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H2O Environmental, Inc. v. Farm Supply Distributors, Inc. Clerk's Record Dckt. 45116

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IN THE SUPREME COURT OF THE STATE OF IDAHO

H2O ENVIRONMENTAL, INC., an Idaho
corporation,

Plaintiff-Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation,

Defendant-Respondent.

Supreme Court Case No. 45116

CLERK'S RECORD ON APPEAL

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

HONORABLE GERALD F. SCHROEDER

VAUGHN FISHER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

HANS A. MITCHELL

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-236

H2O Environmental Inc
vs.
Farm Supply Distributors Inc

§
§
§
§

Location: Ada County District Court
Judicial Officer: Schroeder, Gerald F.
Filed on: 01/08/2015
Case Number History:

CASE INFORMATION

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

DATE	CASE ASSIGNMENT
------	-----------------

Current Case Assignment

Case Number	CV-OC-2015-236
Court	Ada County District Court
Date Assigned	08/02/2016
Judicial Officer	Schroeder, Gerald F.

PARTY INFORMATION

Plaintiff	H2O Environmental Inc	Lead Attorneys Warden, Nicholas Alexander <i>Retained</i> 208-345-7000(W)
Defendant	Farm Supply Distributors Inc	Lyon, Aubrey Dean <i>Retained</i> 208-345-8600(W)
	Farm Supply Distributors, Inc.	Mitchell, Hans A. <i>Retained</i> 208-345-8600(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
------	------------------------------	-------

01/08/2015	New Case Filed Other Claims <i>New Case Filed - Other Claims</i>	
01/08/2015	Complaint Filed <i>Complaint Filed</i>	
01/08/2015	Summons Filed <i>Summons Filed</i>	
01/28/2015	Notice of Appearance <i>Notice Of Appearance (Pollack for Farm Supply Distributors Inc)</i>	
02/04/2015	Answer <i>Answer and Demand for Jury Trial (Pollack for Farm Supply Distributors Inc)</i>	
02/04/2015	Affidavit of Service <i>Affidavit Of Service 1.15.15</i>	
02/23/2015	Notice of Hearing <i>Notice Of Hearing</i>	
02/23/2015	Hearing Scheduled <i>Hearing Scheduled (Status / Scheduling / Settlement Conf 04/08/2015 09:30 AM)</i>	
03/04/2015	Notice	

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Notice of Change of Address

04/08/2015 Hearing Held
*Hearing result for Status / Scheduling / Settlement Conf scheduled on 04/08/2015 09:30 AM:
Hearing Held*

04/08/2015 Hearing Scheduled
Hearing Scheduled (Status Conference 06/17/2015 09:30 AM)

04/08/2015 Miscellaneous
Notice Of Hearing

04/08/2015 **Status/Scheduling/Settlement Conference (9:30 AM)** (Judicial Officer: Young, Patricia G.)

04/27/2015 Notice of Service
Notice Of Service

04/28/2015 Motion
*Motion For Protective Order Regarding Plaintiff's Notice Of Deposition Pursuant To Rule 30
(B)(6)*

04/28/2015 Affidavit
Affidavit Of Counsell In Support Of Defendant's Motion For A Protective Order

05/08/2015 Notice of Service
Notice Of Service of Discovery

05/27/2015 Notice of Service
Notice Of Service of Discovery

05/29/2015 Notice
Notice of Deposition Pursuant to Rule 30 (b) (6)

06/15/2015 Amended
Amended Notice Of Deposition Pursuant To Rule 30(b)(6)

06/17/2015 Hearing Held
Hearing result for Status Conference scheduled on 06/17/2015 09:30 AM: Hearing Held

06/17/2015 Notice of Service
Notice Of Service

06/17/2015 **Status Conference (9:30 AM)** (Judicial Officer: Young, Patricia G.)

06/18/2015 Order
Order Governing Proceedings and Setting Jury Trial

06/18/2015 Hearing Scheduled
Hearing Scheduled (Civil Pretrial Conference 09/09/2015 03:00 PM)

06/18/2015 Hearing Scheduled
Hearing Scheduled (Jury Trial 10/07/2015 09:00 AM)

06/23/2015 Amended
Second Amended Notice Of Deposition Pursuant To Rule 30(b)(6)

06/30/2015 Notice of Service
Notice Of Service

07/09/2015 Motion
Defendant's Motion for Summary Judgment

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07/09/2015 Affidavit
Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment

07/09/2015 Memorandum
Memorandum in Support of Defendant's Motion for Summary Judgment

07/09/2015 Notice of Hearing
Notice Of Hearing

07/09/2015 Hearing Scheduled
Hearing Scheduled (Motion for Summary Judgment 08/10/2015 03:00 PM)

07/28/2015 Motion
Motion to Amend Complaint

07/28/2015 Memorandum
Memorandum in Support of Motion to Amend Complaint

07/28/2015 Response -
Plaintiff's Response to Defendant's Motion for Summary Judgment

07/28/2015 Affidavit
Affidavit of Nicholas Warden in Opposition to Defendant's Motion for Summary Judgment

07/28/2015 Affidavit
Affidavit of Steven King in Support of Response to Defendant's Motion for Summary Judgment

07/28/2015 Affidavit
Affidavit of John Bradley in Opposition to Defendant's Motion for Summary Judgment

08/04/2015 Reply
Defendant Farm Supply Inc's Reply in Support of Motion for Summary Judgment

08/10/2015 Hearing Held
*Hearing result for Motion for Summary Judgment scheduled on 08/10/2015 03:00 PM:
Hearing Held*

08/10/2015 **Motion for Summary Judgment (3:00 PM)** (Judicial Officer: McDaniel, Terry R.)

08/11/2015 Notice of Taking Deposition
*Notice Of Taking Deposition Duces Tecum of H2O Environmental, INC. Pursuant to I.R.C.P
30(B)(6)*

08/12/2015 Amended
Amended Notice Of Taking Deposition Duces tecum Of H2O Environmental Inc

08/25/2015 Motion
Motion in Limine

08/25/2015 Affidavit in Support of Motion
Affidavit Of Nicholas A Warden In Support Of Motion in Limine

08/26/2015 Order
Order Denying Defendants Motion for Summary Judgment

08/26/2015 Motion
Defendant Farm Supply Distributors, Inc.'s Motion to Compel Mediation

08/28/2015 Motion

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Motion in Limine

08/28/2015	Affidavit in Support of Motion <i>Affidavit In Support Of Motion</i>
08/28/2015	Memorandum <i>Memorandum in Support of Motion in Limine</i>
08/28/2015	Motion <i>Motion to Shorten Time</i>
08/31/2015	Motion <i>Motion To Shorten Time</i>
08/31/2015	Notice of Hearing <i>Notice Of Hearing (9.9.15 at 3:00 PM)</i>
09/08/2015	Hearing Vacated <i>Hearing result for Civil Pretrial Conference scheduled on 09/09/2015 03:00 PM: Hearing Vacated</i>
09/08/2015	Hearing Vacated <i>Hearing result for Jury Trial scheduled on 10/07/2015 09:00 AM: Hearing Vacated</i>
09/09/2015	Miscellaneous <i>Defendant Farm Supply Distributor's, Inc's Expert Witness Disclosure</i>
09/09/2015	CANCELED Pre-trial - Civil (3:00 PM) (Judicial Officer: Young, Patricia G.) <i>Vacated</i>
10/07/2015	CANCELED Jury Trial (9:00 AM) (Judicial Officer: Young, Patricia G.) <i>Vacated</i>
10/29/2015	Notice of Hearing <i>Notice Of Hearing</i>
10/29/2015	Hearing Scheduled <i>Hearing Scheduled (Motion 11/24/2015 01:30 AM) Motion To Amend the Complaint and Its Motion In Limine</i>
11/10/2015	Continued <i>Continued (Motion 11/24/2015 01:30 PM) Motion To Amend the Complaint and Its Motion In Limine</i>
11/10/2015	Notice of Hearing <i>Notice Of Hearing (11/24/2015 01:30 PM)</i>
11/10/2015	Motion <i>Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine</i>
11/10/2015	Affidavit <i>Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine</i>
11/10/2015	Notice of Hearing <i>Notice Of Hearing</i>
11/10/2015	Hearing Scheduled <i>Hearing Scheduled (Motion 11/24/2015 01:15 PM) Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine</i>
11/17/2015	Response

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Defendant's Response In Opposition To Plaintiff's Motion To Amend Complaint

11/17/2015	Affidavit <i>Affidavit Of aubrey D. Lyons In Oppositio To Plaintiff's Motion To Amend Complaint</i>
11/17/2015	Response <i>Defendnat's Response In Opposition To Plaintiff's Motion In Limine</i>
11/17/2015	Affidavit <i>Affidavit Of Aubrey D. Lyons In Opposition To Motion In Limine</i>
11/17/2015	Miscellaneous <i>Response in Opposition to Defendant's First Motion in Limine</i>
11/17/2015	Affidavit <i>Affidavit of Nicholas Warden in Opposition to Defendant's First Motion in Limine</i>
11/20/2015	Motion <i>Plaintiff's Reply in Support of Motion in Limine</i>
11/23/2015	Reply <i>Reply to Plaintiff's Response to Defendant Farm Supply Distributors, Inc's Motion In Limine</i>
11/24/2015	Hearing Held <i>Hearing result for Motion scheduled on 11/24/2015 01:15 PM: Hearing Held Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine</i>
11/24/2015	Hearing Held <i>Hearing result for Motion scheduled on 11/24/2015 01:30 PM: Hearing Held Motion To Amend the Complaint and Its Motion In Llimine</i>
11/24/2015	Motion Hearing (1:30 PM) (Judicial Officer: Young, Patricia G.) <i>Motion To Amend the Complaint and Its Motion In Llimine Hearing result for Motion scheduled on 11/24/2015 01:30 PM: Hearing Held</i>
11/24/2015	Motion Hearing (1:15 PM) (Judicial Officer: Young, Patricia G.) <i>Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine Hearing result for Motion scheduled on 11/24/2015 01:15 PM: Hearing Held</i>
12/03/2015	Order <i>Order Granting Leave to Amend</i>
12/03/2015	Order <i>Order Re: Motions in Limine</i>
12/04/2015	Motion <i>Defendant Farm Supply Distributors, Inc's Motion To Exclude Experts (Oral Argument Requested)</i>
12/04/2015	Notice of Hearing <i>Notice Of Hearing</i>
12/04/2015	Hearing Scheduled <i>Hearing Scheduled (Motion 01/06/2016 02:30 PM) Motion To Exclude Experts</i>
12/09/2015	Order <i>Order Governing Proceedings and Setting Trial</i>
12/09/2015	Hearing Scheduled <i>Hearing Scheduled (Court Trial 02/03/2016 09:00 AM)</i>

