Crossett formed the limited liability company as a single member company, with himself as the sole member. Plaintiff failed to sustain his burden of proof that Johnson was to be a member of the LLC from the outset. I conclude that the evidence established that Johnson would be added as a member as soon as he signed the operating agreement. The two had agreed that Cousins would become a member, but since she was not a party to any of the oral agreements, her membership would be dependent upon the terms of the written agreement, which required her signature to be effective. She did not sign, and never became a member.

Until such time as additional members were added, the company existed as a single member company, meaning that Crossett had full authority to run the company. When Johnson and Cousins declined to become members by signing the operating agreement, and in light of the company's worsening financial condition, Crossett was fully within his authority to wind it up by transferring all assets to another company in consideration for the extinguishment of debt.

Plaintiffs alleged that Crossett breached the implied covenant of good faith and fair dealing. There was no act of Crossett, nor any omission to act, that in any way prevented Johnson or Cousins from signing the operating agreement. Plaintiffs have failed to prove any facts which would constitute a breach of the implied covenant.

Plaintiffs allege that Crossett breached some fiduciary duty owed. However, both plaintiffs acknowledged in their testimony that Crossett had caused the company to pay them all money actually due them. Cousins testified that she was fully paid for all salary in accordance with the company's agreement for salary, and Johnson testified that he had been repaid for all money he had invested at the outset. Johnson did not work for the company at any time, and was never owed any money for compensation. Plaintiffs have failed to prove any facts giving rise to any fiduciary duty on the part of Crossett to either of them.

Plaintiff has failed to prove that Crossett's withdrawals from the limited liability company exceeded the amounts due him as necessary to reimburse him for expenses advanced or draws against the guaranteed distribution agreed to by Johnson. Therefore, Crossett is not accountable for any excess withdrawals from the company. Crossett is not liable to the plaintiffs, or either of them, on any of their complaints in this case.

I conclude that this is the most practical solution to apply here.

Attorney Fees

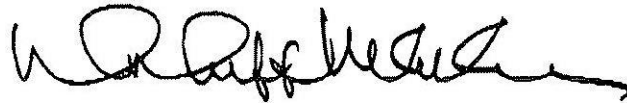
The action is at its foundation a claim for money due from David Crossett. He, individually, is entitled to his attorney fees under I.C. § 12-120.

Directions for Entry of Judgment

Based upon the forgoing analysis, it is the order of the Court that judgment be issued in this matter as follows: That plaintiffs take nothing by their complaint and that it be dismissed as to

all remaining defendants with prejudice. The individual defendant David Crossett is awarded his costs and attorney fees, to be determined in later proceedings in accordance with the applicable rules of civil procedure.

Dated this 1st day of November 2016.

A handwritten signature in black ink, appearing to read "D. Duff McKee", written in a cursive style.

Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have emailed, a copy of the within instrument as notice pursuant to the Idaho Rules to each of the parties of record in this cause as follows:

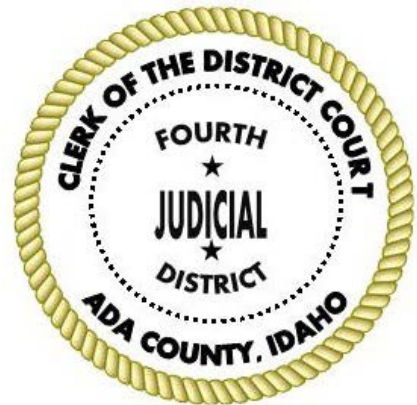
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CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: November 1, 2016

By *Shaitha Lyke*
Deputy Clerk



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Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

DECLARATION OF COUNSEL
SETTING FORTH ATTORNEY FEES
AND COSTS

Michelle R. Points declares and affirms as follows pursuant to Idaho Code § 9-1406:

1. Affiant.

I am an attorney with the law firm of Points Law, PLLC, which represents Defendants David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC in the captioned case. I am licensed to practice law in the state of Idaho. This declaration is submitted pursuant to the Findings of Fact, Conclusions of Law and Directions for Entry of Judgment entered in this case

on November 1, 2016, wherein the Court held that Mr. Crossett was entitled to his attorney fees and costs incurred in defending this action. It is intended to comply with provisions of Idaho Rule of Civil Procedure 54, including but not limited to Idaho Rule of Civil Procedure 54(d)(5) and 54(e)(5). I have directed all invoices in this matter to Mr. Crossett.

2. Basis of Declaration.

The matters set forth in this declaration are based upon my personal knowledge, the work records of my law firm, and a review of those records made by me and other persons with knowledge. The records were made contemporaneously with the events set forth in the records, were made in the ordinary course, and were regularly kept by Points Law, PLLC, counsel for Plaintiff.

3. Fees and Costs Claimed.

Accompanying this affidavit is Exhibit A, which itemizes the requested attorney's fees organized in a manner that details the nature and amount of attorney's fees sought by Mr. Crossett and incurred by this firm, based upon Mr. Crossett having successfully defended against Plaintiffs' claims. In addition to the fees contained in Exhibit A, I will spend approximately 2 hours in preparing this declaration, a notice of hearing and presenting argument at a hearing anticipating opposition to this declaration. I am familiar with the fact of, and the necessity for, such attorney's fees and costs having been incurred in this case. Such fees and costs were actually, necessarily, and reasonably incurred. To the best of my knowledge and belief, the items are correct and the costs claimed are in compliance with Idaho Rule of Civil Procedure 54(d)(5). The attorney's fees claimed are for work actually performed in this action and represent time that relates to defending Plaintiffs' claims. The costs are claimed in compliance

with Idaho Rule of Civil Procedure 54(d)(1). Mr. Crossett is entitled to attorney fees under Idaho Rule of Civil Procedure 54 and Idaho Code § 12-120 as he is the prevailing party.

4. Parties Against Whom Mr. Crossett Claims Fees and Costs.

Mr. Crossett seeks recovery of fees and costs from both Plaintiffs, Mr. Johnson and Ms. Cousins, joint and severally.

5. Basis for Claim Against Plaintiff.

The basis for Mr. Crossett's claim arises from the above referenced decision entered in this case.

6. Factors Supporting the Reasonableness of Mr. Crossett's Claim for Attorney Fees.

Factors that the Court should consider in determining the reasonableness of Mr. Crossett's claim for attorney fees are set forth in Idaho Rule of Civil Procedure 54(e)(3). Those factors are individually discussed in the following paragraphs of this declaration.

7. The Time and Labor Required.

Idaho Rule of Civil Procedure 54(e)(3)(A) provides that the Court shall consider the time and labor required. Mr. Crossett attempted to address the issues in this case only on an as needed basis, to spare the expenditure of unnecessary time and resources. Given the nature of the claims, only necessary discovery was conducted in the form of written discovery and depositions. Research of applicable law was required to prepare all pre-trial submissions and present the facts, evidence and legal theories during trial.

8. The Novelty and Difficulty of the Questions.

Idaho Rule of Civil Procedure 54(e)(3)(B) provides that the Court shall consider the novelty and difficulty of the questions. As discussed in the previous paragraph, it was necessary

to review necessary documents and recordings, as well as research applicable law to evaluate and prepare for trial.

9. The Skill, Experience and Ability of the Attorney.

Idaho Rule of Civil Procedure 54(e)(3)(C) provides that the Court shall consider the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. The lawyer primarily involved in this case myself, Michelle R Points, ISB No. 6224, Principal. I have the requisite skill and experience and properly and efficiently handled this case.

10. The Prevailing Charges.

Idaho Rule of Civil Procedure 54(e)(3)(D) provides that the Court shall consider the prevailing charges for like work. I charged \$230.00 per hour for the defense in this case. Throughout the course of this litigation, I believe that the charges billed for by me have been at the prevailing charges for like work.

11. Mandatory Costs.

Mandatory costs, as outlined in Idaho Rule of Civil Procedure 54(d)(1)(C) are as follows:

Cost for preparation of trial exhibits: \$43.87

Charges for reporting or transcribing: \$811.20

(Q&A Court Reporting and M&M Court reporting; depositions of David and Jill Johnson and Tessa Cousins)

Filing fee for Answer: \$136.00

Total: \$991.07

12. Factors Supporting the Reasonableness of Mr. Crossett's Claim for Costs.

Mr. Crossett is claiming costs as a matter of right pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C).

SUMMARY OF COSTS AND ATTORNEY FEES REQUESTED for Points Law, PLLC:

Attorney fees:	\$18,216.00
Mandatory costs (I.R.C.P. 54(d)(1)(C))	\$ 991.07
Total	<u>\$19,207.07</u>

DATED this 8th day of November, 2016

POINTS LAW, PLLC

By: /s/ Michelle R. Points
Michelle R. Points
Attorney for David Crossett, Drug Testing Compliance
Group, LLC and Vurv, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of November, 2016, I caused to be served a true copy of the foregoing DECLARATION OF COUNSEL SETTING FORTH ATTORNEY FEES AND COSTS by filing said pleading using iCourts! wherein the following were served electronically:

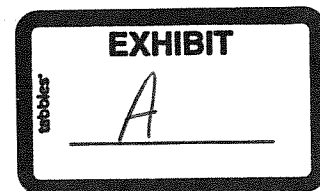
James F. Jacobson
JACOBSON & JACOBSON, PLLC

/s/ Michelle R. Points
Michelle R. Points

Detailed Time Report













Timeframe 08/17/2015 — 10/20/2016
 Total 77.20 Billable Hours
 0.00 Uninvoiced Billable Hours














Client DTC Group LLC
 Project Crossett Johnson litigation
 Task All Tasks
 Staff All Staff



Client	Project	Task	Person	Hours
08/17/2015				1.50
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.50
<i>Draft answer with affirmative defenses.</i>				
08/19/2015				2.70
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	2.70
<i>Exchange emails with client re edits to Answer; edit and revise the same; draft motion to disqualify counsel; draft first set of interrogatories, requests for production and requests for admission.</i>				
08/20/2015				1.50
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.50
<i>Revise and edit answer, motion to disqualify counsel; draft notices of deposition duces tecum for D and J Johnson; draft notice of service.</i>				
08/25/2015				0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30
<i>Call with court clerk re hearing on motion for disqualification; draft notice of hearing and file and serve the same.</i>				
09/08/2015				0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30
<i>Exchange emails with court clerk and client and draft amended notices of deposition duces tecum for D. and J. Johnson.</i>				
09/10/2015				1.10
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.10
<i>Meet with client re depositions of Johnson, potential settlement and case strategy; review objection to motion to disqualify and forward the same to client and vacating hearing on the same.</i>				
09/14/2015				0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30
<i>Draft, file and serve notice of vacating hearing.</i>				
09/15/2015				0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30
<i>Call to court clerk re vacating hearing; exchange emails with counsel re vacated hearing, scheduled depositions and settlement conference.</i>				
09/18/2015				0.20
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20
<i>Exchange emails with counsel re discovery requests and responses.</i>				
09/21/2015				0.40
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40
<i>Exchange emails with counsel re deposition schedule; brief review of discovery responses and call with client re the same.</i>				