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12/09/2015	Hearing Scheduled <i>Hearing Scheduled (Civil Pretrial Conference 01/20/2016 03:30 PM)</i>
12/11/2015	Amended <i>First Amended Complaint</i>
12/17/2015	Answer <i>Answer to First Amended Complaint (Lyon for Farm Supply Distributors)</i>
12/30/2015	Response to Request for Discovery <i>Response in Opposition to Defendant's Motion to Exclude Experts</i>
12/31/2015	Notice of Service <i>Notice Of Service</i>
01/04/2016	Reply <i>Defendant's Reply in Support of Motion to Exclude Experts</i>
01/06/2016	Hearing Held <i>Hearing result for Motion scheduled on 01/06/2016 02:30 PM: Hearing Held Motion To Exclude Experts</i>
01/06/2016	Motion Hearing (2:30 PM) (Judicial Officer: Young, Patricia G.) <i>Motion To Exclude Experts Hearing result for Motion scheduled on 01/06/2016 02:30 PM: Hearing Held</i>
01/20/2016	Hearing Held <i>Hearing result for Civil Pretrial Conference scheduled on 01/20/2016 03:30 PM: Hearing Held</i>
01/20/2016	Witness List <i>Witness List</i>
01/20/2016	Exhibit List/Log <i>Plaintiff H2O Enviromental, Inc's Trial Exhibit List</i>
01/20/2016	Miscellaneous <i>Defendants Lay Witness Disclosure</i>
01/20/2016	Miscellaneous <i>Defendants Exhibit List</i>
01/20/2016	Pre-trial - Civil (3:30 PM) (Judicial Officer: Young, Patricia G.)
01/21/2016	Affidavit of Service <i>Affidavit Of Service (1.19.2016)</i>
01/26/2016	Notice <i>Notice Of Deposition Of John Bradley</i>
01/27/2016	Order <i>Order Granting Defendant's Motion to Exclude Plaintiff's Expert Witnesses</i>
01/27/2016	Notice of Taking Deposition <i>Notice Of Taking Deposition Of Chris Miceli</i>
01/28/2016	Motion <i>Motion To Exclude The Testimony of Christopher Miceli Or To Reconsider Order Granting Motion To Exclude Plaintiff's Expert Witnesses</i>
01/28/2016	Motion

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Motion In Limine Regarding Redacted Documents

01/28/2016	Affidavit in Support of Motion <i>Affidavit of Nicholas Warden In Support Of Motion In Limine</i>
01/28/2016	Motion <i>Motion To Shorten Time</i>
01/29/2016	Amended <i>Amended Affidavit of Nicholas Warden In Support Of Motion In Limine Regarding Redacted Documents</i>
02/01/2016	Order <i>Order on Shorten Time - Granted</i>
02/01/2016	Notice of Hearing <i>Notice Of Hearing</i>
02/01/2016	Hearing Scheduled <i>Hearing Scheduled (Motion in Limine 02/02/2016 09:30 AM)</i>
02/01/2016	Certificate of Mailing <i>Certificate Of Service</i>
02/01/2016	Response <i>Defendant's Response in Opposition to Plaintiff's Motion in Limine Re Redacted Documents, To Exclude Miceli Testimony, ot to Reconsider</i>
02/01/2016	Affidavit <i>Affidavit of Hans A. Mitchell in Opposition to Plaintiff's Motion in Limine Re Redacted Documents, To Exclude Miceli Testimony, or to Reconsider</i>
02/02/2016	Amended <i>Plaintiff H2O Environmental, Inc.'s Amended Trail Exhibit List</i>
02/02/2016	Hearing Held <i>Hearing result for Motion in Limine scheduled on 02/02/2016 09:30 AM: Hearing Held</i>
02/02/2016	Stipulation <i>Stipulation of Facts</i>
02/02/2016	Stipulation <i>Stipulated Exhibit List</i>
02/02/2016	Miscellaneous <i>Declaration of Chris Miceli in Opposition to Plaintiff's Motion in Limine</i>
02/02/2016	Miscellaneous <i>Defendant's Trial Brief</i>
02/02/2016	Motion in Limine (9:30 AM) (Judicial Officer: Young, Patricia G.)
02/03/2016	Memorandum <i>Plaintiff's Pre-Trial Memorandum</i>
02/03/2016	Hearing Held <i>Hearing result for Court Trial scheduled on 02/03/2016 09:00 AM: Hearing Held</i>
02/03/2016	Court Trial (9:00 AM) (Judicial Officer: Young, Patricia G.)
02/24/2016	Transcript Filed

ADA COUNTY DISTRICT COURT
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Transcript Filed

02/25/2016 Stipulation
Stipulation to Extend Deadline to Submit Findings of Fact and Conclusions of Law

02/26/2016 Order
Order Granting Stipulation to Extend Deadline to Submit Findings of Fact and Conclusions of Law

03/09/2016 Miscellaneous
Defendant's Proposed Findings of Fact and Conclusions of Law

03/16/2016 Response to Request for Discovery
Defendant's Response To Plaintiff's Proposed Findings of Fact and Conclusions of Law

03/30/2016 Findings of Fact and Conclusions of Law
Findings Of Fact And Conclusions Of Law

04/19/2016 Judgment
Judgment

04/19/2016 Civil Disposition Entered
Civil Disposition entered for: Farm Supply Distributors Inc, Defendant; H2O Environmental Inc, Plaintiff. Filing date: 4/19/2016

04/19/2016 Status Changed
STATUS CHANGED: Closed

04/19/2016 **Judgment - Money**
Converted Disposition:
\$7952.56
Party (H2O Environmental Inc)
Party (Farm Supply Distributors Inc)

05/02/2016 Motion
Motion for Cost and Attorney's Fees

05/02/2016 Affidavit in Support of Motion
Affidavit of Vaughn Fisher In Support Of Motion for Cost and Attorney's Fees

05/02/2016 Memorandum
Memorandum in Support of Motion for Cost and Attorney's Fees

05/16/2016 Response to Request for Discovery
Response In Opposition To Plaintiff's Motion For Costs And Fees

05/16/2016 Affidavit
Affidavit Of Hans A. Mitchell In Opposition To Plaintiff's Motion For Costs And Fees

05/16/2016 Notice of Hearing
Notice Of Hearing

05/17/2016 Hearing Scheduled
Hearing Scheduled (Hearing Scheduled 06/22/2016 04:00 PM) Response In Opposition to Plaintiff's Motion For Costs And Fees

05/17/2016 Status Changed
STATUS CHANGED: Closed pending clerk action

06/22/2016 Hearing Held
Hearing result for Hearing Scheduled scheduled on 06/22/2016 04:00 PM: Hearing Held

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-236

Response In Opposition to Plaintiff's Motion For Costs And Fees

06/22/2016 **Hearing Scheduled (4:00 PM)** (Judicial Officer: Young, Patricia G.)
Response In Opposition to Plaintiff's Motion For Costs And Fees Hearing result for Hearing Scheduled scheduled on 06/22/2016 04:00 PM: Hearing Held

07/05/2016 Order
Order on Plaintiff's Motion for Costs and Fees \$7354.65

07/05/2016 Status Changed
STATUS CHANGED: closed

07/25/2016 Transcript Filed
Transcript Filed

07/26/2016 Objection
Objection to Plaintiff's Proposed Judgment


08/01/2016 Notice of Appeal
NOTICE OF APPEAL To District Court


08/01/2016 Appeal Filed in District Court
Appeal Filed In District Court


08/02/2016 Change Assigned Judge: Administrative
Judge Change: Administrative


08/02/2016 Transcript Filed
Notice Of Reassignment - Judge Schroeder


08/07/2016 Order
Governing Procedure on Appeal


09/12/2016  Brief Filed
Appellant's


10/06/2016  Motion
Defendant/Respondent's Motion to Dismiss Appeal as Moot


10/06/2016  Memorandum
in Support of Defendant/Respondent's Motion to Dismiss Appeal as Moot

10/06/2016  Affidavit
of Hans A. Mitchell in Support of Defendant/Respondent's Motion to Dismiss Appeal as Moot


10/10/2016  Brief Filed
Respondent's


10/17/2016  Notice of Hearing


10/18/2016  Notice of Hearing
Amended


10/19/2016  Brief Filed
Brief in Opposition to Motion to Dismiss Appeal as Moot Oral Argument Requested


ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2015-236


10/19/2016  Affidavit
Affidavit of Vaughn Fisher in Opposition to Motion to Dismiss Appeal as Moot


10/26/2016  Miscellaneous
Respondent's Reply in Support of Motion to Dismiss Appeal as Moot


10/27/2016  Civil Notice of Hearing
Amended Motion to Dismiss and Objections


10/31/2016  Brief Filed
Appellant's Reply Brief


11/07/2016  Notice of Hearing
Notice of Oral Argument 12/8/16 @1:30pm


11/14/2016  Returned/Undeliverable Mail
Resent To Nicholas Warden 11/18/16


11/17/2016  **CANCELED Oral Argument (1:30 PM)** (Judicial Officer: Schroeder, Gerald F.)
Vacated
Motion to Dismiss


12/08/2016  **Motion to Dismiss (1:30 PM)** (Judicial Officer: Schroeder, Gerald F.)
and Opposition to Motion to Dismiss


12/08/2016  Court Minutes


04/04/2017  Decision or Opinion
on Appeal


04/18/2017  Memorandum of Costs & Attorney Fees
Respondent's

04/18/2017  Affidavit
of Hans A. Mitchell in Support of Respondent's Memorandum of Costs and Fees on Appeal


05/02/2017  Objection
to Request for Attorney Fees

05/15/2017  Notice
of Errata

05/16/2017  Civil Notice of Hearing
Objection Hearing (6/1/2017 at 3:30 PM)

05/16/2017  Notice of Appeal

05/16/2017 Appeal Filed in Supreme Court


06/01/2017  **Objection Hearing (3:30 PM)** (Judicial Officer: Schroeder, Gerald F.)
Events: 05/16/2017 Civil Notice of Hearing

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE No. CV-OC-2015-236

06/01/2017

 Court Minutes

07/11/2017

 Notice
of Transcript Lodged - Supreme Court No. 45116

DATE

FINANCIAL INFORMATION

Defendant Farm Supply Distributors Inc
Total Charges
Total Payments and Credits
Balance Due as of 7/11/2017

136.00
136.00
0.00

Plaintiff H2O Environmental Inc
Total Charges
Total Payments and Credits
Balance Due as of 7/11/2017

476.00
476.00
0.00

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
910 W. Main St., Ste. 254
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 297-2689

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED P.M. 120

JAN 08 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

CV 00 1500236

Case No. _____

COMPLAINT

COMES NOW the Plaintiff, H2O Environmental, Inc. ("H2O"), by and through its counsel of record, FISHER RAINEY HUDSON, and claims and alleges against the Defendant as follows:

PARTIES

1. Plaintiff H2O is, and at all relevant times herein was, a Nevada corporation, registered in Idaho and with its principal place of business in Ada County, Idaho.

TR/S

2. Defendant Farm Supply Distributors, Inc. ("FSD") is, and at all relevant times herein was, an Oregon corporation, registered in Oregon with its principal place of business in Enterprise, Oregon, but conducting business in the State of Idaho.

JURISDICTION AND VENUE

3. Defendant is a company that transacted business in the State of Idaho for pecuniary benefit during the relevant time period and is, therefore, subject to this Court's jurisdiction under the State's long-arm statute codified in Idaho Code § 5-514(a).

4. The causes of action set forth below arose in Ada County. Therefore, venue is proper in the Fourth Judicial District pursuant to Idaho Code § 5-404.

COUNT I BREACH OF CONTRACT

5. A contract was formed between H2O and the Defendant, whereby H2O would perform environmental remediation services and the Defendant would pay for those services.

6. H2O performed under the contract by providing emergency remediation services in response to a fuel spill at a Maverick country store located in Boise, Idaho.

7. H2O submitted invoice 8393501 and 8393741 ("invoices") to FSD for work performed pursuant to the agreement between the parties.

8. After discussions with FSD, H2O agreed to reduce the total amount due under the invoices to forty-five thousand eight hundred twenty-eight dollars and twenty cents (\$45,828.20).

9. On August 27, 2014, FSD's agent made a payment toward the outstanding balance of thirty-eight thousand four hundred seventy-three dollars and fifty-five cents (\$38,473.55), leaving an unpaid balance of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65) still outstanding.