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09/22/2015				1.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.30	
<i>Exchange emails with court reporter, counsel and client re scheduling of deposition; draft second amended notice of deposition duces tecum; exchange emails with K. Cameron re information on D. Johnson; exchange emails with client re the same; exchange emails and calls with client re deposition questions, strategy going forward and related matters.</i>					
09/23/2015				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
<i>Draft, file and serve request for trial setting; exchange emails with client re deposition scheduling; exchange emails with counsel re the same and potential protective order; email client re the same.</i>					
09/24/2015				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
<i>Exchange emails with client re description of knowledge of potential witnesses; email counsel re the same; call with client re additional Johnson information, case strategy and related matters.</i>					
09/28/2015				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Exchange emails with client re litigation matters.</i>					
09/30/2015				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Exchange emails with client re notification to counsel re facts on Johnson's family; call with client re the same.</i>					
10/06/2015				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Call with client re no settlement offer and related matters.</i>					
10/11/2015				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Exchange emails with court reporter re upcoming depositions and forward amended notices to the same.</i>					
10/14/2015				2.90	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	2.90	
<i>Prepare for depositions of Johnson.</i>					
10/15/2015				0.60	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.60	
<i>Call with client re tomorrow's depositions of Johnson and several related matters; final preparation for tomorrow's depositions.</i>					
10/16/2015				4.80	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	4.80	
<i>Meet with clients and conduct deposition of D. and J. Johnson; exchange emails with client re provisions in operating agreement and related matters.</i>					
10/18/2015				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
<i>Review several emails from client re case facts and strategy for proceeding; email client re the same; review notice of scheduling conference and available trial dates.</i>					
10/20/2015				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
<i>Exchange emails with counsel re trial date, discovery and related matters; email client re the same.</i>					













10/23/2015				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Exchange emails with client re potential depositions of certain witnesses.</i>					
10/30/2015				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
<i>Call with client re bifurcation of trial; draft email to counsel re the same.</i>					
11/11/2015				1.10	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.10	
<i>Email counsel re discovery requests; begin research on bifurcation motion and begin outline of motion and memorandum.</i>					
11/16/2015				0.90	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.90	
<i>Continue to draft responses to Plaintiff's discovery requests; email client re the same.</i>					
11/17/2015				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Review email from client and revise and edit discovery responses.</i>					
11/19/2015				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Compile file and serve discovery responses and notice of service.</i>					
12/07/2015				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Review supplemental discovery requests and begin draft of response.</i>					
12/10/2015				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Exchange emails with counsel re responses to discovery requests and response to settlement offer.</i>					
01/06/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Review correspondence from counsel re meet and confer on specific discovery requests; exchange emails with S. Cozakas re court reporter on earlier depositions.</i>					
01/11/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Review meet and confer letter; begin draft of response and exchange emails and calls with client re the same.</i>					
01/12/2016				0.80	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.80	
<i>Continue to draft and edit letter to counsel for Johnson in response to meet and confer letter; exchange emails with client re case status and strategy for proceeding with potential settlement or dismissal.</i>					
02/03/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Review scheduling order and email client re potential mediation.</i>					
02/08/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	














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Review several pleadings filed by Plaintiff; review scheduling order re amendment deadline; call with client re the same and accounting issues.

02/10/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
	<i>Review additional pleadings filed by Plaintiff; review repository re hearing information and email counsel re the same.</i>				
02/24/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Review several motions filed by Johnson and email counsel for Johnson re motion to intervene and hearing; confirm with court repository.</i>				
02/25/2016				1.60	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.60	
	<i>Draft memorandums in opposition to Johnson's motion to compel, motion to consolidate and motion to amend complaint.</i>				
02/29/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Exchange several emails with counsel re motion to intervene pleadings and hearing and related matters.</i>				
03/04/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
	<i>Exchange emails with counsel re trial setting; review and outline response to Johnson's reply pleadings.</i>				
03/07/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
	<i>Review Johnson reply on motion to intervene.</i>				
03/25/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Review proposed order on motions decided from bench prepared by counsel for Johnson; email counsel re the same.</i>				
04/21/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
	<i>Exchange emails with client re upcoming trial and related matters.</i>				
06/01/2016				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
	<i>Exchange emails with clients re service of summons and several related trial issues.</i>				
06/02/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
	<i>Exchange emails and call with client re service of amended complaint; review file for notes on amendment motion; exchange emails with counsel re service of complaints and stipulation re dismissal of Blak and individuals.</i>				
06/13/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
	<i>Review protective order forwarded by counsel for Johnson; exchange emails with counsel and client re the same; email counsel re final version of amended complaint that was served.</i>				
06/15/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	

Review and execute stipulation for protective order; exchange emails with client and counsel re production of Quickbooks documents and request for final version of amended complaints.

06/16/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Exchange emails with client re QuickBook reports and review timelines for lay witness disclosure.</i>				
06/17/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Review draw report produced by client; exchange emails with client re the same; email counsel PL report for DTC through 2015.</i>				
06/20/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Exchange emails with counsel and client re deposition scheduling.</i>				
06/23/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
	<i>Review and calendar notice of deposition and forward the same to client.</i>				
07/07/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
	<i>Review correspondence and email counsel for copy of served Amended Complaint.</i>				
07/08/2016				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
	<i>Begin draft of answer to first amended complaint; email client re the same.</i>				
07/12/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Review amended notice of deposition duces tecum; email document to counsel; email client re the same.</i>				
07/15/2016				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
	<i>Review scheduling order and discovery responses and email client re lay witness disclosure.</i>				
07/17/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
	<i>Exchange emails with client re deposition scheduling and related issues.</i>				
07/18/2016				1.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.30	
	<i>Exchange emails with client and counsel re deposition and production issues; draft answer to first amended complaint with affirmative defenses and lay witness disclosure; file and serve.</i>				
07/19/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
	<i>Exchange emails with client re deposition; email counsel re the same; call to counsel re scheduling issues with deposition.</i>				
07/20/2016				0.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
	<i>Prepare materials for deposition; email and call to counsel re deposition scheduling; email client re the same.</i>				
07/21/2016				3.00	

DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	3.00	
					0.20
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
					0.50
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
					0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
					0.20
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
					0.40
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
					0.20
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
					1.10
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.10	
					0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
					0.50
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
					0.30
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
					0.40
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
					0.40
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
					0.40

DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.40	
<i>Review plaintiffs' response to motions in liming and motion to bifurcate and pretrial motion.</i>					
09/29/2016				0.60	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.60	
<i>Begin draft of witness list, exhibit list and jury instructions</i>					
09/30/2016				1.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	1.50	
<i>Continue to draft witness and exhibit lists and jury instructions; outline argument for today's hearing; attend pretrial conference; call with client re the same.</i>					
10/04/2016				0.20	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.20	
<i>Contact respective court reporters to get depositions of Johnson and Cousins.</i>					
10/07/2016				0.30	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.30	
<i>Exchange emails with court clerk re use of Plan B judge and pretrial filings; email client re the same and related matters.</i>					
10/08/2016				0.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.50	
<i>Research case law on operating agreements and fiduciary duty.</i>					
10/10/2016				7.40	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	7.40	
<i>Continue to review cases, depositions, instruction and draft proposed findings of fact and conclusions of law; exchange emails with client throughout day re the same.</i>					
10/11/2016				2.10	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	2.10	
<i>Continue to draft and edit proposed findings of fact and conclusions of law; efile and serve on court clerk.</i>					
10/12/2016				0.90	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.90	
<i>Review Plaintiffs proposed findings and conclusions; exchange emails with client re the same; calls with client re the same and trial preparation.</i>					
10/14/2016				3.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	3.50	
<i>Prepare exhibits and notebooks; begin drafting of questions for witnesses and continue to review deposition testimony.</i>					
10/15/2016				5.00	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	5.00	
<i>Meet with client in preparation for trial; finish drafting witness questions and preparing exhibits for trial (2 hours written off).</i>					
10/16/2016				0.70	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	0.70	
<i>Continue to work on witness questions; exchange emails with client re the same.</i>					
10/17/2016				6.50	
DTC Group LLC	Crossett Johnson litigation	Admin	Michelle Points	6.50	

Meet with client and attend trial day one; revise direct examination questions and closing statement (1 hour written off).

10/18/2016

2.50

DTC Group LLC

Crossett Johnson litigation

Admin

Michelle Points

2.50



Attend trial day 2.

Total

77.20

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W.
and KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

**OBJECTION TO DEFENDANTS'
REQUEST FOR ATTORNEY'S FEES**

COME NOW the above-named Plaintiffs, DAVID JOHNSON and TESSA COUSINS, by and through their counsel of record Jacobson & Jacobson, PLLC, and respectfully submits this Objection to Defendants' Request for Attorney's Fees, based upon the following points of law and authority.

DISCUSSION

A. Legal Standards on Attorney Fees under I.C. § 12-120(3).

Under Idaho law, the prevailing party in a civil action may be awarded reasonable attorney's fee when that action is brought to recover on "an open account, account stated, note, bill, negotiable instrument, guaranty or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law." I.C. § 12-120(3). This section of the Idaho Code defines the term commercial transaction "to mean all transactions except transactions for personal or household purposes." *Id.* "It has long been held that '[t]he critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim *and constitute a basis on which the party is attempting to recover.*'" *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (quoting *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999)) (emphasis added). An action to enforce a statutory penalty or right is not a commercial transaction. *Kelly v. Silverwood Estates*, 127 Idaho 624, 631, 903 P.2d 1321, 1328 (1995); *Gumprecht v. Doyle*, 128 Idaho 242, 245, 912 P.2d 610, 613 (1995). Therefore, attorney's fees sought under Idaho Code § 12-120(3) are unavailable "when the claim is based on a statutory provision, *even when the underlying action depends on contract.*" *Shay v. Cesler*, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999); *L&W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 747, 40 P.3d 96, 105 (2002).

B. There is no commercial transaction under Idaho Code § 12-120(3) in this case.

In *Kelly v. Silverwood Estates*, the court reasoned that the issue of accounting and winding up of the partnership affairs, and a distribution of partnership assets was not a commercial transaction because the basis of plaintiff's recovery was enforcement of a statutory

penalty. *Kelly*, 127 Idaho at 631, 912 P.2d at 1328. Similarly, in *Gumprecht v. Doyle*, the court found that a shareholder's suit was based on statutory penalties or rights, and as such was not a commercial transaction under Idaho Code § 12-120(3) making the award of attorney's fees inappropriate. *Gumprecht*, 128 Idaho at 245, 912 P.2d at 613. Because the basis of recovery in each action was statutory, the transactions were not considered commercial transactions under Idaho Code § 12-120(3) making an award of attorney's fees inappropriate. This was in spite of the fact that each underlying action depended on a contractual relationship. *Kelly*, 127 Idaho at 630-31, 912 P.2d at 1327-28 (showing that the underlying action depended on the existence of a partnership agreement); *Gumprecht*, 128 Idaho at 242-43, 912 P.2d at 610-11 (showing that the underlying action depended on the contractual relationship between a shareholder and the corporation).

Similar to the *Kelly* and *Gumprecht*, the action in this case depends upon a contractual relationship—members in a limited liability company. However, also similar to *Kelly* and *Gumprecht*, each claim in this case is based on a statutory theory of recovery. Plaintiffs in this case claim that Defendant Crossett (1) breached his duty of loyalty set out in Idaho Code § 30-25-407(a); (2) breached his duty of care set out in Idaho Code § 30-25-409(c); (3) breached the implied duty of good faith and fair dealing set out in Idaho Code § 30-25-409(d); (4) did not properly make distributions to Plaintiffs as fellow members of DTC Group, LLC as required under Idaho Code § 30-25-404(d); and (5) improperly attempted to expel Plaintiffs as members in violation of Idaho Code § 30-25-602. The theory of recovery for each of these is an action to enforce a statutory penalty or right. Therefore, this case does not constitute a commercial transaction within the meaning of Idaho Code § 12-120(3), even though the underlying action depends on the contractual relationship between the parties as members of DTC Group, LLC.

Consequently, an award of attorney's fees to the defendants under Idaho Code § 12-120(3) is inappropriate and the court should deny Defendants' Request for Attorney's Fees.

DATED this 22nd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson, of the firm
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points	<input type="checkbox"/>	U.S. Mail, postage prepaid
POINTS LAW, PLLC	<input type="checkbox"/>	Hand-Delivered
910 W. Main, Ste. 222	<input type="checkbox"/>	Overnight Mail
Boise, ID 83702	<input checked="" type="checkbox"/>	iCourt/email
Facsimile: (208) 336-2088	<input type="checkbox"/>	Facsimile

DATED this 22nd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson, of the firm
Attorneys for Plaintiffs

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W.
and KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

**AFFIDAVIT OF DAVID JOHNSON IN
SUPPORT OF PLAINTIFFS'
MOTION TO FOR NEW TRIAL**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

DAVID JOHNSON, being first duly sworn upon oath, deposes and states as follows:


1. Your Affiant is over the age of eighteen and is competent to testify as to the matters contained herein based on his own personal knowledge.

AFFIDAVIT OF DAVID JOHNSON IN SUPPORT OF PLAINTIFFS' MOTION FOR NEW TRIAL - 1

000105

2. This Affidavit is submitted in support of Plaintiffs' Motion to Grant a New Trial and contains information to the best of Plaintiff Johnson's knowledge.
3. At the trial of this matter, the court refused to acknowledge the fact that Defendants admitted in their pleadings that both myself and Plaintiff Cousins were members of DTC Group, LLC since its founding. The court was made aware of this admission by Defendants through my attorney of record, James F. Jacobson. Yet the court did not address this admission in its Findings of Fact and Conclusions of Law.
4. Furthermore, the court was made aware of the facts surrounding the formation of DTC Group, LLC, all of which support the Defendants' admission that both myself and Plaintiff Cousins were members of DTC Group, LLC since its founding. Particularly that Defendant Crossett did in fact make the required filings with the office of the Secretary of State on behalf of the company that the three of us had formed together, which was testified to by myself, Plaintiff Cousins, and Defendant Crossett.
5. Defendant Crossett testified at trial that he treated Plaintiff Cousins and myself as members of DTC Group, LLC. This treatment included Plaintiff Cousins and my being paid distributions based on our ownership interests, as shown in Exhibit 1 admitted at trial. Plaintiff Cousins and I testified that we were members of DTC Group, LLC since its inception. However, the court ignored all of these facts. Defendant Crossett testified at trial regarding text messages exchanged between me and him wherein I asserted my ownership interest in DTC Group, LLC and Defendant Crossett did not dispute my statements regarding my ownership interest.

FURTHER, your affiant sayeth not.



David Johnson

SUBSCRIBED AND SWORN to before me this 23rd day of November, 2016.





NOTARY PUBLIC FOR IDAHO

Resident at Boise, Idaho

My commission expires: 1/5/18

CERTIFICATE OF SERVICE

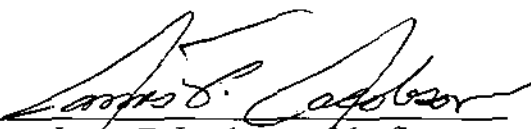
I HEREBY CERTIFY that on the 23rd day of November, 2016, a true and correct copy of the foregoing documents was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088
Attorney for Defendants

- U.S. Mail, postage prepaid
- Hand-Delivered
- iCourt/email
- Facsimile

DATED this 23rd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By 
James F. Jacobson, of the firm
Attorneys for Plaintiffs

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jflawidaho.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
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Plaintiffs,

vs.

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COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W.
and KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

**AFFIDAVIT OF JAMES F.
JACOBSON IN SUPPORT OF
PLAINTIFF'S MOTION FOR NEW
TRIAL**

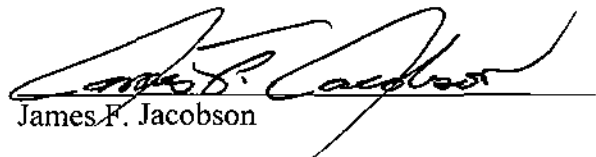
STATE OF IDAHO)
) ss.
COUNTY OF ADA)

JAMES F. JACOBSON, being first duly sworn upon oath, deposes and states as follows:

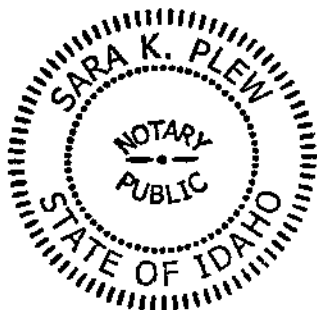
1. That he is the attorney of record for Plaintiffs David Johnson and Tessa Cousins in the above-entitled matter.

2. At the trial of this matter, Defendant Crossett testified that he was given a salary by DTC Group, LLC, which was provided him in compensation for his services as Manager. He was provided Exhibit H during his testimony, which is a profit and loss statement for DTC Group, LLC for the year 2013, 2014, and 2015. In his testimony, he indicated that the line item in Exhibit H labeled "Net Income" was his salary for each year.
3. However, this testimony is in direct opposition to his testimony given at his deposition in which he indicated that his salary was a part of the line item labeled "Payroll Expenses," and that "Net Income" was a line item separate and apart from his salary. Exhibit 1, p. 22. In his deposition, Defendant Crossett stated he did not know why the "Net Income" line showed approximately \$60,000. Exhibit 1, p. 25. I have attached Defendant Crossett's deposition to this affidavit and labeled it Exhibit 1.
4. Defendant Crossett's testimony in his deposition is in direct correlation with Plaintiff Cousins' testimony at trial, in which she also stated that Defendant Crossett's salary was reflected in the line item labeled "Payroll Expenses," and not in "Net Income."

FURTHER, your affiant sayeth not.


James F. Jacobson

SUBSCRIBED AND SWORN to before me this 23rd day of November, 2016.




Sara K. Plew

NOTARY PUBLIC FOR IDAHO

Resident at Boise, Idaho

My commission expires August 13, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of November, 2016, a true and correct copy of the foregoing documents was served upon:

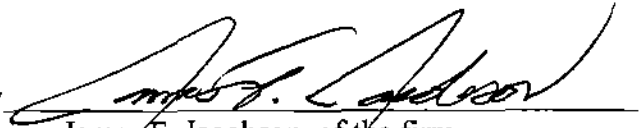
Michelle R. Points
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Attorney for Defendants

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DATED this 23rd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By



James F. Jacobson, of the firm
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual,)
and TESSA COUSINS, an individual)
)
Plaintiffs,)
)
vs.) Case No. CV OC 1513887
)
DAVID CROSSETT, an individual,)
SCOTT H. LEE, an individual,)
DRUG TESTING COMPLIANCE GROUP,)
LLC, an Idaho limited liability)
company, VURV, LLC, an Idaho)
limited liability company, BO W.)
and KRYSTAL SCHEMELLING, a)
married couple,)
)
Defendants.)
_____)

DEPOSITION OF DAVID CROSSETT

July 21, 2016

Boise, Idaho

Reported by:

Andrea J. Couch, CSR #716, RDR, CRR, CRC

DEPOSITION OF DAVID CROSSETT

BE IT REMEMBERED that the deposition of DAVID CROSSETT was taken by the Plaintiffs at the law offices of Jacobson & Jacobson, located at 7655 West Riverside Drive, Boise, Idaho, before Associated Reporting & Video, Andrea J. Couch, Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Thursday, the 21st day of July, 2016, commencing at the hour of 9:30 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiffs: JACOBSON & JACOBSON
By: James F. Jacobson, Esq.
7655 West Riverside Drive
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By: Michelle R. Points, Esq.
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Boise, Idaho 83702
Telephone: (208) 287-3216
Facsimile: (208) 336-2088
mpoints@pointslaw.com

1 have as well as you.
 2 Q. Well, that's not quite my question.
 3 Maybe you didn't understand. Let me ask that
 4 again.
 5 Are there other financial records of
 6 DTC Group that your accountant has that are not
 7 Deposition Exhibit 1?
 8 A. Not that I'm aware of, no.
 9 Q. So if I requested from Rachel financial
 10 documents related to DTC Group, the only thing
 11 she's going to give me is Deposition Exhibit 1?
 12 A. Correct.
 13 Q. What happened to the other financial
 14 records of DTC Group?
 15 A. I don't know. It was a couple of years
 16 ago, and we've moved offices twice.
 17 Q. And you have no recollection of what you
 18 did with those financial records?
 19 A. I don't.
 20 MS. POINTS: Can I interject? I'm not sure
 21 that David is understanding the question.
 22 MR. JACOBSON: Okay.
 23 MS. POINTS: Just a few follow-up questions.
 24 MR. JACOBSON: Sure.
 25 MS. POINTS: You provided financial

[Page 20]

1 information to Ms. Pulliam, and she kept the
 2 QuickBooks for you?
 3 THE WITNESS: Right.
 4 MS. POINTS: So she would have had access to
 5 those QuickBooks programs, correct?
 6 THE WITNESS: Yes.
 7 MS. POINTS: And she used those QuickBooks
 8 programs to, for instance, prepare your tax returns
 9 for DTC?
 10 THE WITNESS: Right.
 11 MS. POINTS: And your K-1s, if you took any
 12 distributions?
 13 THE WITNESS: Correct.
 14 MS. POINTS: So she would have those
 15 financial records?
 16 THE WITNESS: Oh, yes.
 17 Q. (BY MR. JACOBSON) So she still has the
 18 QuickBooks file?
 19 A. Yes. I'm sorry. Yes.
 20 MR. JACOBSON: Thank you, Counsel. I
 21 appreciate the clarification.
 22 MS. POINTS: Yeah.
 23 Q. (BY MR. JACOBSON) So we could get
 24 financial records related to DTC Group from
 25 Ms. Pulliam?

[Page 21]

1 A. Yes.
 2 Q. Okay. All right.
 3 But you don't have any record of who
 4 your employees were or your sales force was in
 5 2014?
 6 A. Not outside of QuickBooks.
 7 Q. You were paying yourself a salary in
 8 2014?
 9 A. Yes.
 10 Q. What was your salary?
 11 A. I -- I don't know exactly, but I think
 12 it's roughly about \$60,000.
 13 Q. Okay.
 14 A. And that information was provided to
 15 you.
 16 Q. Okay. I appreciate that.
 17 And then the remainder of that payroll
 18 expense went to these other 14 employees?
 19 A. Correct.
 20 Q. Were your salespeople being paid on a
 21 commission basis or were they being paid in some
 22 other fashion?
 23 A. Salespeople were being paid on
 24 commission.
 25 Q. Okay. Besides yourself and the

[Page 22]

1 salespeople, did DTC Group have any other employees
 2 in 2014?
 3 A. Yes.
 4 Q. Who?
 5 A. There were administrators that did
 6 things on the back end.
 7 When you're asking "who," are you asking
 8 what they did or names of who they are?
 9 Q. "Who" is their names. "What" is what
 10 they did.
 11 A. We had many different employees. We
 12 went through a lot. Again, it would be in
 13 QuickBooks.
 14 Q. Are you telling me that in terms of your
 15 administrative people, you had a significant amount
 16 of turnover in one year?
 17 A. We did.
 18 Q. Do you know how many administrative
 19 people you employed in 2014?
 20 A. I don't know the number exactly, but it
 21 could be as high as 10 or 12.
 22 Q. And not all at one time but at varying
 23 times depending on your high rate of turnover?
 24 A. Correct.
 25 Q. The number for payroll expense drops

[Page 23]

1 down to minus \$29.13 in 2015.
 2 Can you explain that?
 3 A. Yes. When DTC no longer had employees
 4 at the end of the year.
 5 Q. So DTC Group did have employees in 2015
 6 of some kind?
 7 A. I don't believe so. I was the only
 8 employee of DTC Group for 2015.
 9 Q. You were the only one?
 10 A. Correct.
 11 Q. For the entire year? You laid everybody
 12 off in December of 2013? Excuse me, 2014.
 13 A. All of those -- all of those employees
 14 moved to another company out of DTC Group.
 15 Q. What company did they move to?
 16 A. To Vurv, V-u-r-v.
 17 Q. Okay. Why did they do that?
 18 A. Because DTC was failing.
 19 Q. What do you mean by "failing"?
 20 A. It could not pay its bills.
 21 Q. Let's look on page 2 of Deposition
 22 Exhibit 1.
 23 A. Uh-huh.
 24 Q. You're showing a net profit of
 25 \$63,471.75.