10. H2O has made various demands for the balance due, including, but not limited to, a demand letter dated December 4, 2014, from H2O's counsel to FSD.

11. FSD has breached the contract between the parties by failing to pay the remainder of the balance owed for services performed.

12. As a result of the Defendant's breach, H2O has sustained damages in the amount of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65).

**COUNT II
BREACH OF COVENANT OF GOOD FAITH
AND FAIR DEALING**

13. Plaintiffs reallege and incorporate paragraphs 1-12 as if fully set forth herein.

14. Implied in every contract is a covenant of good faith and fair dealing.

15. FSD's breach of this covenant includes, but is not limited to, its failure to make full payment to H2O for remediation services performed.

16. As a direct result of FSD's breach of the covenant of good faith and fair dealing, H2O has been damaged in the amount of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65).

COSTS AND ATTORNEY FEES

17. At the time the debts set forth above were incurred, FSD agreed to be liable for all costs of collection which H2O might incur, including reasonable attorney fees. FSD's unwarranted and unjustified refusal to make payment of the outstanding balance has compelled H2O to retain the services of an attorney in order to prosecute this action. Therefore, pursuant to the agreement between the parties, I.R.C.P 54 and Idaho Code §§ 12-120 and 12-121, H2O is entitled to recover its reasonable attorney fees in the sum of not less than three thousand dollars

(\$3,000.00) if judgment is entered by default, and such other amount as the Court may find reasonable if this matter is contested.

18. At the time the debts set forth above were incurred, FSD agreed to pay interest on all past due amounts at the contract rate of 18% per annum. H2O is, therefore, entitled to recover pre-judgment interest at the contract rate.


PRAYER FOR RELIEF

WHEREFORE, H2O prays for judgment as follows:

- a. That judgment be entered against FSD in the sum of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65), plus interest thereon at the rate of eighteen percent (18%) per annum through the date of judgment, plus statutory interest on the judgment thereafter until paid;
- b. For reasonable attorneys' fees incurred in the prosecution of this action in at least the sum of \$3,000.00 if judgment is entered by default, and for such other and further sums as the Court may find reasonable if judgment is entered other than by default;
- c. For costs and expenses incurred by the Plaintiff; and
- d. For such other and further relief as the Court may deem appropriate under the circumstances.

DATED this 8th day of January, 2015.

FISHER RAINEY HUDSON



Nicholas Warden, of the firm
Attorney for Plaintiff

Hans A. Mitchell, ISB No. 5565
Jessica E. Pollack, ISB No. 8700
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

NO. _____
A.M. _____ P.M. 4:36

FEB 04 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

Attorneys for Defendant

ORIGINAL

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

ANSWER AND DEMAND FOR JURY
TRIAL

COME NOW, Defendant Farm Supply Distributors, Inc. ("Farm Supply"), by and through its counsel of record, Carey Perkins LLP, and hereby answers the Plaintiff's Complaint in the above-entitled matter as follows:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim against Farm Supply upon which relief can be granted.

SECOND DEFENSE

ANSWER AND DEMAND FOR JURY TRIAL - 1

000017

TR

I.

Farm Supply denies each and every allegation of the Plaintiff's Complaint not herein expressly and specifically admitted.

II.

PARTIES

1. Farm Supply lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and therefore denies them.

2. Farm Supply admits only that portion of paragraph 2 which states it is an Oregon corporation with its principal place of business in Enterprise, Oregon.

JURISDICTION AND VENUE

3. Farm Supply admits it is subject to this Court's jurisdiction in the instant action. The remaining allegations in paragraph 3 are denied.

4. Farm Supply admits that venue is proper in the Fourth Judicial District in and for Ada County, Idaho. The remaining allegations in paragraph 4 are denied.

BREACH OF CONTRACT

5. Farm Supply admits only that portion of paragraph 6 which alleges that Plaintiff performed emergency remediation services in response to a fuel spill at a Maverik store in Boise, Idaho. All remaining allegations in paragraph 6 are denied.

6. Farm Supply admits that invoices 8393741 and 8393501 reflect amounts billed by Plaintiff. All remaining allegations in paragraph 7 are denied.

7. Farm Supply admits Plaintiff was paid \$34,473.55, otherwise paragraph 9 is denied.

8. With respect to paragraph 10, Farm Supply admits it received a letter, dated December 4, 2014, from Defendant's attorney. The contents of the December 4, 2014 letter speak for itself. Any remaining allegations in paragraph 10 are denied.

9. Paragraph 11 is denied.

10. Paragraph 12 is denied.

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

11. In response to paragraph 13, Farm Supply restates and realleges its answers to paragraphs 1–12 as if fully incorporated herein.

12. The allegation contained in paragraph 14 is a legal conclusion to which no response is required.

13. Paragraph 15 is denied.

14. Paragraph 16 is denied.

COSTS AND ATTORNEY FEES

15. Paragraph 17 is denied.

16. Paragraph 18 is denied.

AFFIRMATIVE DEFENSES

1. The Plaintiff's claims, or parts thereof, are barred by the doctrine of accord and satisfaction and/or novation.

2. The Plaintiff's claims, or parts thereof, are barred by the doctrines of waiver and estoppel.

3. Plaintiff's recovery is precluded because it breached the agreement alleged and/or failed to comply with material provisions of said agreement.

4. Payment of any amount requested by the Plaintiff will result in unjust enrichment because the Plaintiff has been fully compensated for the reasonable value of goods or services provided.

5. Plaintiff's claims fail for lack of consideration.

6. Plaintiff's claims fail for lack of a contract.

7. Plaintiff has failed to join an indispensable party under Idaho R. Civ.

P. 19.

8. Farm Supply reserves the right to amend this Answer to plead further affirmative defenses.

WHEREFORE, Defendant Farm Supply Distributors prays for relief as follows:

1. That the Plaintiff take nothing by way of its Complaint and that its claims against Farm Supply be dismissed with prejudice.

2. That Farm Supply be awarded its attorney fees and costs pursuant to all applicable law including, but not limited to, Idaho Code §§ 12-120, 12-121 and Rule 54 of the Idaho Rules of Civil Procedure.

3. That this Court award Farm Supply such other and further relief as it deems just and equitable.

JURY DEMAND

Farm Supply demands a trial by jury of no less than 6 as to all issues.

DATED this 4th day of February, 2015.

CAREY PERKINS LLP

By Jessica E. Pollack
Jessica E. Pollack, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2015, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher
Nicholas A. Warden
FISHER RAINEY HUDSON
910 W. Main St., Ste. 254
Boise, Idaho 83702
Telephone: (208) 345-7000
Attorneys for Plaintiff

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile (208) 297-2689

Jessica E. Pollack
Jessica E. Pollack

JUN 18 2015

CHRISTOPHER D. RICH, Clerk
By DEIRDRE PRICE
DEPUTY

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

H2O ENVIRONMENTAL INC.

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS INC

Defendant.

Case No. CV OC 15 00236

ORDER GOVERNING
PROCEEDINGS AND SETTING
JURY TRIAL

Upon a scheduling conference held pursuant to notice, and the Court being advised, it is hereby ordered that:

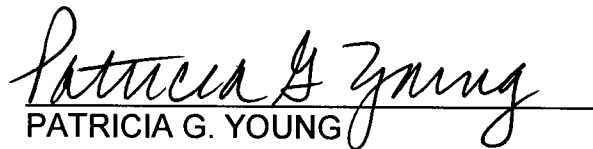
- 1) The 1 day jury trial of this action shall commence before this Court on **Wednesday, October 7, 2015** Trial schedule will be 9:00 a.m. to 4:00 p.m. Counsel and the parties shall be present at 8:30 a.m. on the first day of trial.
- 2) A pretrial settlement conference is hereby set for **September 9, 2015** at **3:00 p.m.**
 - a) All parties and counsel must be present at the pretrial settlement conference. Counsel must be the handling attorney, or be fully familiar with the case.



- b) Jury Instructions are to be submitted to the court by **September 21, 2015** if they are not submitted the right to a jury trial will be waived.
- 3) All discoveries must be completed no later than **September 9, 2015**
- 4) All dispositive motions are to be filed and scheduled for hearing no later than **September 9, 2015**.
- 5) All other pretrial motions, including Motions in Limine, shall be filed by **September 9, 2015**.
- 6) All exhibits must be submitted at the time of trial. All exhibits shall be pre-marked, including the case number.
- 7) Plaintiff's expert witnesses are to be disclosed no later than **September 9, 2015**. Defendant's expert witnesses are to be disclosed no later than **September 9, 2015**. Rebuttal expert witnesses are to be disclosed no later than **September 21, 2015**.
- 8) Juror names will be picked at random by the AS400 computer program at 2:00 p.m. the day before the trial starts.
- 9) Failure to comply with this Order shall subject a party to appropriate sanctions in the discretion of the Court which may include, without limitation, the imposition of costs and attorney fees against the offending party and/or the party's attorney, the dismissal with prejudice of a party's claims, or the striking of defenses to a claim. A party may be excused

from strict compliance with any of the provisions of this Order only upon motion and the finding of extraordinary circumstances justifying the non-compliance.

DATED on this 17 day of June 2015.

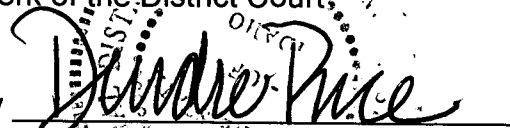

PATRICIA G. YOUNG
Senior Magistrate Judge

CERTIFICATE OF MAILING

I hereby certify that on this 18 day of June 2015 I mailed (served) a true and correct copy of the within instrument to:

Nicholas Warden Attorney at Law 950 W. Bannock St., Ste. 630 Boise, ID 83702	Jessica Pollack Attorney at Law Capitol Park Plaza 300 North 6 th St., Ste.200 PO Box 519 Boise, ID 83701
---	---

Christopher D. Rich
Clerk of the District Court

By 
Deputy Court Clerk

ORIGINAL

Hans A. Mitchell, ISB No. 5565
Jessica E. Pollack, ISB No. 8700
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. _____ FILED _____
A.M. _____ P.M. 402

JUL 09 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

COME NOW, the above-entitled Defendant, Farm Supply Distributor's Inc.,
by and through its attorneys of record, Carey Perkins LLP, and moves this Court pursuant
to Rule 56(c) of the Idaho Rules of Civil Procedure, for summary judgment dismissing the
action on the ground that there is no genuine issue as to any material fact and that
Defendant Farm Supply is entitled to judgment as a matter of law.

AR

This Motion is based upon the Memorandum in Support of Defendant's Motion for Summary Judgment, the Affidavit of Counsel, and the pleadings on file in the above-entitled action.

DATED this 9th day of July, 2015.

CAREY PERKINS LLP

By Jessica E. Pollack
Jessica E. Pollack, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2015, I served a true and correct copy of the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher
Nicholas A. Warden
FISHER RAINEY HUDSON
950 W. Bannock Street, Ste. 630
Boise, Idaho 83702
Telephone: (208) 345-7000
Attorneys for Plaintiff

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile (208) 297-2689

Jessica E. Pollack
Jessica E. Pollack

ORIGINAL

Hans A. Mitchell, ISB No. 5565
Jessica E. Pollack, ISB No. 8700
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. _____ FILED _____
A.M. _____ P.M. 9:02

JUL 09 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAOK
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

AFFIDAVIT OF COUNSEL IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

STATE OF IDAHO)
 : ss.
County of Ada)

JESSICA E. POLLACK, having been first duly sworn upon oath, deposes
and says:

1. I am a member of the law firm Carey Perkins LLP, attorneys of record
for the Defendant Farm Supply Distributors, Inc. ("Farm Supply") in the above-referenced

AP

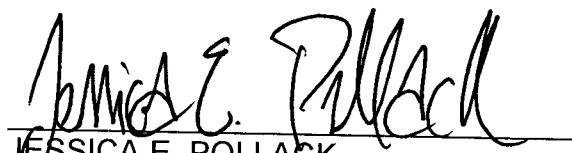
caption action, and the following statements are made of my own personal knowledge and are true and correct.

2. Farm Supply served its First Set of Interrogatories, Requests for Admission and Requests for Production of Documents to Plaintiff in this matter on May 8, 2015.

3. On July 17, 2015, the Plaintiff serves its Responses to Defendant's First Requests for Admission. A true and correct copy of Plaintiff's Responses to Defendant's First Requests for Admission is attached hereto as **Exhibit A**.

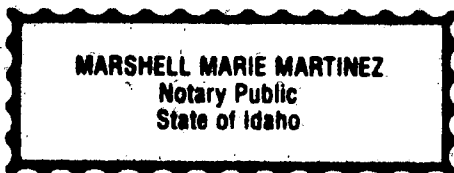
4. On June 30, 2015, the Plaintiff served its Responses to Defendant Farm Supply's First Set of Interrogatories, Requests for Admission and Requests for Production of Documents to Plaintiff, which included supplemental responses to Defendant's Request for Admission No. 3 and No. 4. A true and correct copy of Plaintiff's Supplemental Responses to Defendant's Request for Admission No. 3 and No. 4 is attached hereto as **Exhibit B**.


FURTHER your Affiant saith not.


JESSICA E. POLLACK

SUBSCRIBED AND SWORN to before me this 9th day of July, 2015.

(SEAL)



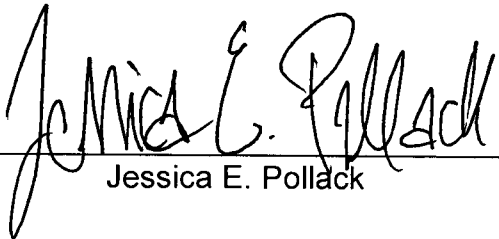

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires 04/15/2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2015, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher
Nicholas A. Warden
FISHER RAINEY HUDSON
950 W. Bannock Street, Ste. 630
Boise, Idaho 83702
Telephone: (208) 345-7000
Attorneys for Plaintiff

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile (208) 297-2689



Jessica E. Pollack

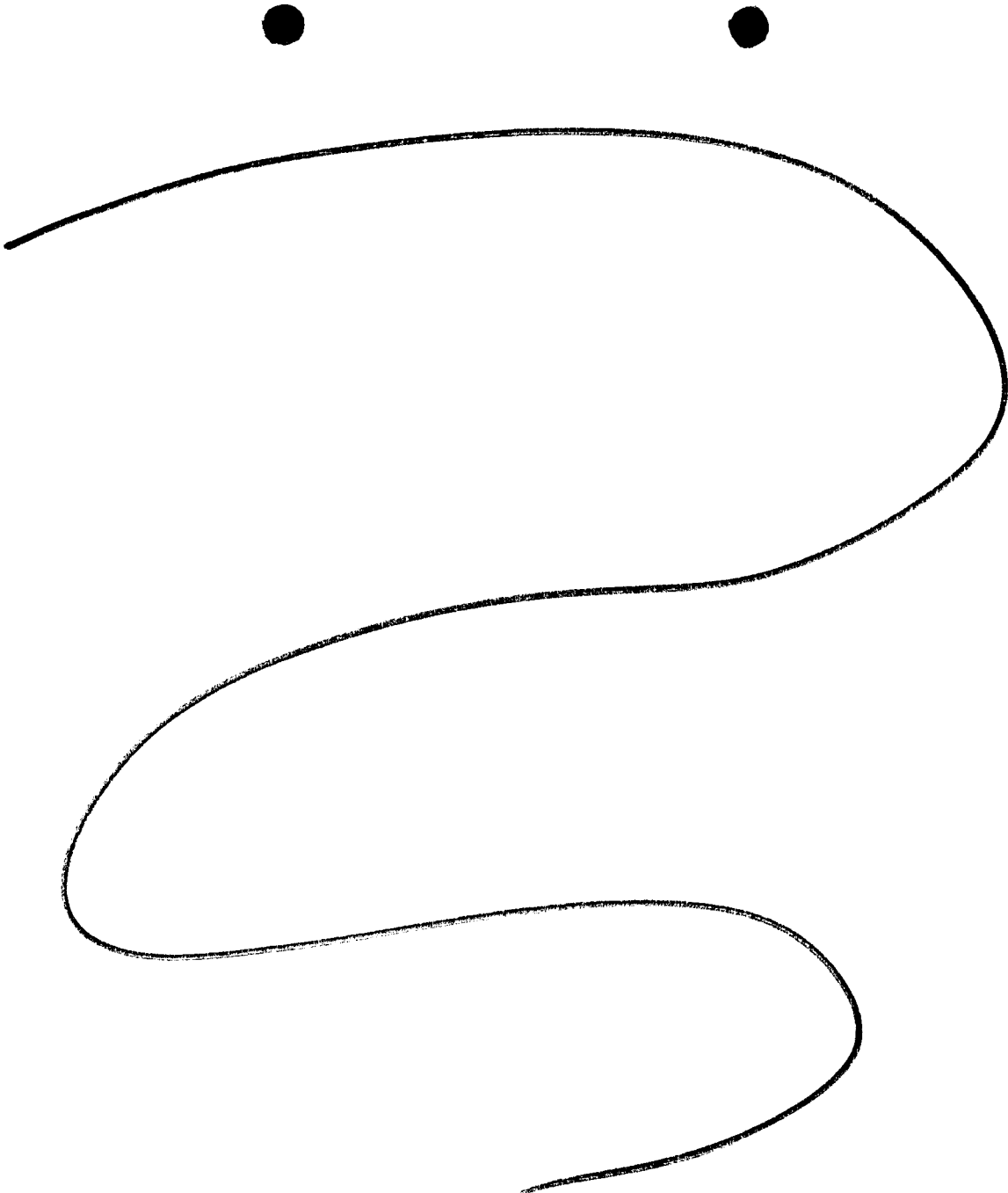


EXHIBIT A

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation
Defendant.

Case No. CV OC 1500236

**PLAINTIFF'S RESPONSES TO
DEFENDANT'S FIRST REQUESTS FOR
ADMISSION**

REQUEST FOR ADMISSION NO. 1: Please admit that you did not execute a written contract with Defendant Farm Supply regarding remediation services for the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Admitted.

REQUEST FOR ADMISSION NO. 2: Please admit that the "2014 Materials & Service Fee Schedule" attached hereto as Exhibit A (hereinafter "Fee Schedule") is a true and correct copy of Plaintiff's Fee Schedule that was in effect when Plaintiff provided remediation services for the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Admitted.

**PLAINTIFF'S RESPONSES TO DEFENDANT'S FIRST
REQUESTS FOR ADMISSION - 1**

REQUEST FOR ADMISSION NO. 3: Please admit that you did not discuss the rates to be charged for Plaintiff's remediation services with any representatives of Defendant Farm Supply before providing the remediation services on the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 12 as part of a supplemental response to discovery.

REQUEST FOR ADMISSION NO. 4: Please admit that you did not provide a Fee Schedule to Defendant Farm Supply or its representative before you provided remediation services on the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 13 as part of a supplemental response to discovery.

REQUEST FOR ADMISSION NO. 5: Please admit that the invoice attached hereto as **Exhibit B** is a true and correct copy of Plaintiff's invoice number 008393501 to Defendant Farm Supply, as amended by Plaintiff on August 4, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Plaintiff admits that the invoice attached to Defendant's requests as **Exhibit B** is a true and correct copy of invoice number 008393501 revised by Plaintiff and submitted by Plaintiff to Defendant. Plaintiff lacks sufficient knowledge to confirm the exact date on which the revised invoice was submitted to Defendant and therefore denies the remaining allegations in Request for Admission No. 5.

REQUEST FOR ADMISSION NO. 6: Please admit that Plaintiff's invoice number 008393501, attached hereto at **Exhibit B**, shows charges incurred on July 12, 2014 and July 13, 2014, for a "crew truck (ER)" at the "price" of \$90.00 per hour.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Plaintiff admits that invoice 008393501 lists charges for a "crew truck (ER)" at the "price" of \$90.00 per hour. Request No. 6 is denied to the extent it seeks an admission that the description of work performed is accurate. The entry was meant to be for the use of a utility truck with lifgate as part of an emergency response. The price of \$90 accurately reflects the price of that service as set forth in Plaintiff's fee schedule.

REQUEST FOR ADMISSION NO. 7: Please admit that the invoice attached hereto as **Exhibit C** is a true and correct copy of Plaintiff's invoice number 008393741 to Defendant Farm Supply.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Admitted.

REQUEST FOR ADMISSION NO. 8: Please admit that Plaintiff's invoice number 008393741, attached hereto as **Exhibit C**, shows charges incurred on August 1, 2014, for a "crew truck" at the "price" of \$75.00 per hour and "crew truck (OT)" at the "price" of \$90.00 per hour.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Plaintiff admits that invoice 008393741 lists charges for a "crew truck" at the "price" of \$75.00 per hour and "crew truck (OT)" at the "price" of \$90.00 per hour. Request No. 8 is denied to the extent it seeks an admission that the description of work performed is accurate. The entry was meant to be for the use of a utility truck at the straight time and overtime rates. The price of \$75 per hour accurately reflects the straight time price of that service as set forth in Plaintiff's fee schedule.

REQUEST FOR ADMISSION NO. 9: Please admit that Plaintiff's invoice number 008393741, attached hereto at **Exhibit C**, shows charges incurred for "Steven King Project Management Admin" at the "price" of \$50.00 per hour.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Admitted.

REQUEST FOR ADMISSION NO. 10: Please admit that page 3 of Plaintiff's Fee Schedule, attached hereto at **Exhibit A**, lists the "straight time" hourly rate for a "crew truck" as \$35.00.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Admitted.

REQUEST FOR ADMISSION NO. 11: Please admit that page 3 of Plaintiff's Fee Schedule, attached hereto at **Exhibit A**, lists the "E.R. Time" hourly rate for a "crew truck" as \$50.00 per hour.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Admitted.

REQUEST FOR ADMISSION NO. 12: Please admit that Plaintiff's Fee Schedule, attached hereto at **Exhibit A**, does not include an "Overtime" rate for a "crew truck."

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Admitted.

REQUEST FOR ADMISSION NO. 13: Please admit that Plaintiff's list of "Personell [sic] Hourly Rates" on page 1 of Plaintiff's Fee Schedule, attached hereto at **Exhibit A**, does not include a "Project Manager Admin" hourly rate.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Plaintiff admits that list of "Personell [sic] Hourly Rates" on page 1 of Plaintiff's Fee Schedule includes a "Project Manager" hourly rate and an "Administrative/Secretarial" hourly rate, but does not expressly assign an hourly rate for "Project Manager Admin". Request No. 13 is denied to the extent it seeks an admission that \$50 per hour is an unreasonable price for the value of Project Manager time spent conducting administrative tasks.

REQUEST FOR ADMISSION NO. 14: Please admit that Plaintiff's invoice number 008393501, attached hereto at **Exhibit B**, contains an overcharge for "crew truck (ER)" on July 12, 2014 and July 13, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Denied. Please see Response to Request for Admission No. 6 above.