[Page 24]

1 Is that correct?
 2 A. That's what it says.
 3 Q. And how does that equate to your
 4 statement of, "DTC Group couldn't pay its bills"?
 5 A. It carried almost \$200,000 in debt from
 6 the legal fees.
 7 Q. Why then is it showing a net profit of
 8 over \$60,000?
 9 A. I don't know. But you're looking at a
 10 cash basis profit and loss, and DTC is accrual
 11 basis.
 12 Q. Well --
 13 A. I'm not an accountant, so I don't know,
 14 but I can tell you the reality of the checks that I
 15 wrote.
 16 Q. Do you understand the difference between
 17 cash and accrual?
 18 A. A little bit.
 19 Q. What is your understanding of the
 20 difference between a cash basis accounting and an
 21 accrual basis accounting?
 22 A. Cash basis shows you what is there in
 23 cash right now. Accrual shows you -- it takes into
 24 account what you may owe.
 25 Q. That's your understanding?

[Page 25]

1 A. That's my understanding.
 2 Q. Okay. Any other understanding besides
 3 that?
 4 A. No.
 5 Q. But it's your testimony that DTC Group's
 6 debt load was too high for it to continue?
 7 A. Correct.
 8 Q. And so your plan was to shutter the
 9 company and open up a new company that did
 10 essentially the same thing as DTC Group?
 11 A. No, that was not the plan.
 12 Q. What was the plan?
 13 A. DTC Group could not pay its bills. We
 14 were being sued, investigated; had a lot of
 15 problems. Dave Johnson wanted nothing to do with
 16 the company, refused to sign the operating
 17 agreement after multiple requests.
 18 Q. You already said that. I appreciate
 19 that.
 20 A. I just --
 21 It's part of what it looked like in
 22 September.
 23 Q. Okay.
 24 A. And then I had met an individual who had
 25 experience in call centers, and we talked about

[Page 26]

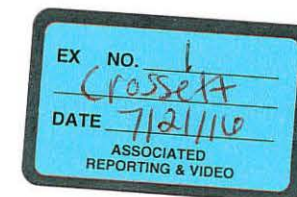
1 starting a company to sell lots of call center
 2 products.
 3 Q. This was Scott Lee?
 4 A. Scott Lee.
 5 Q. Okay. Go ahead.
 6 A. So we started Vurv as a call center to
 7 sell multiple types of products, and DTC was one of
 8 the many products that we could offer.
 9 And as DTC was failing, we -- I moved
 10 the employees over to Vurv, and we kept DTC open to
 11 pay its debts.
 12 Q. What did you use to pay DTC Group's
 13 debts? Where did those funds come from?
 14 A. Those funds --
 15 Initial debts came from DTC, and then
 16 those funds came from Vurv.
 17 Q. Why did Vurv pay DTC Group's debts?
 18 A. That was the agreement I had.
 19 Q. Is there a written agreement between
 20 DTC Group and Vurv where Vurv assumed the debts of
 21 DTC Group?
 22 A. No.
 23 Q. Is there a promissory note between Vurv
 24 and DTC Group where Vurv loaned money to DTC Group
 25 in exchange for a promise to pay?

[Page 27]

Profit & Loss

January 2013 through December 2015

	Jan - Dec 13	Jan - Dec 14	Jan - Dec 15	TOTAL
Ordinary Income/Expense				
Income	197,889.56	1,099,445.68	800,486.42	2,097,821.66
Cost of Goods Sold				
Cost of Goods Sold	21,221.24	163,834.26	320,586.97	505,642.47
Total COGS	21,221.24	163,834.26	320,586.97	505,642.47
Gross Profit	176,668.32	935,611.42	479,899.45	1,592,179.19
Expense				
Automobile Expense	0.00	1,632.64	340.78	1,973.42
Bank Fees	0.00	3.21	556.94	560.15
Continuing Education	0.00	545.00	0.00	545.00
Depreciation Expense	4,320.00	3,480.00	0.00	7,800.00
Dues & Subscriptions	75.00	672.00	0.00	747.00
Employee Insurance	0.00	283.98	0.00	283.98
Faxing Service	48.95	118.07	133.47	300.49
Insurance Expense	0.00	1,011.76	587.52	1,599.28
Interest Expense	7.30	508.56	640.76	1,156.62
Licenses & Permits	0.00	30.00	0.00	30.00
Marketing Expenses	214.29	4,070.75	74.72	4,359.76
Meals and Entertainment	2,512.34	4,330.89	556.46	7,399.69
Merchant Account Fees	4,789.21	37,066.79	16,140.79	57,996.79
Office Supplies	3,917.81	14,424.35	15,382.33	33,724.49
Outside Services	25.00	354,694.14	235,449.39	590,168.53
Payroll Expenses	61,737.30	277,240.12	-29.13	338,948.29
Postage/Mailing Costs	2,905.36	11,874.62	27,918.87	42,698.85
Professional & Legal	179.00	119,505.54	191,825.88	311,510.42
Refunds to us	0.00	0.00	-13.95	-13.95
Rent Expense	6,150.00	19,235.00	2,750.00	28,135.00
Repairs and Maintenance	1,539.64	3,451.20	947.89	5,938.73
RV exp	0.00	0.00	248.00	248.00
Technology	21,025.19	17,001.99	8,707.16	46,734.34
Travel Expense	1,808.39	977.67	695.48	3,481.54



9:54 PM

06/15/16

Cash Basis

Profit & Loss

January 2013 through December 2015

	<u>Jan - Dec 13</u>	<u>Jan - Dec 14</u>	<u>Jan - Dec 15</u>	<u>TOTAL</u>
Uncategorized Expense	0.00	0.00	2,934.04	2,934.04
Uncategorized Expenses (deleted)	351.02	0.00	0.00	351.02
Total Expense	<u>111,605.80</u>	<u>872,158.28</u>	<u>505,847.40</u>	<u>1,489,611.48</u>
Net Ordinary Income	65,062.52	63,453.14	-25,947.95	102,567.71
Other Income/Expense				
Other Income	0.00	18.61	3.64	22.25
Other Expense	-2,581.34	0.00	0.00	-2,581.34
Net Other Income	<u>2,581.34</u>	<u>18.61</u>	<u>3.64</u>	<u>2,603.59</u>
Net Income	<u><u>67,643.86</u></u>	<u><u>63,471.75</u></u>	<u><u>-25,944.31</u></u>	<u><u>105,171.30</u></u>

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. COUCH, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 28th day of July, 2016.

ANDREA J. COUCH
RDR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

MOTION FOR A NEW TRIAL

COMES NOW the above-named Plaintiffs, DAVID JOHNSON, an individual, and TESSA COUSINS, an individual in the above matter, by and through their counsel of record, Jacobson & Jacobson, PLLC, and pursuant to Idaho Rules of Civil Procedure 59(a)(1)(B), 59(a)(1)(G), and 59(a)(1)(H) moves that this court grant a new trial on all issues presented at trial. This Motion is based on the facts that: (1) the trial court abused its discretion by ignoring the Defendants' admission in their answer that Plaintiffs were members of DTC Group, LLC, which prevented Plaintiffs from having a fair trial; (2) there was insufficient evidence to justify

the verdict as the great weight of evidence supported Defendants' admission that Plaintiffs were members of DTC Group, LLC; (3) there was insufficient evidence to justify the verdict that Defendant Crossett's compensation was part of the "Net Income" line item in the DTC Group, LLC profit and loss statement presented at trial; and (4) the trial court committed a clear error in law in refusing to acknowledge or follow the statutory guidelines that outline the how an LLC is to be governed should there be gaps in an operating agreement or should a written agreement never be executed. This request is further supported by the accompanying Memorandum in Support of Motion for a New Trial, Plaintiff Johnson's Affidavit in Support of Motion for a New Trial, and James Jacobson's Affidavit in Support of Motion for a New Trial.

DATED this 23rd day of November, 2016

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of November, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088

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DATED this 23rd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson
Attorneys for Plaintiffs

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
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COMPLIANCE GROUP, LLC, an Idaho
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Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married
couple,

Defendants.

CASE NO. CV OC 1513887

**MEMORANDUM IN SUPPORT OF
MOTION FOR NEW TRIAL**

COMES NOW the above-named Plaintiffs, DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual in the above matter, by and through their counsel of record,
Jacobson & Jacobson, PLLC, and hereby submit this Memorandum in Support of Motion for a
New Trial:

I.

INTRODUCTION

There are multiple grounds on which Plaintiffs request a new trial. First, the trial court
committed an error in law by (1) refusing to acknowledge that Defendants admitted that

Plaintiffs were members of DTC Group, LLC (hereafter “DTC”) in their pleadings; and (2) refusing to apply the standards clearly set out in the Idaho Code for situations in which either there are gaps in the operating agreement or the operating agreement is oral and not written. Second, there was insufficient evidence to justify the verdict that (1) Plaintiffs were not members of DTC and (2) no damages were owed based on the rationale that Defendant Crossett had paid Plaintiffs what they were owed before DTC’s doors were shut. And third, the trial court committed an abuse of discretion by refusing to acknowledge that Defendants had admitted in their pleadings that both Plaintiffs were members of DTC. This prevented Plaintiffs from having a fair trial, as Defendants had already admitted to their own liability, yet the trial court declared that Defendant Crossett was not liable because Plaintiffs were not members of DTC. A new trial is warranted under any one of these grounds. *See* I.R.C.P. Rule 59(a)(1) (stating that the court can grant a new trial for *any* of the reasons listed above). Therefore, Plaintiffs respectfully request this court grant this motion and issue a new trial in this matter.

II.

ARGUMENT

A. A new trial should be granted on the grounds that the trial court committed errors in law by ignoring the admission by Defendants in the pleadings.

In Idaho, a new trial may be granted on the grounds that the trial court committed “error in law, occurring at the trial.” I.R.C.P. Rule 59(a)(1)(H). When a motion is based on these grounds, the moving party “must set forth with particularity the factual grounds for the motion.” I.R.C.P. Rule 59(a)(2). To determine whether a new trial is warranted, the court must apply a two-prong test. *Carlson v. Stanger*, 146 Idaho 642, 648, 200 P.3d 1191, 1197 (2008). First, “the court must find that the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict.” *Id.* And second, “the court must conclude that

a retrial would produce a different result.” *Id.* In determining the second prong, the court must determine that it is more probable than not that a retrial would produce a different result. *Blizzard v. Lundeby*, 156 Idaho 204, 208, 322 P.3d 286, 290 (2014) (“The second prong ‘requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial.’”). Where the court finds that such prejudicial errors of law have occurred, “[t]he trial court has a duty to grant a new trial.” *Schaefer v. Ready*, 134 Idaho 378, 380, 3 P.3d 56, 58 (2000).