REQUEST FOR ADMISSION NO. 15: Please admit that Plaintiff's invoice number 008393741, attached hereto at **Exhibit C**, contains an overcharge for a "crew truck" on August 1, 2014.

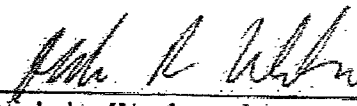
RESPONSE TO REQUEST FOR ADMISSION NO. 15: Denied. Please see Response to Request No. 8 above.

REQUEST FOR ADMISSION NO. 16: Please admit that Plaintiff's invoice number 008393741, attached hereto at **Exhibit C**, contains an overcharge for a "crew truck (OT)" on August 1, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Denied. Please see Response to Request for Admission No. 8 above. Plaintiff admits that the fee schedule does not include a price for overtime spent using a utility truck with a liftgate, but denies Request No. 16 to the extent it seeks an admission that the price charged does not accurately reflect the value of overtime spent using a utility truck with a liftgate.

DATED this 17 day of June, 2015.

FISHER RAINEY HUDSON



Nicholas Warden, of the firm
Attorney for Plaintiff

**PLAINTIFF'S RESPONSES TO DEFENDANT'S FIRST
REQUESTS FOR ADMISSION - 5**

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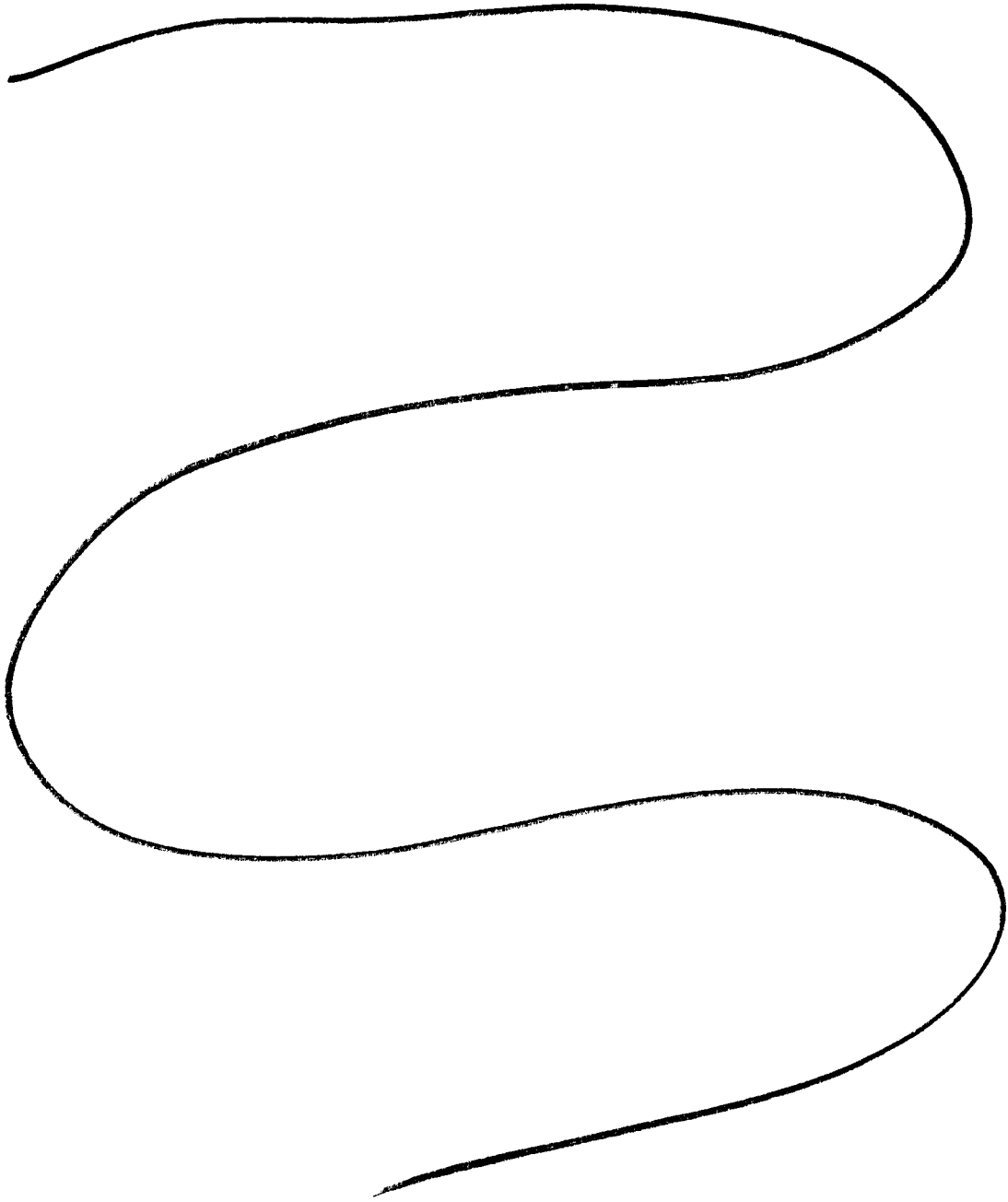


EXHIBIT B

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

MAGISTRATE DIVISION

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation
Defendant.

Case No. CV OC 1500236

**PLAINTIFF'S RESPONSES TO
DEFENDANT FARM SUPPLY'S FIRST
SET OF INTERROGATORIES,
REQUESTS FOR ADMISSION AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO PLAINTIFF**

INTERROGATORY NO. 1: Please state the name, address, and telephone number of each person answering or assisting in answering these interrogatories, requests for admission and requests for production.

RESPONSE TO INTERROGATORY NO. 1: Ed Savre c/o Fisher Rainey Hudson, 950 W. Bannock St., Ste. 630, Boise, ID 83702.

INTERROGATORY NO. 2: Please identify each and every person known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this action. By this Interrogatory, we seek the identities of all persons who have

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF
INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR
PRODUCTION OF DOCUMENTS TO PLAINTIFF - 1**

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: Documents bates numbered H2O 001-113.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents in your possession which are or may be relevant to any of the facts, circumstances, allegations, and/or defenses set forth in the pleadings on file in this matter.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: Please see documents bates numbered H2O 001-004 and 070-071.

REQUEST FOR PRODUCTION NO. 13: Produce all documents relating or pertaining in any way to the Spill which is the subject matter of this litigation or your involvement with the Spill. Such documents shall include the following: photographs, drawings, files, records, reports, letters, transmittals, submittals, correspondence, memoranda, minutes, emails, recordings, purchase orders, contracts, agreements, statements, invoices, logs, calendars, schedules, time sheets, drawings, plans, specifications, sketches, maps, shop drawings, estimates, calculations, budgets, bids, change orders, proposed change orders, requests for information, manuals, test results, appointment books, telephone call records and logs, notes, notebooks, invoices, trip tickets, diaries, reports, notations, files, shipping manifests, bills of lading, organizational charts, policy statements, procedures, instructions, guidelines, charts, diagrams, indices and/or chronological listings of documents which relate to the Spill.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: Please see documents bates numbered H2O 001-113. Plaintiff reserves the right to supplement its response.

REQUEST FOR ADMISSION NO. 3: Please admit that you did not discuss the rates to be charged for Plaintiff's remediation services with any representatives of Defendant Farm Supply before providing the remediation services on the Spill.

PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 11

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 12 as part of a supplemental response to discovery.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admitted.

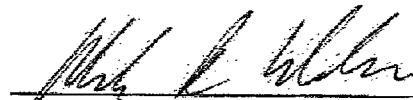
REQUEST FOR ADMISSION NO. 4: Please admit that you did not provide a Fee Schedule to Defendant Farm Supply or its representative before you provided remediation services on the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 13 as part of a supplemental response to discovery.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 4: Admitted.

DATED this 30 day of June, 2015.

FISHER RAINEY HUDSON



Nicholas Warden, of the firm
Attorney for Plaintiff

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 297-2689

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED _____
P.M. 4

JUL 28 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV-OC 1500236

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

There are two issues of material fact that preclude granting summary judgment in favor of the Defendant. First, as to Plaintiff's breach of Contract Claim there are genuine issues of material fact as to whether Defendant ratified the contract by continuing to receive services after it had received notice of the pricing by invoice and fee schedule. Second, in the event the parties failed to reach an enforceable contract, the proper remedy is for Plaintiff to receive the reasonable value of the services it has provided.

LEGAL AUTHORITY

In the section of its brief entitled "Standard of Review", Defendant has accurately articulated the relevant legal authority in granting or denying a motion for summary judgment.

STATEMENT OF FACTS

1. On Saturday, July 12, 2014, a transport truck containing fuel spilled a portion of its contents at a Maverik gas station in Boise, Idaho. King Aff., paragraph 2.
2. The truck was owned by Farm Supply Distributors, Inc. ("Defendant" or "Farm Supply"), and was driven by a Farm Supply employee at the time of the spill. Willis Depo., 9:21-25.
3. The day of the spill, Greg Willis, CEO of Farm Supply, contacted a representative of H2O and hired H2O to clean up the spill. Willis Depo., 17:22-25, 18:1-4, 18:16-24.
4. Between July 12 and August 4, 2014, H2O performed the work Farm Supply hired it to do and cleaned up the spill. King Affidavit, paragraph 4.
5. Though not in advance of its initial response to the emergency, prior to completion of the clean up, H2O submitted a fee schedule to Farm Supply containing an itemized list of prices for its services. King Affidavit, paragraph 5.
6. H2O submitted invoices to Farm Supply periodically throughout the clean up for work it had performed as of that date. These invoices reflected prices for work performed consistent with prices contained in H2O's fee schedule. King Affidavit, paragraph 6.
7. Farm Supply has never voiced concern regarding the workmanship or quality of services provided by H2O, nor have they identified a basis to do so. Willis Depo., 43:22-25, 44:1-11.

8. Farm Supply has testified that it has no basis to question the accuracy of what H2O billed for its services. Willis Depo., 38:4-7.

9. Farm Supply has testified that it has no basis to contest whether H2O charged it a reasonable amount for the services it provided. Willis Depo., 40:4-17.

10. To date, Farm Supply has already paid \$38,473.55 of the total invoiced amounts, leaving an unpaid balance of \$7,354.65. Df. Br., pg. 3.

ARGUMENT

I. Summary judgment should be denied because there is a genuine issue of material of fact whether Defendant ratified the price H2O charged for its services.

A ratification of contract terms may occur where a party seeking to void a contract “intentionally accepts the benefits growing out of it, remains silent, acquiesces in it for any considerable length of time after opportunity is afforded to avoid it or have it annulled, or recognizes its validity by acting upon it.” *Mountain Elec. Co. v. Swartz*, 87 Idaho 403, 411, 393 P.2d 724, 729 (1964). Farm Supply ratified the price H2O charged for its services when it accepted the benefit it derived from the clean up and failed to dispute the prices it received from H2O during the clean up.

Farm Supply hired H2O to clean up a fuel spill it had caused. It agreed to pay H2O to clean up that spill. Over the course of roughly three weeks, H2O cleaned up the spill and brought Farm Supply into compliance with applicable state and local law. King Affidavit, paragraph 4. Prior to completing the clean up, H2O submitted a fee schedule to Farm Supply containing itemized prices for services related to the clean up. King Affidavit, paragraph 5. H2O also submitted periodic invoices throughout the clean up process containing prices for its services consistent with those contained in the fee schedule. *See*, King Affidavit, paragraph 6. At no time during the clean up process did Farm Supply dispute the prices contained in the fee

schedule or the invoices. King Affidavit, paragraph 10; *See*, Willis Depo., 38:4-7, 40:4-17. The first invoice was received within five days of the three-week clean up. King Affidavit, paragraph 7.

Farm Supply had ample opportunity throughout the clean up process to dispute the cost of H2O's services, but failed to do so. The facts demonstrate that Farm Supply intentionally accepted the benefits of having its fuel spill cleaned up by H2O, and that it chose to remain silent and/or acquiesce to the prices contained within H2O's fee schedule and invoices for the duration of the clean up. Contrary to Defendant's assertion, H2O did not "unilaterally determine[] the rates it would charge" any more than Farm Supply unilaterally determined the amount it would pay. Df. Br., pg 5.

- a. Summary judgment should be denied because Defendant misstates Plaintiff's discovery responses in its briefing.

In support of its motion for summary judgment, Defendant incorrectly characterizes the substance of Plaintiff's responses to Requests for Admission Nos. 3 and 4. Defendant's Request for Admission No. 3 asks Plaintiff to "admit that [Plaintiff] did not discuss the rates to be charged for Plaintiff's remediation services with any representatives of Defendant Farm Supply before providing the remediation services on the Spill." Plaintiff responded with an admission. Similarly, Defendant's Request for Admission No. 4 asks Plaintiff to "admit that [Plaintiff] did not provide a Fee Schedule to Defendant Farm Supply or its representative before you provided remediation services on the Spill." Again, Plaintiff responded with an admission.

Defendant then states that these admissions serve as evidence that "Plaintiff unilaterally determined the rates it would charge, *only after performing work on the Spill.*" Df. Br., pg. 5 (emphasis added). This is inaccurate. Defendant's requests for admission pertain to events that occurred before H2O commenced work. The scope of these admissions cannot be reasonably

interpreted to extend beyond commencement of work nor do they stand for an admission that price was not communicated to Farm Supply until after clean up was complete.

II. Summary judgment should be denied because the parties' failure to agree on price in advance of services being provided is not material to all of Plaintiff's claims.

By its motion, Farm Supply seeks summary judgment as to all of Plaintiff's claims. The sole basis presented in support of this request is the parties' failure to agree on a price for H2O's services in advance of the commencement of clean up. Even if the Court finds in favor of Defendant regarding ratification, summary judgment on all of Plaintiff's claims is inappropriate because the issue of whether the parties agreed on a price in advance does not resolve whether H2O has received payment of the reasonable value of services it performed.¹

As stated above, Farm Supply has already paid H2O \$38,473.55 of the total amount H2O invoiced for its services. Implicit in this payment is recognition by the Defendant that H2O, at minimum, is entitled to receive the reasonable value of services it performed at Farm Supply's request. This is the issue at the heart of this proceeding and is an issue of fact presently in dispute. Farm Supply has stated that payment of any amount beyond what has already been paid "will result in unjust enrichment because the Plaintiff has been fully compensated for the reasonable value of goods or services provided." Answer, pg. 4. H2O has presented evidence that the prices contained in H2O's fee schedule represent the reasonable value of its services because (a) they are consistent with prices charged by other companies in the same industry, and (b) they are consistent with what H2O has been charging its clients since about 2010. *See*, Bradley Affidavit, paragraphs 3 and 4. Moreover, Farm Supply recently designated two representatives to testify on behalf of the company regarding the reasonableness of what H2O

¹ It is for this reason Plaintiff has filed a motion to amend its Complaint to add a claim for unjust enrichment concurrent with this Response.

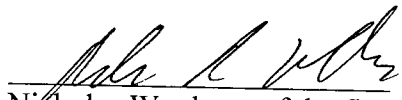
charged for its services and neither deponent could identify a basis to dispute the reasonableness of H2O's charges. *See*, Willis Depo., 40:4-17; *See also*, Ward Depo., 48:11-14.

CONCLUSION

Farm Supply has already made payment to H2O under the terms of the agreement between them in an amount that Farm Supply considers to represent the reasonable value of H2O's services. Defendant's request for summary judgment should be denied because genuine issues of material fact exist regarding whether Farm Supply ratified the price for H2O's services. Further, in the event ratification is not found, there is a genuine issue of material fact as to the reasonable value of the services provided.

DATED this 28 day of July, 2015.

FISHER RAINEY HUDSON

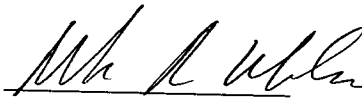

Nicholas Warden – of the firm
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of July, 2015, I caused a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Jessica E. Pollack
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email




Nicholas Warden

4. Attached hereto as Exhibit "1" is a true and correct copy of excerpts from the deposition of Greg Willis cited in Plaintiff's Response to Defendant's Motion for Summary Judgment.

5. Attached hereto as Exhibit "2" is a true and correct copy of excerpts from the deposition of Carol Ward cited in Plaintiff's Response to Defendant's Motion for Summary Judgment.

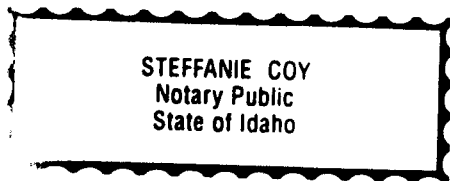
6. Further your affiant sayeth naught.

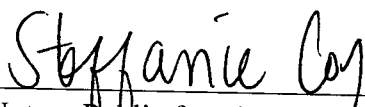
DATED this 28 day of July, 2015.



Nicholas Warden

SWORN AND SUBSCRIBED before me this 28 day of July, 2015.





Notary Public for Idaho
Residing at: Boise
My Commission Expires: March 26, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of July, 2015, I caused a true and correct copy of the foregoing **AFFIDAVIT OF NICHOLAS WARDEN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Jessica E. Pollack
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

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- Via Hand Delivery
- Email



Nicholas Warden



EXHIBIT 1

1 MR. WARDEN: Fair enough.

2 Q. Were you designated to be here by a
3 representative of Vertex?

4 A. No.

5 Q. Were you designated to be here by a
6 representative of Zurich?

7 A. No.

8 Q. Okay. So, other than the fact that you
9 were an officer of the organization, are there other
10 reasons why you were designated to appear here today
11 to testify?

12 A. Well, I'm assuming it's -- I was designated
13 to appear here today, because of any knowledge I might
14 have on the matter at hand.

15 Q. Okay. So, based on the scope of your
16 knowledge of the matter at hand, would that be a fair
17 way to describe it?

18 A. Yes.

19 Q. And what is your understanding of the
20 matter at hand?

21 A. One of my company's tanker trucks had a
22 Hazmat spill --

23 Q. Uh-huh.

24 A. -- at a Maverick fuel station in Boise,
25 Idaho.

1 Q. So, you received a telephone phone call
2 from a representative of the Boise Fire Department?
3 A. That's correct.
4 Q. Do you remember that individual's name?
5 A. I do not.
6 Q. But he called you, and what did he say?
7 A. That there had been an accident, a spill.
8 Q. Anything else?
9 A. And that my driver had ingested fuel and
10 had been taken to the hospital by ambulance.
11 Q. Because he ingested fuel?
12 A. Yes.
13 Q. Wow. Okay. Anything else?
14 A. And that a person from the emergency
15 response team for Ada County, I think, it was Ada
16 County, not Boise. It might have been the city of
17 Boise, but I can't remember, would be contacting me.
18 Q. Okay.
19 A. To see what we needed to do to get a Hazmat
20 team out. .
21 Q. Okay.
22 A. And I hung up the phone, and it was a
23 woman. I can't tell her name from the emergency
24 response people from Ada County or the city of Boise,
25 told me the scope of the spill that a tank had

17

1 ruptured and the trailer was sitting on top of the
2 cement block, and some fuel had been, had got into the
3 storm drain. And I needed to get a Hazmat cleanup
4 team out there.

5 And I told her that I was 22 miles in the
6 middle of nowhere at a picnic and --

7 Q. With barbecue sauce?

8 A. And, yeah, with barbecue on my face and she
9 said there were two Hazmat companies in the area, and
10 that is all that was in the area, it was two
11 companies.

12 And I can't remember the first one. It
13 doesn't matter at this point, and H2O Environmental.
14 I do remember I phoned the first one first, and they
15 never answered the phone.

16 And so, I phoned H2O Environment and told
17 them what I had going on and they responded.

18 Q. Okay.

19 A. And I do remember I talked to a woman in
20 Reno, Nevada.

21 Q. Okay. So, the representative of H2O that
22 you spoke to --

23 A. The representative of H2O was in Reno,
24 Nevada. I do remember that.

25 Q. And she was female?

1 A. I might have scanned them. I might have
2 been told about them when they came in from my office
3 manager in passing.

4 Q. And to your knowledge, what did they say?
5 Let me ask more generally. To your knowledge, what
6 did they pertain to?

7 A. The cleanup.

8 Q. The cleanup. Okay.

9 MR. WARDEN: Can we go for a second?

10 (Discussion held off the record).

11 Q. (BY MR. WARDEN:) So, Craig, I just have a
12 couple more quick questions here.

13 A. Sure.

14 Q. So, the spill occurred when?

15 A. It was July the 12th.

16 Q. July the 12th of this year?

17 A. Last year.

18 Q. Last year. Of last year. About how long
19 did the cleanup run?

20 A. Oh, I think it went on for a couple two,
21 three weeks.

22 Q. Two or three weeks. At any time during the
23 period, were you at all concerned with the quality of
24 work performed by H2O?

25 A. No. I was well aware that they were being

43

1 checked on pretty closely.

2 Q. Okay. But you weren't --

3 A. Just from the business I'm in.

4 Q. Right.

5 A. They're not going to do shoddy work.

6 Q. Okay. And what about after that, since
7 that time, since the remediation services were
8 complete, since the spill was cleaned up, have you at
9 any time had reason to be concerned about the quality
10 of work performed by H2O?

11 A. No.

12 Q. Okay. Had you worked at H2O before this?

13 A. No. That's the first Hazmat spill my
14 company has had, and I'm the fourth owner of the
15 company; we've been in business since 1938.

16 So, there aren't very many companies any
17 older than the ones I've owned. I've personally
18 hauled fuel for 32 years before I bought the company.

19 Q. Wow.

20 A. So. . .

21 Q. Well, I understand you're a busy man. I
22 appreciate you taking the time to answer questions
23 here today. Counsel may have some further questions,
24 then I might have follow-up, but other than that, for
25 now, I'm done. Thank you.

1 there were no charges that you were able to identify
2 as unreasonable?

3 A. That's correct.

4 Q. Okay. Do you have any reason to believe
5 that the itemized charges within the, the itemized
6 charges contained in Exhibit 4 are somehow inaccurate?

7 A. No.

8 Q. Do you have any knowledge of the reasonable
9 value of environmental remediation services?

10 A. Do I have any knowledge of the reasonable
11 value?

12 Q. Of environmental remediation services?

13 A. No.

14 Q. Okay.

15 A. I don't own an environmental company. I
16 can tell you, if you want a gallon of gas hauled from
17 Portland, Oregon, to Boise, Idaho, I've got a
18 reasonable knowledge of the value of that.

19 Q. I believe it. Do you have any reason to
20 believe that there is somebody, an individual at
21 Vertex, with knowledge relevant to the reasonableness
22 of charges for environmental remediation services
23 performed by H2O?

24 A. No.

25 Q. Same question for Zurich. Do you have any

1 reason to believe that there is anybody at Zurich with
2 knowledge regarding the reasonableness of charges for
3 environmental remediation services?

4 A. I wouldn't have knowledge of it.

5 Q. Okay.

6 A. But I'll go back to my response that I gave
7 a little bit ago. I doubt there is anybody from
8 Vertex and Zurich that knows what it costs to haul a
9 gallon of gas from Portland, Oregon, to Boise, Idaho,
10 either.