It is clear that the court committed prejudicial error by ignoring the admissions by Defendants in their pleadings, and ruling that Plaintiffs were not members of DTC. The law is clear when it comes to admissions in pleadings. “Admissions made in a pleading are denominated solemn admissions and are not required to be supported by evidence on the part of the adverse party. *Such admissions are taken as true against the party making them*, without further proof or controversy.” *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 217, 229, 101 P. 81, 85-86 (1908), reversed on other grounds, *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 235, 101 P. 81 (1909) (emphasis added).

In the pleadings, Defendants admitted that “Defendant [Crossett] filed, on behalf of the business *that Plaintiffs and Defendant Crossett had formed*, articles of organization for [DTC].” First Amended Complaint, ¶ 14 (emphasis added); Answer to First Amended Complaint, ¶ 9. This clearly is an admission that Defendant Crossett filed with the intent that “Plaintiffs and Defendant Crossett” were the initial members of the limited liability company that they had formed together. Further, Defendants admitted that Defendant Crossett listed himself as “a member” and not the member. First Amended Complaint, ¶ 14 (emphasis added); Answer to First Amended Complaint, ¶ 9. This admission should have negated the possibility of the court

ruling that Defendant Crossett formed a single member LLC. Yet the court, in its findings of fact and conclusions of law, ruled that Defendant Crossett initially formed DTC as a single-member LLC. Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, p. 19. The trial court blatantly refused to acknowledge the admissions of the Defendants in their pleadings. Such an act by the court is clearly in opposition to the long-held standard that admissions in pleadings are “taken as true.” *Knowles*, 16 Idaho at 229, 101 P. at 85.

The evidence shows that the trial court committed an error of law in this issue, which would require a retrial to serve the ends of justice. Also, the evidence also shows that this error clearly prejudiced the Plaintiffs through the court’s adverse ruling on this issue at trial, and that it is more probable than not that the outcome of this issue would change upon retrial. As such, it is the duty of the court to grant a new trial. *See Schaefer*, 134 Idaho at 380, 3 P.3d at 58.

B. A new trial should be granted on the grounds that the court committed errors in law by ignoring the Idaho Code’s treatment of limited liability companies.

The court committed error in law by refusing to apply the standards that are clearly outlined in the Idaho Code for situations in which there are gaps in the operating agreement, or where there is no written operating agreement. Instead, the trial court applied its own version of what is to happen in such situations. The trial court made this clear when it stated that “[t]he law on limited liability companies is seriously underdeveloped,” and that it is “not clear in the law what is to happen when things go wrong and the formation of the company is imperfectly carried out.” Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, p. 15.¹

¹ In fact, the court did not cite to any case law, and only cited one statute, in support of its conclusions of law. *See* Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, pp. 14-21. Where a significant number of relevant statutes were placed in front of the court in Plaintiffs’ Pretrial Memorandum and argued at the closing of the trial, it is difficult to understand why the trial court referenced only a single citation in a seven-page brief entitled “Analysis and Conclusions of Law.”

The trial court chose to ignore the fact that an oral operating agreement can serve as a fully functioning operating agreement throughout the life of an LLC. *See* I.C. § 30-25-102(a)(9) (stating that an operating agreement can be “oral, implied, in a record, or in any combination thereof.”). The court wonders, “what happens when the formation [of an LLC] is incomplete?” The Idaho legislature has clearly spelled out what is to happen in such situations. In the comments to Idaho Code Section 30-25-102(a)(9), the legislature stated:

[A]s soon as a limited liability company has any members, the limited liability company performs has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC; (ii) they form the LLC or cause it to be formed; and (iii) *without further ado or agreement*, they become the LLC’s initial members. *An operating agreement exists.*

I.C. § 30-25-102(a)(9), cmt. (Emphasis added). It is clear that the terms agreed to in any oral operating agreement are to be treated as though it were a written agreement. Furthermore, the Idaho Code has outlined how an LLC is to be governed in situations where there are gaps in the terms of the operating agreement. *See* I.C. §§ 30-25-101 through 111 (governing such general provisions of the LLC including the operating agreement and its scope and effect on the LLC, its member, and those with whom it does business); I.C. §§ 30-25-201 through 205 (governing the formation of an LLC); I.C. §§ 30-25-301 through 304 (governing the relations of members and managers to persons dealing with the LLC); I.C. §§ 30-25-401 through 410 (governing the relations of members to each other and the LLC); I.C. §§ 30-25-501 through 504 (governing the ability of members to transfer interests and the rights and interests of transferees and creditors); I.C. §§ 30-25-601 through 603 (governing the process of dissociation of a member); I.C. §§ 30-25-701 through 708 (governing the process of dissolution and winding up of an LLC); I.C. §§ 30-25-801 through 806 (governing the ability of members to initiate legal action against the LLC). Some of these statutes are default rules that can be changed by the operating agreement,

should the members so wish. *See* I.C. § 30-25-105(b) (“To the extent the operating agreement does not provide for a matter described in subsection (a) of this section, this chapter governs the matter.”). And some cannot be changed by the operating agreement. *See* I.C. § 30-25-105(c). Everything from the birth of an LLC through to its death, and everything in between, is governed by either the operating agreement or the Idaho Code, or both. Yet the trial court could not decide whether partnership law or corporate law should govern such situations. *See* Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, p. 15-16 (“In partnership law and corporate law, these areas are covered by statutory provisions. . . . However, in the case of an LLC, the only guidance in the statutes is that these areas are to be handled as agreed in the operating agreement.”).

In further error, the trial court stated that, “[o]nce the written operating agreement was vetted by counsel and approved by the parties, the oral agreements between [the parties] were insufficient to stand as an oral operating agreement, at least with respect to the admission of Cousins and Johnson as members.” Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, p. 18. The court further stated:

[t]here might have been some weight to plaintiff’s argument if the [written] operating agreement had never been prepared and agreed upon. . . . But when the agreement that is contemplated by the parties and required by law is fully prepared, vetted by counsel, approved by both parties, and presented for signature, and then one party unilaterally declines to sign, . . . that is a clear indication that there is not a meeting of the minds.

Id. at p. 19-20. These statements taken together seem to suggest that the trial court believes that an oral operating agreement, recognized as valid by both statute and case law (*See* I.C. § 30-25-102(a)(9); I.C. § 30-25-102(a)(9), cmt.; *Estate of E.A. Collins v. Geist*, 143 Idaho 821, 153 P.3d 1167 (2007)), becomes null and void only upon the *drafting* of a written operating agreement that remains unsigned by all parties. Such a view is clearly erroneous.

The written operating agreement can only be seen as a proposed amendment of the original oral operating agreement as it substantially expanded the terms of its governance over DTC. However, this amendment was never signed by any of the members of DTC, including Defendant Crossett. Therefore, the amendment was never executed, and has no effect over the original operating agreement. Plaintiffs are unaware of any statute or case law that allows an unexecuted amendment of an operating agreement to automatically take the place of a valid operating agreement by its mere, unsigned existence alone. As such, the evidence on this issue and the interests of justice clearly weigh in favor granting a new trial. Also, Plaintiffs were again clearly prejudiced by this error in law, and it is very probable that a retrial will result in a different verdict. As such, it is the duty of the court to grant a new trial. *See Schaefer*, 134 Idaho at 380, 3 P.3d at 58.

C. A new trial should be granted on the grounds that there was insufficient evidence to support the trial court's verdict on the issues of both liability and damages.

Under Idaho law, the court may grant a new trial if there was insufficient evidence to justify the verdict of the trial court. I.R.C.P. Rule 59(a)(1)(G). When a motion is based on these grounds, the moving party “must set forth with particularity the factual grounds for the motion.” I.R.C.P. Rule 59(a)(2). “In order to grant a new trial on the ground of insufficiency . . . the trial court must determine both (1) the verdict is against the clear weight of the evidence, and (2) a new trial would produce a different result.” *Heitz v. Carroll*, 117 Idaho 373, 378, 788 P.2d 188, 193 (1990).

On the issue of liability, the court ruled that Defendant Crossett was not liable to the Plaintiffs since the Plaintiffs were never members of DTC. *See Findings of Fact, Conclusions of Law and Directions for Entry of Judgment*, p. 18. The clear weight of the evidence, however, opposes this verdict. The particular facts in support of this are discussed at length in the previous

two sections of this memo, along with the Affidavit of David Johnson in Support of the Motion to Grant a New Trial. The weight of the evidence supports the position that Plaintiffs were, and always have been, members of DTC. Thus, considering this fact, a new trial will produce a different result on the issue of liability.

On the issue of damages, the court ruled that both Plaintiffs were paid everything that was owed to them. *See* Findings of Fact, Conclusions of Law and Directions for Entry of Judgment, p. 18. However, this is not the case if Plaintiffs were members of DTC from its inception. In particular, Exhibit H from the trial is a profit and loss statement from DTC which shows a net income for the years 2013 and 2014. *See* Exhibit H. At trial, Defendant Crossett testified that his salary as manager of DTC came from that net income. Affidavit of James Jacobson, ¶ 2. However, Defendant Crossett testified in his deposition that his salary was part of the payroll line item in the profit and loss statement. Affidavit of James Jacobson, ¶ 3. This position was supported by the testimony of Plaintiff Cousins at trial, where she stated that the salary of all DTC employees, including Defendant Crossett's salary, were reflected in the payroll line item of the profit and loss statement. Affidavit of James Jacobson, ¶ 4. Therefore, the clear weight of the evidence shows that, as members, Plaintiffs were not paid everything that was owed to them as they were owed their portion of the net income from DTC. Considering this evidence, it is also clear that the result of the damages issue would be different if the issue were tried again. Therefore, this court should grant a new trial on the grounds that there was insufficient evidence to justify the verdict of the court on both liability and damages.

D. A new trial should be granted on the grounds that the trial court abused its discretion which prevented Plaintiffs from having a fair trial.

Under Idaho law, a court may grant a new trial should there be “any order of the court or abuse of discretion by which either party was prevented from having a fair trial.” I.R.C.P. Rule

59(a)(1)(B). A motion based on these grounds “must be accompanied by an affidavit stating in detail the facts relied upon in support of the motion.” I.R.C.P. Rule 59 (a)(2).

An affidavit by Plaintiff Johnson has been filed, which details the facts relied upon by the Plaintiffs in support of the Motion to Grant a New Trial (hereafter “Motion”). Briefly, the facts outline that the trial court was made aware that Defendants had admitted to the fact that Plaintiffs were members of DTC in their pleadings. Affidavit of David Johnson, ¶ 3. The court was also made aware of all the facts that supported this admission. Affidavit of David Johnson, ¶ 4. Yet the trial court unilaterally chose to ignore this admission, and ruled that neither Plaintiff was ever a member of DTC. *See Findings of Fact, Conclusions of Law and Directions for Entry of Judgment*, p. 18. Further, Plaintiffs’ counsel specifically pointed out to the trial court the fact that Defendants had made this admission, both during the course of the trial and at closing argument. The fact that the trial court clearly ignored the pleadings prejudiced the Plaintiffs, and prevented them from having a fair trial. As such, the court should grant a new trial on the grounds that the trial court abused its discretion by ignoring the pleadings of the parties.

III.