11 Q. Right.

12 A. It's not what they do, and that isn't what
13 I do.

14 Q. So, it's not what they do?

15 A. They don't haul fuel.

16 Q. They also don't conduct environmental
17 remediation services, correct?

18 A. I have no idea what they do.

19 Q. Okay.

20 A. I know what I do.

21 Q. Okay. So, they may?

22 A. They may.

23 Q. Okay.

24 A. I have no knowledge of it.

25 Q. Okay. Fair enough. I'm going to spare you

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1 the boredom and torture of going through item through
2 item the services performed by H2O and asking you
3 whether or not the amount they charged is reasonable;
4 and instead, I'm going to ask you, generally, once
5 more, do you have any reason to believe that the
6 itemized charges that H2O -- Well, do you have any
7 reason to believe what H2O charged Farm Supply for the
8 environmental remediation services it performed in
9 response to the spill, were unreasonable, in any way
10 unreasonable?

11 A. I wouldn't have any knowledge of that.

12 Q. Okay. So, you have no reason to -- Do you
13 have any -- Well, let me -- My question is a little
14 different.

15 Do you have any reason to believe that
16 those charges were unreasonable?

17 A. No. Not other than the correspondence that
18 was, has been sent on to our office. That's the only
19 reason I would have to believe that there is a matter
20 in dispute about it.

21 Q. Is this correspondence between your
22 organization and counsel?

23 A. No.

24 Q. Okay. So, what the --

25 A. I'm talking about from H2O to our office to



EXHIBIT 2

1 A. Okay.

2 Q. What is the reasonable value for the use of
3 a power washer for environmental remediation services?

4 A. I don't know.

5 Q. Okay. Does the amount of \$70 per hour
6 sound reasonable to you?

7 A. I don't know.

8 Q. Okay.

9 A. Could be too low, could be too high. I
10 have no idea.

11 Q. Okay. Do you have any knowledge,
12 whatsoever, of the reasonableness of any of the
13 charges that H2O charged Farm Supply for its services?

14 A. No.

15 Q. I'm hoping that that question will save me
16 from going through all the itemized charges one by
17 one. But you don't understand that the scope of that
18 question covers all itemized charges --

19 A. I know nothing about environmental cleanup.

20 Q. And you know nothing about the
21 reasonableness of charges for those services?

22 A. I know nothing.

23 Q. Okay.

24 A. I'm not knowledgeable.

25 Q. And you also do not know the identity of

3. Attached hereto as Exhibit "1" is a true and correct copy of Defendant's Answer filed on February 4, 2015, with this court.

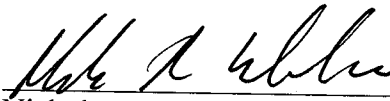
4. Attached hereto as Exhibit "2" is a true and correct copy of Plaintiff's Amended 30(b)(6) dated June 15, 2015.

5. Attached hereto as Exhibit "3" is a true and correct copy of the May 29, 2015 letter sent by Nicholas Warden to Jessica Pollack.

6. Attached hereto as Exhibit "4" is a true and correct copy of relevant portions of the deposition of Greg Willis taken on July 8, 2015.

7. Further your affiant sayeth naught.

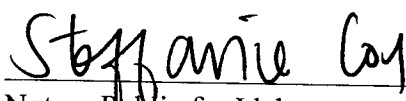
DATED this 25 day of August, 2015.



Nicholas Warden

SWORN AND SUBSCRIBED before me this 25 day of August, 2015.






Notary Public for Idaho
Residing at: Boise
My Commission Expires: March 28, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of August, 2015, I caused a true and correct copy of the foregoing AFFIDAVIT OF NICHOLAS A. WARDEN IN SUPPORT OF MOTION IN LIMINE to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Aubrey Lyon
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email



Nicholas Warden



EXHIBIT 1

Hans A. Mitchell, ISB No. 5565
Jessica E. Pollack, ISB No. 8700
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

COPY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

ANSWER AND DEMAND FOR JURY
TRIAL

COME NOW, Defendant Farm Supply Distributors, Inc. ("Farm Supply"), by and through its counsel of record, Carey Perkins LLP, and hereby answers the Plaintiff's Complaint in the above-entitled matter as follows:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim against Farm Supply upon which relief can be granted.

SECOND DEFENSE

ANSWER AND DEMAND FOR JURY TRIAL - 1

000065

I.

Farm Supply denies each and every allegation of the Plaintiff's Complaint not herein expressly and specifically admitted.

II.

PARTIES

1. Farm Supply lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and therefore denies them.

2. Farm Supply admits only that portion of paragraph 2 which states it is an Oregon corporation with its principal place of business in Enterprise, Oregon.

JURISDICTION AND VENUE

3. Farm Supply admits it is subject to this Court's jurisdiction in the instant action. The remaining allegations in paragraph 3 are denied.

4. Farm Supply admits that venue is proper in the Fourth Judicial District in and for Ada County, Idaho. The remaining allegations in paragraph 4 are denied.

BREACH OF CONTRACT

5. Farm Supply admits only that portion of paragraph 6 which alleges that Plaintiff performed emergency remediation services in response to a fuel spill at a Maverik store in Boise, Idaho. All remaining allegations in paragraph 6 are denied.

6. Farm Supply admits that invoices 8393741 and 8393501 reflect amounts billed by Plaintiff. All remaining allegations in paragraph 7 are denied.

7. Farm Supply admits Plaintiff was paid \$34,473.55, otherwise paragraph 9 is denied.

8. With respect to paragraph 10, Farm Supply admits it received a letter, dated December 4, 2014, from Defendant's attorney. The contents of the December 4, 2014 letter speak for itself. Any remaining allegations in paragraph 10 are denied.

9. Paragraph 11 is denied.

10. Paragraph 12 is denied.

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

11. In response to paragraph 13, Farm Supply restates and realleges its answers to paragraphs 1–12 as if fully incorporated herein.

12. The allegation contained in paragraph 14 is a legal conclusion to which no response is required.

13. Paragraph 15 is denied.

14. Paragraph 16 is denied.

COSTS AND ATTORNEY FEES

15. Paragraph 17 is denied.

16. Paragraph 18 is denied.

AFFIRMATIVE DEFENSES

1. The Plaintiff's claims, or parts thereof, are barred by the doctrine of accord and satisfaction and/or novation.

2. The Plaintiff's claims, or parts thereof, are barred by the doctrines of waiver and estoppel.

3. Plaintiff's recovery is precluded because it breached the agreement alleged and/or failed to comply with material provisions of said agreement.

4. Payment of any amount requested by the Plaintiff will result in unjust enrichment because the Plaintiff has been fully compensated for the reasonable value of goods or services provided.

5. Plaintiff's claims fail for lack of consideration.
6. Plaintiff's claims fail for lack of a contract.
7. Plaintiff has failed to join an indispensable party under Idaho R. Civ.

P. 19.

8. Farm Supply reserves the right to amend this Answer to plead further affirmative defenses.

WHEREFORE, Defendant Farm Supply Distributors prays for relief as follows:

1. That the Plaintiff take nothing by way of its Complaint and that its claims against Farm Supply be dismissed with prejudice.
2. That Farm Supply be awarded its attorney fees and costs pursuant to all applicable law including, but not limited to, Idaho Code §§ 12-120, 12-121 and Rule 54 of the Idaho Rules of Civil Procedure.
3. That this Court award Farm Supply such other and further relief as it deems just and equitable.

JURY DEMAND

Farm Supply demands a trial by jury of no less than 6 as to all issues.

DATED this 4th day of February, 2015.

CAREY PERKINS LLP

By JS
Jessica E. Pollack, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2015, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher
Nicholas A. Warden
FISHER RAINEY HUDSON
910 W. Main St., Ste. 254
Boise, Idaho 83702
Telephone: (208) 345-7000
Attorneys for Plaintiff

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile (208) 297-2689

JS
Jessica E. Pollack



EXHIBIT 2

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**AMENDED NOTICE OF DEPOSITION
PURSUANT TO RULE 30(b)(6)**

To: Farm Supply Distributors, Inc. c/o Jessica Pollack
Carey Perkins, LLP
Capitol Park Plaza
300 North 6th St., Ste. 200
P.O. Box 519
Boise, Idaho 83701

PLEASE TAKE NOTICE that Plaintiff, by and through its counsel of record, FISHER RAINEY HUDSON, will take the testimony on oral examination of those witnesses so designated by Defendant Farm Supply Distributors, Inc., pursuant to Idaho Rule of Civil Procedure 30(b)(6), at the Eagle View Inn & Suites, 1200 Highland Avenue, Enterprise, Oregon, 97828,

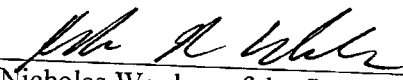
commencing at 1:00 p.m. on June 25, 2015, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

Pursuant to Rule 30(b)(6), plaintiff requests that Farm Supply Distributors, Inc. designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. The person(s) so designated shall testify as to matters known or reasonably available to the organization regarding the following topics:

1. Any information known by Farm Supply Distributors that demonstrates the amount charged by H2O Environmental for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho was unreasonable.
2. The validity and accuracy of the amount invoiced by H2O Environmental, Inc. for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho.

DATED this 15 day of June, 2015.

FISHER RAINEY HUDSON




Nicholas Warden, of the firm
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of June, 2015, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION PURSUANT TO RULE 30(b)(6)** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Jessica E. Pollack
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email



Nicholas Warden



EXHIBIT 3



May 29, 2015

Jessica Pollack
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th St., Ste. 200
P.O. Box 519
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Motion for Protective Order

Dear Jessica,

Thank you for your letter of May 15, 2015. Enclosed is a Notice of 30(b)(6) deposition set seven (7) days after the scheduling conference set for June 17th. In response to your letter:

- You asked that the deposition be conducted in Enterprise, Oregon. We agreed.
- You asked that the proposed deposition topics be narrowed. We agreed to remove three of the five proposed topics.
- You raised concerns regarding Farm Supply's ability to comply with Rule 30(b)(6) because nobody who works at Farm Supply can be designated. We have explained that under the Rule Farm Supply may appoint "other persons who consent to testify on its behalf" including a member of Farm Supply's insurance company, or that company's expert. If someone at the insurance company has knowledge of why H2O's bill is unreasonable, then that information is reasonably available to your client and it should appoint the most appropriate person from the insurance company to testify.
- Though I believe you fully understand the information we seek by our proposed topics, per your request for further clarification, we seek information regarding the facts that serve as the basis for your claim that what H2O charged Farm

Supply is unreasonable. We are also seeking the basis for Farm Supply's "red-lining" or revision of invoices it received from H2O.

Your client refuses to pay a bill. Your position appears to be that there is either nobody with knowledge of the reasons for why the bill has not been paid, or that the reasons for nonpayment are privileged or otherwise non-discoverable. We consider this position untenable and ask once again that you cooperate with us to complete this short deposition so that we can get this \$9000 dispute resolved quickly. If you insist on bringing this matter to the court's attention, we ask that you schedule the hearing on your motion for protective order at the time currently designated by the court for the upcoming scheduling conference.

Your anticipated cooperation is greatly appreciated.

Best regards,



Nick Warden



EXHIBIT 4

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

H2O ENVIRONMENTAL, INC., an Idaho)
Corporation,)

Plaintiff,)

vs.)

FARM SUPPLY DISTRIBUTORS, INC.,)
an Oregon corporation)

Defendant.)