CONCLUSION

This memorandum has outlined four grounds on which the court should grant Plaintiffs a new trial in this matter. The trial court committed an error in law by ignoring the admission of Defendants in their pleading that Plaintiffs were members of DTC from its founding. The trial court committed error in law by ignoring the Idaho Code which clearly outlines the governance of a limited liability company when there are gaps in an operating agreement or when there is an oral operating agreement. There was insufficient evidence for the trial court’s verdicts on the issues of liability and damages. Under Idaho law, a new trial can be granted on any one of these

grounds. *See* I.R.C.P. Rule 59(a)(1) (stating that the court can grant a new trial for *any* of the reasons listed in this memorandum). The clear weight of the evidence in these matters suggests that a new trial is needed in the interest of serving justice. The evidence also suggests that a different result is more probable than not. Considering all of these facts and evidence, this court should grant the Plaintiffs' Motion for a New Trial, and Plaintiffs respectfully request that the Court do so.

DATED this 23rd day of November, 2016

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of November, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088

U.S. Mail, postage prepaid
 Hand-Delivered
 iCourt/email
 Facsimile

DATED this 23rd day of November, 2016.

JACOBSON & JACOBSON, PLLC

By: /s/ James F. Jacobson
James F. Jacobson, of the firm
Attorneys for Plaintiffs

Michelle R. Points, ISB No. 6224
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Facsimile: 208.336.2088
Email: mpoints@pointslaw.com

Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLAINCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

REPLY TO PLAINTIFFS' OBJECTION
TO DEFENDANTS' MOTION FOR
ATTORNEY FEES

As the Court is aware, following the trial of this case, Judge McKee entered Findings of Fact, Conclusions of Law and Directions for Entry of Judgment ("Findings"). In those Findings, Judge McKee held that "[t]he action is at its foundation a claim for money due from David Crossett. He individually, is entitled to his attorney fees under I.C. ¶ 12-120." Findings, p. 21.

This case, in sum, was based on Plaintiffs' claim that a business existed, that Plaintiffs were members of that business and that Mr. Crossett took money from that business that he should have distributed to them.

In objection to the motion for attorney fees, Plaintiffs take the position that because their claims were based on statutes, they fall outside the purview of I.C. § 12-120(3) and no fees should be awarded.¹ In this case, Plaintiffs did not attempt to enforce statutory penalties, they attempted to "undo" a series of commercial transactions; that is the basis of Plaintiffs' claims. Plaintiffs do not dispute that the litigation "depends" on the contractual relationship between the parties as member of DTC Group, LLC. *See* Objection, page 3.

Counts I, II, and III of Plaintiffs First Amended Complaint seek a Declaratory Judgment. Most importantly, Count I seeks a declaration that Plaintiffs were members of Drug Testing Compliance Group, LLC ("DTC Group) and Count XI ("tortious interference with business expectancy"). None of these Counts are based on statute.

Judge McKee's decision "declares" that Plaintiffs were not members, therefore Plaintiffs had no business expectancy in DTC Group. That is the crux, and the end, of the case.

Put another way, the first "hurdle" Plaintiffs had to get past in this litigation was whether or not they were members of DTC Group, LLC; did the events or "transactions" that transpired between the parties give Plaintiffs membership status. This was not a statutory claim but required a factual determination by the Court. It was concluded that Plaintiffs were not members DTC Group. The remaining claims of Plaintiffs then became moot. Plaintiffs therefore have no recovery and Mr. Crossett is the prevailing party.

¹ Notwithstanding the position taken in their objection that there is no basis to award attorney fees and costs, tellingly, in their First Amended Complaint, Plaintiffs ask that they be awarded their attorney fees and costs.

Because Plaintiff did not prevail on their (non-statutory) claim that they were in fact members of DTC Group, Mr. Crossett is the prevailing party and should be awarded his attorney fees and costs.

DATED this 1st day of December, 2016

POINTS LAW, PLLC

By: /s/ Michelle R. Points
Michelle R. Points
Attorney for David Crossett, Drug Testing Compliance
Group, LLC and Vury, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of December, 2016, I caused to be served a true copy of the foregoing REPLY TO PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION FOR ATTORNEY FEES by filing said pleading using iCourts! wherein the following were served electronically:

James F. Jacobson
JACOBSON & JACOBSON, PLLC

/s/ Michelle R. Points
Michelle R. Points

Michelle R. Points, ISB No. 6224
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910 W. Main, Ste. 222
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Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLAINCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR NEW
TRIAL

Plaintiffs assert four arguments as to why they believe the Court should order a new trial.

None of the arguments have merit and are arguably frivolous.

1. Defendants' "Admission"

Plaintiffs argue that a new trial should be granted on the grounds that the trial court committed error by ignoring certain "admissions" in a pleading made by Defendants.

Specifically, Plaintiffs in their First Amended Complaint alleged "Defendant [Crossett] filed, on

behalf of the business that Plaintiffs and Defendant Crossett had formed, articles of organization for an Idaho limited liability company, listing himself as a Member or Manager and as the registered agent. The limited liability company was named “Drug Testing Compliance Group, LLC.”

Defendant Crossett has never denied this allegation. There is a difference in a group of people forming a company, and the individuals that formed the company actually becoming members of the company. That is, forming a company and becoming a member of a company are two separate things, and as Plaintiffs have been made repeatedly aware, that has been how Mr. Crossett has consistently explained this “admission.”

Evidence was presented throughout trial that Plaintiffs didn’t want to become members of DTC Group or sign the written operating agreement¹ given the turmoil that had erupted since it opened its doors for business. The Court got it exactly right when it held that “the oral agreement with regard to Cousins and Johnson was that they would become members upon signing of the operating agreement.” Findings, p. 11.

Next, Plaintiffs assert that Defendants “admitted” in their Answer the allegation that Defendant Crossett listed himself a member and not *the* member, and that this admission should have negated a finding by the Court that DTC Group was a single member LLC – apparently taking the position that if he really thought he was the only member then he should have denied the allegation? Plaintiffs’ argument is frivolous. Mr. Crossett admitted he listed himself as a member. *See* attached Secretary of State printout – he did list himself as a member – was he to deny Plaintiffs’ allegation? Of course not.

¹ The operating agreement, which was drafted by Mr. Jacobsen, had been completed and was ready to sign.

2. The Code

Plaintiffs next argue that they should be given a new trial because the Court ignored Idaho Code which provides that an oral operating agreement can serve as a fully functioning operating agreement. This is a non issue. Plaintiffs did not want to become members of DTC Group and agreed that they would only become members of DTC Group upon signing the operating agreement that had been prepared by Mr. Jacobsen – which is why they refused to sign it! There was substantial testimony on this issue. Notwithstanding some misconstrued dicta from Judge McKee’s findings of fact, the bottom line is the code doesn’t come into play at all because Plaintiffs were not members of DTC Group. To further support this point, Mr. Johnson testified throughout his deposition and at trial that the written operating agreement that had been drafted by Mr. Jacobsen controlled the status of the parties, and the operating agreement (Defendants’ Exhibit A) clearly provides that **no person will be admitted to the Company** as a member unless they sign the signature page of the operating agreement. *See* Section 3.4, p. 9. Signing was a condition precedent to membership.

3. Liability and Damages

Plaintiffs dispute the Court’s finding that they were not members of DTC Group. Plaintiffs argue that they were members, thus, the Court should have reached a “different result” on these issues.

As set forth above, the Court properly held that Plaintiffs were not members of DTC Group, thus there is no reason to re-visit the issues of liability and damages.

4. Fair Trial

The argument presented by Plaintiffs in this section simply restates their earlier arguments that the Court ignored certain admissions, which admissions were addressed in section one of this brief.

5. Conclusion

Plaintiffs' motion for a new trial is entirely frivolous. The motion should be denied and Mr. Crossett should be awarded his attorney fees and costs for having to respond to it.

DATED this 1st day of December, 2016

POINTS LAW, PLLC

By: /s/ Michelle R. Points
Michelle R. Points
Attorney for David Crossett, Drug Testing Compliance
Group, LLC and Vurv, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December, 2016, I caused to be served a true copy of the foregoing REPLY TO PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION FOR ATTORNEY FEES by filing said pleading using iCourts! wherein the following were served electronically:

James F. Jacobson
JACOBSON & JACOBSON, PLLC

/s/ Michelle R. Points
Michelle R. Points



CERTIFICATE OF ORGANIZATION LIMITED LIABILITY COMPANY

FILED EFFECTIVE

2013 JUN -5 AM 11:28

(Instructions on back of application)

SECRETARY OF STATE
STATE OF IDAHO

1. The name of the limited liability company is:

DRUG TESTING COMPLIANCE GROUP LLC

2. The complete street and mailing addresses of the initial designated office:

1737 N. PEWTER AVE.

(Street Address)

KUNA, ID 83634

(Mailing Address, if different than street address)

3. The name and complete street address of the registered agent:

DAVID CROSSETT

(Name)

1737 N. PEWTER AVE, KUNA

(Street Address)

ID
83634

4. The name and address of at least one member or manager of the limited liability company:

DAVID CROSSETT

Name

1737 N. PEWTER AVE, KUNA, ID

Address

83634

5. Mailing address for future correspondence (annual report notices):

1737 N. PEWTER AVE, KUNA, ID 83634

6. Future effective date of filing (optional): _____

Signature of a manager, member or authorized person.

Signature _____

Typed Name: DAVID CROSSETT

Signature _____

Typed Name: _____

Secretary of State use only

IDAHO SECRETARY OF STATE
06/05/2013 05:00
CK: 1427212 CT: 172099 IN: 1376816
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W126034

Michelle R. Points, ISB No. 6224
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Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

DECLARATION OF COUNSEL
SETTING FORTH ATTORNEY FEES
AND COSTS

Michelle R. Points declares and affirms as follows pursuant to Idaho Code § 9-1406:

This declaration is submitted as a supplement to the declaration filed on or about
November 8, 2016, as my clients have incurred additional attorney fees given Plaintiffs objection
to my clients' motion for attorney fees and costs, and motion for a new trial.

My previous declaration set for the following:

SUMMARY OF COSTS AND ATTORNEY FEES REQUESTED for Points Law, PLLC:

Attorney fees:	\$18,216.00
Mandatory costs (I.R.C.P. 54(d)(1)(C))	\$ 991.07
Total	<u>\$19,207.07</u>

Since the time of that filing I have incurred 2.9 hours addressing the referenced motions filed by Plaintiffs, thus my client has incurred \$667.00 in addition fees, bringing the total amount sought to: **\$19,874.07.**

DATED this 1st day of December, 2016

POINTS LAW, PLLC

By: /s/ Michelle R. Points
Michelle R. Points
Attorney for David Crossett, Drug Testing Compliance
Group, LLC and Vurv, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of December, 2016, I caused to be served a true copy of the foregoing SUPPLEMENTAL DECLARATION OF COUNSEL SETTING FORTH ATTORNEY FEES AND COSTS by filing said pleading using iCourts! wherein the following were served electronically:

James F. Jacobson
JACOBSON & JACOBSON, PLLC

/s/ Michelle R. Points
Michelle R. Points

FILED By: Stephanie Hardy Deputy Clerk
Fourth Judicial District, Ada County
CHRISTOPHER D. RICH, Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON and TESSA
COUSINS, individually,

Plaintiffs,

v.

DAVID CROSSETT, an individual, et al.

Defendants.

Case No. CV OC 1513887

RULING ON OBJECTION TO
DEFENDANT’S APPLICATION FOR
ATTORNEY FEES

The defendant David Crossett, individually, clearly prevailed in this matter and was awarded his costs under Idaho Rule of Civil Procedure 54(d) and his attorney fees under Idaho Code § 12-120(3). Plaintiffs concede the defendant entitlement to costs as the prevailing party under the civil rules as a matter of right, but object to any attorney fees. Their contention is that the action in question here was not founded upon “a commercial transaction” as is required for any award of attorney fees, but rather was an action to enforce a statutory penalty or right – which by case law is not considered a commercial transaction.

Under I.C. § 12-120(3), a “commercial transaction” is defined as “all transactions except transactions for personal or household purposes.” By case law, the Idaho court limited application of this statute where other statutes exist that provide for or prevent award of attorney fees. Where such other statutes exist, the Supreme Court has held that attorney fees are only available under the germane statutes; there is to be no duplication.

Where, however, the other statutes contain no separate provision for attorney fees, and provided that the action otherwise appears to be founded upon transactions that are not for “personal or household purposes,” the general attorney fee statute of I.C. § 12-120(3) is available.

Plaintiffs contend that their cause of action against the defendant David Crossett was founded upon the defendant’s breach of duty under one or more of I.C. §§ 30-25-404(d), 30-25-407(a), 30-25-409(c), or 30-25-602. Their theory of recovery, according to the plaintiffs, was to enforce a statutory penalty or right as contained in one or more of these statutes, which precluded an award under I.C. § 12-120(3). The rationale is not supportable; it is not the existence of a defined right or provision in another statute that is controlling here, it is whether the other statute includes its own provision for attorney fees that preempts application of I.C. § 12-120(3).

Here, the limited liability company that might have been the subject matter of the action no longer exists; by the time of trial, both the defendant Drug Testing Compliance Group, LLC, or DTC, and the defendant Vurv LLC had been liquidated and dissolved. The action was continued only as an individual action for damages by the plaintiffs against Crossett for damages upon a breach.

This was not an attempted derivative action for the benefit of the company under I.C. § 30-25-802, but rather by individuals claiming to be members against another member for damages on account of the individual plaintiffs’ own interests. The action is permitted by I.C. § 30-25-801(a), so long as no part of what is claimed inures to the benefit of the company generally, in which case it would be permitted only as a derivative action under I.C. § 30-22-802. The derivative action has its own statutory

provision for attorney fees under the statute, but nothing is said about attorney fees in the exception statute permitting an action by members against members. With the exception of the provision for attorney fees to a sustaining member in a derivative action, there is no provision in the code sections pertaining to limited liability companies on the subject of penalty for enforcement or attorney fees.

If a breach had been found, and the individuals found to be entitled to damages as member of the limited liability company, the calculation of damages might have been under one or more of the limited liability statutes cited, but one first had to find an ordinary breach of contract to reach the issue of any entitlement under the statutes.

Idaho Code § 30-25-404(d) provides that if a member is entitled to a distribution from the company, the member “is entitled to all the remedies available to a creditor of the limited liability company.” This would include attorney fees under I.C. § 12-120(3).

Idaho Code § 30-25-407(a) merely provides that a limited liability company is member managed unless the operating agreement provides otherwise. Subpart (b) of the statute provides, in general, that in a member managed company, a majority vote of the members is required for any action.

Idaho Code § 30-25-409(a) provides that a member owes a duty of loyalty, as defined, to other members and to the company. Included in subpart (d) is the provision that duties shall be discharged consistent with the implied contractual provisions of good faith and fair dealing, which is a common law provision incorporated into every contract. Under subpart (c), in winding up a company, the duty of loyalty or standard of conduct is generally defined as refraining from engaging in grossly negligent or reckless conduct, or willful misconduct or knowing violations of the law, which are all common law

standards. Under subpart (e), a member does not violate this section merely because the member's conduct furthers his own interests. This provision of the code defines an exception to the relationship of members; it does not provide for any penalty upon breach or other means of enforcement. There is nothing in this statutory structure that would preempt I.C. § 12-120(3) in an action among individuals.

Idaho Code § 30-25-602 provides for the dissociation of a member, including expelling the member, and the effects thereof. However, the facts as found in this case were that the plaintiffs never became members of the company.

When Idaho Code § 12-120(3) applies, an award of attorney fees is mandatory. *Action Collection Servs., Inc., v. Bigham*, 146 Idaho 286, 290, 192 P.3d 1110, 1114 (Ct. App. 2008). In order to determine whether Idaho Code § 12-120(3) applies to a given case, “[t]he critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute the basis upon which the party is attempting to recover.” *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 704, 874 P.2d 506, 515 (1993). In *De Groot v. Standley Trenching, Inc.*, the Supreme Court stated:

Idaho Code Section 12–120(3) provides for attorney fees to the prevailing party in a civil action to recover on “any commercial transaction.” Commercial transactions are all transactions except for personal or household purposes. Whether there is a commercial transaction is a question of law over which this Court exercises free review. Where a party alleges the existence of a contractual relationship of a type embraced by section 12–120(3) . . . that claim triggers the application of [I.C. § 12–120(3)] and a prevailing party may recover fees even though no liability under a contract was established. This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur. Idaho courts will consider whether the parties alleged the application of I.C. § 12–120.

De Groot v. Standley Trenching, Inc., 157 Idaho 557, 338 P.3d 536, 546 (2014) (citations and quotation marks omitted).

The gravamen of the action in this case was a claim among individuals for damages in failing to divide the profits of the enterprise as was allegedly agreed. However, the facts as found were that there were no profits to divide. A commercial transaction was integral to the plaintiffs' claims and was the basis upon which they sought recovery.

The cases cited by the plaintiff are distinguishable from the facts as found in this case. In *Kelly v Silkwood Estates*, 127 Idaho 624 (1995), the suit was by a claimed partner against the partnership as an entity for an accounting in connection with the winding up of partnership affairs. It was brought under the provisions of the Uniform Partnership Act and was not an action between individuals. In *Gumprect v Doyle*, 128 Idaho 242 (1995), the gravamen of the action was by a professional who had withdrawn from the professional corporation in a dispute over the value of shares that were repurchased by the corporation; it was brought under the corporation code provisions pertaining to rights of minority shareholders, it was not an action among individuals. *Shay v Cesler*, 132 Idaho 585 (1999), was an action for treble damages on unpaid wages which included a specific statute on attorney fees. *LW Supply Corp v Chartrand Family Trust*, 136 Idaho 738 (2002) was a statutory lien foreclosure with a specific statute covering attorney fees.

“The calculation of reasonable attorney fees is within the discretion of the trial court.” *Bott v. Idaho State Bldg. Authority*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996). “When awarding attorney's fees, a district court must consider the applicable

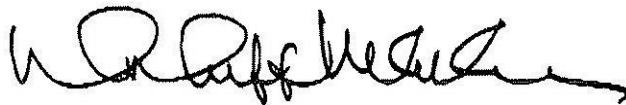
factors set forth in I.R.C.P. 54(e)(3) and may consider any other factor that the court deems appropriate.” *Lettunich v. Lettunich*, 145 Idaho 746, 749–50, 185 P.3d 258, 261–62 (2008) (citation omitted). “Rule 54(e)(3) does not require the district court to make specific findings in the record, only to consider the stated factors in determining the amount of the fees. When considering the factors, courts need not demonstrate how they employed any of those factors in reaching an award amount.” *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004).

The attorney fees as claimed are supported by the detailed recitation of time plus a reasonable allowance for the additional work. I have considered all of the elements of I.R.C.P. 54(e)(3) and find the following to be germane to my decision here: (A) the time and effort required, (B) the novelty and difficulty of the questions raised, (C) the skill required, (D) prevailing charges for like work, (G) the amount involved and the result obtained. Other factors in the rule are not applicable or significant to this case. I find and conclude that the attorney fee claim of \$18,883.00 for fees is reasonable and appropriate under the circumstances.

Attorney fees are awarded in the amount of \$18,883.00. As noted at the hearing, there is no dispute as to the costs, of which all are allowed as a matter of right. Costs are awarded in the amount of \$991.07.

It is so ordered.

Dated this __ day of December, 2016.



Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING

I hereby certify that on Signed: 12/16/2016 09:37 AM, I served a true and correct copy of the within instrument to:

James Frederick Jacobson
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
james@jjlawidaho.com

Michelle R. Points
POINTS LAW, PLLC
910 W. Main Street, Ste. 222
Boise, ID 83702
mpoints@pointslaw.com

CHRISTOPHER D. RICH
Clerk of the District Court

By: Stephanie Hardy
Deputy Court Clerk



FILED By: Stephanie Hardy Deputy Clerk
Fourth Judicial District, Ada County
CHRISTOPHER D. RICH, Clerk

Michelle R. Points, ISB No. 6224
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Telephone: 208.287.3216
Facsimile: 208.336.2088
Email: mpoints@pointslaw.com

Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887


JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1. Plaintiffs David Johnson and Tessa Cousins take nothing by their complaint, as amended, and that complaint is dismissed with prejudice in its entirety against Defendants David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC.
2. Defendant David Crossett is awarded judgment in the amount of \$19,207.07 against Plaintiffs David Johnson and Tessa Cousins, jointly and severally.

DATED this _____ day of December, 2016

Signed: 12/20/2016 04:00 PM

By: 
for The Honorable D. Duff McKee

CERTIFICATE OF SERVICE

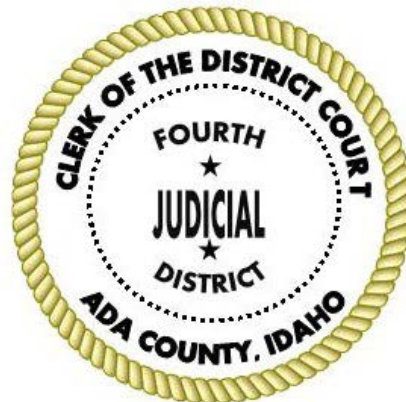
Signed: 12/21/2016 10:49 AM

I HEREBY CERTIFY that on the ____ day of December, 2016, I caused to be served a true copy of the foregoing JUDGMENT by filing said pleading using iCourts! wherein the following were served electronically:

James F. Jacobson
JACOBSON & JACOBSON, PLLC
james@jjlawidaho.com

Michelle R. Points
POINTS LAW, PLLC
mpoints@pointslaw.com

/s/ Stephanie Hardy
CLERK OF THE COURT



NO _____ FILED 3:15
A.M. _____ P.M.

James F. Jacobson [ISB No. 7011]
JACOBSON & JACOBSON, PLLC
7655 W. Riverside Drive
Boise, ID 83714
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com

JAN 27 2017

CHRISTOPHER D. RICH, Clerk
By **SANTIAGO BARRIOS**
DEPUTY

Attorneys for Appellants

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Appellants,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married
couple,

Respondents.

CASE NO. CV OC 1513887

NOTICE OF APPEAL

**TO: DAVID CROSSETT, AND THE PARTY'S ATTORNEY OF RECORD, POINTS
LAW, PLLC, AND CLERK OF THE ABOVE-ENTITLED COURT**

NOTICE IS HEREBY GIVEN:

That the above-named Appellants, David Johnson and Tessa Cousins (hereinafter "Plaintiffs"), appeal against the above-named Respondent, David Crossett (hereinafter "Defendant"), to the Idaho Supreme Court from the Judgment that was issued on December 21, 2016, together with all other interlocutory judgments and orders entered prior thereto in this action, Honorable D. Duff McKee presiding. That Appellant has the right to appeal to the Idaho

Supreme Court, with the final appealable judgment being entered by the district court in this action on December 21, 2016, thereby making the above referenced Order and Judgment appealable pursuant to I.A.R. 11(a)(1). A copy of the final judgment being appealed is attached to this notice.

Preliminarily, the issues to be determined on appeal are as follows:

1. whether the trial court committed a prejudicial error of law by ignoring Defendants' admission in their First Amended Complaint that Plaintiffs were members of DTC Group, LLC;
2. whether the trial court committed a prejudicial error of law by failing to appropriately apply various provisions of Idaho's statute governing limited liability companies;
3. whether there was insufficient evidence to support the trial court's verdict on the issues of both liability and damages;
4. whether the trial court committed error by ignoring Defendants' admission in their First Amended Complaint that Plaintiffs were members of DTC Group, LLC; and
5. whether the trial court erred in granting attorney's fees to Defendants under Idaho Code Section 12-120(3).

This list of issues to be determined on appeal shall not prevent Appellant from asserting other issues on appeal. The appellant requests the preparation of the following portions of the reporter's transcript in electronic format: (1) the testimony of David Johnson from October 17-18, 2016 and (2) the testimony of David Crossett from October 17-18, 2016.

In addition to the standard record provided for in I.A.R. 28, Appellant hereby requests that the following documents be included in the clerk's record on appeal:

- Plaintiffs' Motion for New Trial.
- Plaintiffs' Memorandum in Support of Plaintiffs' Motion for New Trial.

- Affidavit of James F. Jacobson in Support of Plaintiffs' Motion for New Trial.
- Affidavit of David Johnson in Support of Plaintiffs' Motion for New Trial.
- Defendants' Response to Plaintiffs' Motion for New Trial.
- Declaration of Counsel Setting Forth Attorney Fees and Costs.
- Supplemental Declaration of Counsel Setting Forth Attorney Fees and Costs.
- Plaintiffs' Objection to Defendants' Request for Attorney's Fees.
- Reply to Plaintiffs' Objection to Defendants' Motion for Attorney Fees.
- Plaintiffs' Pre-Trial Memo.
- Defendant's Pre-Trial Memo.

The appellant requests that all exhibits admitted into evidence at the trial of this matter be copied and sent to the Supreme Court.

I certify: (a) that a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: Christy Olesek, 4883 N. Lake Park Pl., Garden City, ID 83714; (b) that the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript; (c) that the estimated fee for preparation of the clerk's or agency's record has been paid; (d) that the appellate filing fee has been paid; and (e) that service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 27th day of January, 2017.

JACOBSON & JACOBSON, PLLC

By



James F. Jacobson, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of January, 2016, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Facsimile: (208) 336-2088

U.S. Mail, postage prepaid
 Hand-Delivered
 iCourt/email
 Facsimile

Clerk of the Court
Ada County
200 W. Front St.
Boise, ID 83701

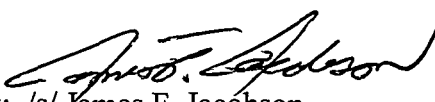
U.S. Mail, postage prepaid
 Hand-Delivered
 iCourt/email
 Facsimile

Court Reporter
Christy Olesek
4883 N. Lake Park Pl.
Garden City, ID 83714

U.S. Mail, postage prepaid
 Hand-Delivered
 iCourt/email
 Facsimile

DATED this 27th day of January, 2017.

JACOBSON & JACOBSON, PLLC


By: /s/ James F. Jacobson
James F. Jacobson, of the firm
Attorneys for Plaintiffs

FILED By: Stephanie Hardy Deputy Clerk
Fourth Judicial District, Ada County
CHRISTOPHER D. RICH, Clerk

Michelle R. Points, ISB No. 6224
POINTS LAW, PLLC
910 W. Main, Ste. 222
Boise, ID 83702
Telephone: 208.287.3216
Facsimile: 208.336.2088
Email: mpoints@pointslaw.com

Attorney for David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiff,

vs.

DAVID CROSSETT, an individual, SCOTT
H. LEE, an individual, DRUG TESTING
COMPLIANCE GROUP, LLC, an Idaho
limited liability company, VURV, LLC, an
Idaho limited liability company, BO W. and
KRYSTAL SCHMELLING, a married couple,

Defendants.

Case No. CV OC 1513887

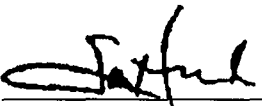
JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1. Plaintiffs David Johnson and Tessa Cousins take nothing by their complaint, as amended, and that complaint is dismissed with prejudice in its entirety against Defendants David Crossett, Drug Testing Compliance Group, LLC and Vurv, LLC.
2. Defendant David Crossett is awarded judgment in the amount of \$19,207.07 against Plaintiffs David Johnson and Tessa Cousins, jointly and severally.

DATED this _____ day of December, 2016

Signed: 12/20/2016 04:00 PM

By: 
for The Honorable D. Duff McKee

CERTIFICATE OF SERVICE

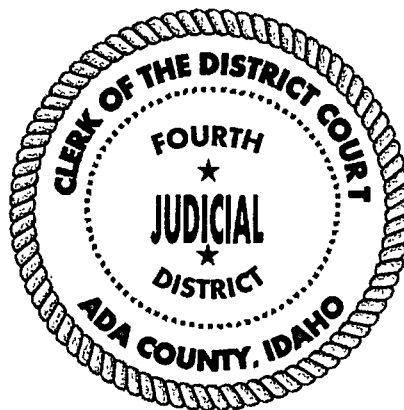
Signed: 12/21/2016 10:49 AM

I HEREBY CERTIFY that on the ____ day of December, 2016, I caused to be served a true copy of the foregoing JUDGMENT by filing said pleading using iCourts! wherein the following were served electronically:

James F. Jacobson
JACOBSON & JACOBSON, PLLC
james@jjlawidaho.com

Michelle R. Points
POINTS LAW, PLLC
mpoints@pointslaw.com

/s/ Stephanie Hardy
CLERK OF THE COURT



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs-Appellants,

vs.

DAVID CROSSETT, an individual,

Defendant-Respondent,

and

SCOTT H. LEE, an individual, DRUG
TESTING COMPLIANCE GROUP, LLC,
an Idaho limited liability company, VURV,
LLC, an Idaho limited liability company,
BO W. and KRYSTAL SCHMELLING, a
married couple,

Defendants.

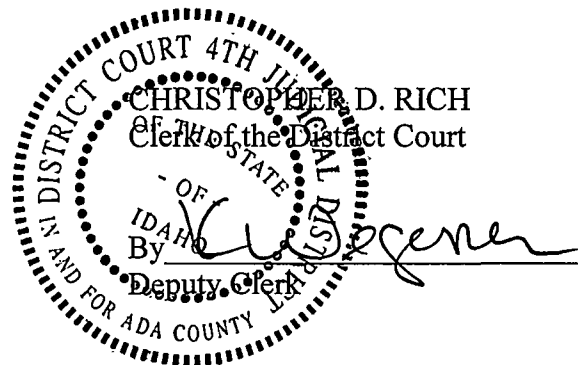
Supreme Court Case No. 44791

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being
forwarded to the Supreme Court on Appeal

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 2nd day of March, 2017.



CERTIFICATE OF EXHIBITS

000158

EXHIBIT LIST

Judge D. Duff McKee/ Stephanie Hardy
Judge Clerk

DATE: October 17, 2016

DISPOSITION: Court Trial
CASE NO. CVOC15.13887

David Johnson	James Jacobson
Tessa Cousins	
Plaintiff	Attorney(s)

vs.

David Crossett	Michelle Points
Drug Testing Compliance "DTC"	
Defendant	Attorney(s)

BY	NO.	DESCRIPTION	STATUS
Plaintiff	1	DTC Checks	Admitted 10/18/16
Plaintiff	2	Operating Agreement for DTC	Admitted 10/18/16
Plaintiff	3	Profit and Loss from 1/1/13-12/31/15	Admitted 10/18/16
Plaintiff	4	Check from DTC to Tessa Cousins	Admitted 10/18/16
Plaintiff	5	Emails between David Johnson and James Jacobson	Admitted 10/18/16
Plaintiff	6	Text messages communication between Johnson/Crossett	Admitted 10/18/16
Defense	A	Operating Agreement of DTC	Admitted 10/18/16
Defense	B	Statement of David M. Johnson dated 8/25/13	Admitted 10/18/16
Defense	C	Statement of David M. Johnson dated 6/10/14	Admitted 10/18/16
Defense	D	Checks from DTC Group, LLC to David Johnson	Admitted 10/18/16
Defense	E	Letter to Tessa Cousins to David dated 10/2/14	Admitted 10/18/16
Defense	F	Journal entries by Jill Johnson dated 7/8/13	Admitted 10/18/16
Defense	G	Plaintiff's Proposed Finding of Fact and Conclusion of Law	Admitted 10/18/16
Defense	H	Profit and Loss Statement for DTC Group 1/1/13-6/15/16	Admitted 10/18/16
Defense	I	Balance Sheet for DTC Group as of 12/15/14	Admitted 10/18/16
Defense	J	Deposition of Jill Johnson	Admitted 10/18/16

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs-Appellants,

vs.

DAVID CROSSETT, an individual,

Defendant-Respondent,

and

SCOTT H. LEE, an individual, DRUG
TESTING COMPLIANCE GROUP, LLC,
an Idaho limited liability company, VURV,
LLC, an Idaho limited liability company,
BO W. and KRYSTAL SCHMELLING, a
married couple,

Defendants.

Supreme Court Case No. 44791

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

JAMES F. JACOBSON

ATTORNEY FOR APPELLANT

BOISE, IDAHO

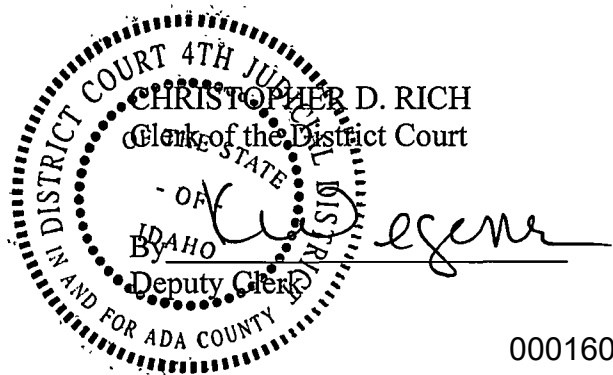
MICHELLE R. POINTS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: MAR 02 2017

CHRISTOPHER D. RICH
Clerk of the District Court
- OF -
IDAHO
By [Signature]
Deputy Clerk



CERTIFICATE OF SERVICE

000160

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID JOHNSON, an individual, and
TESSA COUSINS, an individual,

Plaintiffs-Appellants,

vs.

DAVID CROSSETT, an individual,

Defendant-Respondent,

and

SCOTT H. LEE, an individual, DRUG
TESTING COMPLIANCE GROUP, LLC,
an Idaho limited liability company, VURV,
LLC, an Idaho limited liability company,
BO W. and KRYSTAL SCHMELLING, a
married couple,

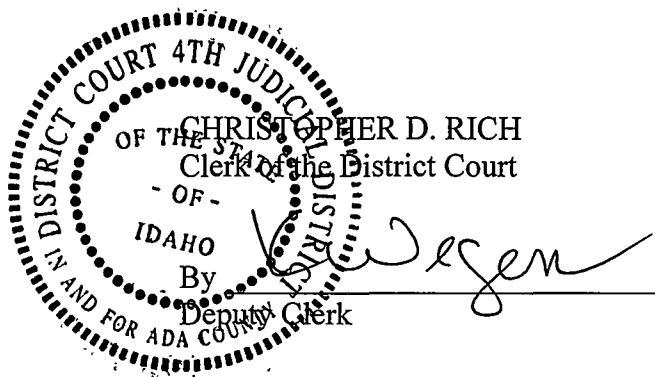
Defendants.

Supreme Court Case No. 44791

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 27th day of January 2017.



CERTIFICATE TO RECORD

000161