No.
CV OC 1500236

30(b)(6) DEPOSITION OF CRAIG WILLIS
Taken at the instance of the Plaintiff

July 8, 2015
2:25 p.m.
1200 Highland Avenue
Enterprise, Oregon

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
P. O. Box 223
Pendleton, Oregon 97801
(541) 276-9491 - (800) 358-2345

1 there were no charges that you were able to identify
2 as unreasonable?

3 A. That's correct.

4 Q. Okay. Do you have any reason to believe
5 that the itemized charges within the, the itemized
6 charges contained in Exhibit 4 are somehow inaccurate?

7 A. No.

8 Q. Do you have any knowledge of the reasonable
9 value of environmental remediation services?

10 A. Do I have any knowledge of the reasonable
11 value?

12 Q. Of environmental remediation services?

13 A. No.

14 Q. Okay.

15 A. I don't own an environmental company. I
16 can tell you, if you want a gallon of gas hauled from
17 Portland, Oregon, to Boise, Idaho, I've got a
18 reasonable knowledge of the value of that.

19 Q. I believe it. Do you have any reason to
20 believe that there is somebody, an individual at
21 Vertex, with knowledge relevant to the reasonableness
22 of charges for environmental remediation services
23 performed by H2O?

24 A. No.

25 Q. Same question for Zurich. Do you have any

38

1 the boredom and torture of going through item through
2 item the services performed by H2O and asking you
3 whether or not the amount they charged is reasonable;
4 and instead, I'm going to ask you, generally, once
5 more, do you have any reason to believe that the
6 itemized charges that H2O -- Well, do you have any
7 reason to believe what H2O charged Farm Supply for the
8 environmental remediation services it performed in
9 response to the spill, were unreasonable, in any way
10 unreasonable?

11 A. I wouldn't have any knowledge of that.

12 Q. Okay. So, you have no reason to -- Do you
13 have any -- Well, let me -- My question is a little
14 different.

15 Do you have any reason to believe that
16 those charges were unreasonable?

17 A. No. Not other than the correspondence that
18 was, has been sent on to our office. That's the only
19 reason I would have to believe that there is a matter
20 in dispute about it.

21 Q. Is this correspondence between your
22 organization and counsel?

23 A. No.

24 Q. Okay. So, what the --

25 A. I'm talking about from H2O to our office to

40

ORIGINAL

Hans A. Mitchell, ISB No. 5565
Aubrey D. Lyon, ISB No. 8380
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. _____
A.M. _____ FILED 461
P.M. _____

AUG 04 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT FARM SUPPLY INC.'S
REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I.
INTRODUCTION

Plaintiff is attempting to transform its disorderly business practices into an enforceable contract. Plaintiff performed services without a contract and was paid a reasonable price for its services. In fact, Plaintiff accepted payment of 86 percent of what it unilaterally attempted to change. In order to recover the remaining 14 percent, Plaintiff has the burden of proving the existence of a contract.

Plaintiff has failed to show that a genuine issue of material fact exists regarding whether the parties entered into a contract. Plaintiff relies on the ratification doctrine as a substitute for evidence of the creation of a contract. That reliance is misplaced because ratification cannot apply where no contract arose in the first place. Plaintiff also argues that it should prevail because it merely seeks the reasonable value of its services. This argument fails because Plaintiff did not plead an equitable theory of relief in its Complaint.

II. ARGUMENT

A. **Ratification does not apply in this case, and Plaintiff failed to identify an issue of material fact regarding the formation of a contract.**

Plaintiff's sole argument against summary judgment on its breach of contract claim is that Defendant Farm Supply entered into a contract through ratification. Plaintiff's argument places the cart before the horse.

Plaintiff does not address the fundamental problem of its claim: Plaintiff and Farm Supply did not enter into a contract because they did not agree on a material term. Ratification is a contract theory that applies where a party agrees to be bound by an existing, though voidable, contract. *Clearwater Constr. & Eng'g v. Wickes Forest Indus.*, 108 Idaho 132, 135, 697 P.2d 1146, 1149 (1985). In order for ratification to apply, a contract must exist to be ratified. See *Restatement (Second) of Contracts* § 380 (discussing ratification of a voidable contract); see also *Clearwater Constr.*, 108 Idaho at 135, 697 P.2d at 1149 ("Ratification results where the party entering into the contract under duress intentionally accepts its benefits, remains silent, or acquiesces in it after an

opportunity to avoid it, or recognizes its validity by acting upon it.”). Plaintiff offered no authority for the proposition that ratification can be used as a substitute for the valid creation of a contract.

Additionally, ratification only applies in circumstances not present here: duress, undue influence, incapacity, abuse of fiduciary relation, and ultra vires conduct of an agent. *Sterling v. Bloom*, 111 Idaho 211, 267, 723 P.2d 755, 811 (1986) (principal not liable for agent’s unauthorized conduct unless principal acquiesces to the conduct); *Restatement (Second) of Contracts* § 380 (contract voidable due to duress, undue influence, incapacity, or abuse of fiduciary relationship may be ratified). Plaintiff relied upon the rule set forth in *Mountain Elec. co. v. Swartz*, but that rule only applies to ratification of an existing contract voidable due to duress. 87 Idaho 403, 411, 393 P.2d 724, 729 (1964). The passage from *Mountain Electric* that Plaintiff relies upon provides, in its entirety:

A contract entered into under duress is generally considered not void, but merely voidable, and is capable of being ratified after the duress is removed, such ratification resulting if the party entering into the contract under duress intentionally accepts the benefits growing out of it, remains silent, acquiesces in it for any considerable length of time after opportunity is afforded to avoid it or have it annulled, or recognizes its validity by acting upon it.

Id. Absent these specific special circumstances giving rise to a voidable contract, the ratification doctrine does not apply.

In this case, Plaintiff’s Complaint alleges breach of contract and breach of an implied term in the contract, and Farm Supply moved for summary judgment because the uncontroverted evidence shows that no contract was formed. The parties did not agree

on a material term—the price of Plaintiff’s services. Plaintiff and Farm Supply simply did not enter into a contract, voidable or otherwise, so no contract exists to be ratified. Plaintiff has the burden on summary judgment of showing the existence of elements essential to its case, and it has failed to show the existence of a contract. Accordingly, summary judgment for Farm Supply is appropriate.

B. Plaintiff’s argument regarding reasonable value of services is improperly raised on summary judgment because Plaintiff’s Complaint lacks an allegation of unjust enrichment.

Plaintiff contends that the issue of “whether H2O has received payment of the reasonable value of services it performed” is before the Court. (Plf.’s Response to Mot. For Summ. J. 5.) That assertion is incorrect.

Idaho R. Civ. P. 8(a)(1) requires a simple, concise, and direct statement fairly apprising the defendant of claims and grounds upon which the claim rests. *Myers v. A.O. Smith Harvestore Products*, 114 Idaho 432, 439, 757 P.2d 695, 702 (Ct.App.1988). In this case, Plaintiff’s sole cause of action in its Complaint was breach of contract. Plaintiff did not raise an equitable theory to recover the reasonable value of its services, and it cannot raise a new claim for relief in its opposition to Farm Supply’s motion for summary judgment.

**III.
CONCLUSION**

For the foregoing reasons, and there being no genuine issue of material fact, Defendant Farm Supply respectfully requests that this Court grant its motion for summary judgment.

DATED this 4th day of August, 2015.

CAREY PERKINS LLP

By Aubrey D. Lyon
Aubrey D. Lyon, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2015, I served a true and correct copy of the foregoing DEFENDANT FARM SUPPLY INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher
Nicholas A. Warden
FISHER RAINEY HUDSON
950 W. Bannock Street, Ste. 630
Boise, Idaho 83702
Telephone: (208) 345-7000
Attorneys for Plaintiff

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile (208) 297-2689

Aubrey D. Lyon
Aubrey D. Lyon

AUG 25 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

MOTION IN LIMINE

COMES NOW the Plaintiff, H2O Environmental, Inc., by and through its counsel of record, FISHER RAINEY HUDSON, and respectfully moves this Court for an order barring the Defendant, its witnesses, and its attorneys from mentioning in argument, and from offering evidence or cross-examining witnesses on the topics set forth below.

ARGUMENT

1. **Evidence that the amounts Plaintiff charged Defendant for environmental remediation services are unreasonable should be barred.**

JH

Evidence related to the unreasonableness of what H2O charged for its services should be barred because it conflicts with a position previously adopted by Defendant in this litigation. The doctrine of “[q]uasi-estoppel is properly invoked against a person asserting a claim inconsistent with a position previously taken by that person with knowledge of the facts and his or her rights, to the detriment of the person seeking application of the doctrine.” *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 70, 936 P.2d 1309, 1312 (1997); *see also Willig v. State, Dept. of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995); *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994).

In its Answer, Defendant states as an affirmative defense that “[p]ayment of any amount requested by the Plaintiff will result in unjust enrichment because the Plaintiff has been fully compensated for the *reasonable value of goods or services provided.*” Affidavit of Nicholas A. Warden In Support of Motion In Limine (“Warden Aff.”), Ex. 1 (emphasis added). After considerable back-and-forth, on June 15, 2015, H2O filed an amended notice of Rule 30(b)(6) deposition of the Defendant seeking a designee to testify as to “[a]ny information known by Farm Supply Distributors that demonstrates the amount charged by H2O Environmental for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho was unreasonable.” Warden Aff., Ex. 2. Concurrent with filing the amended notice, Plaintiff sent a letter to opposing counsel clarifying what information was sought by the above-cited topic stating that by this topic Plaintiff seeks “information regarding the facts that serve as the basis for your claim that what H2O charged Farm Supply is unreasonable.” Warden Aff., Ex. 3.

At the deposition, Greg Willis, owner, CEO and 30(b)(6) designee for Farm Supply, testified that (1) the company had no basis to contest the accuracy of what H2O billed Farm

Supply for its services (Warden Aff., Ex. 4, Willis Depo., 38:4-7), and that (2) Farm Supply had no basis to contest whether H2O charged a reasonable amount for the services it provided (*Id.* at 40:4-17). In accordance with the doctrine of quasi-estoppel, this Court should estop Defendant from introducing evidence or arguments at trial regarding the accuracy or reasonableness of H2O's charges because Defendant failed to produce evidence of such at the Rule 30(b)(6) deposition and affirmatively adopted the position that it has no basis to contest either.

DATED this 25 day of August, 2015.

FISHER RAINEY HUDSON




Nicholas Warden, of the firm
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of August, 2015, I caused a true and correct copy of the foregoing MOTION IN LIMINE to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Aubrey Lyon
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email



Nicholas Warden

Young
Beatty
9-10-15

ORIGINAL

Hans A. Mitchell, ISB No. 5565
Aubrey D. Lyon, ISB No. 8030
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

NO. _____
FILED _____
AM. _____ PM. 4:17

SEP 09 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT FARM SUPPLY
DISTRIBUTORS, INC.'S EXPERT
WITNESS DISCLOSURE

COMES NOW Defendant Farm Supply Distributors, Inc., by and through its
counsel of record, Carey Perkins LLP, and hereby discloses the expert witnesses it expects
to call at trial:

Chris Miceli, The Vertex Companies, Inc.: Mr. Miceli is an environmental
claims manager at The Vertex Companies. Mr. Miceli's qualifications are further set forth
in his curriculum vitae, attached hereto as **Exhibit 1**, and he is expected to testify
consistently with its contents, which are incorporated by reference herein. He is further

WS

expected to testify regarding his qualifications, background, education, and experience. Mr. Miceli holds the opinions disclosed herein to a reasonable degree of professional certainty.

Mr. Miceli is expected to testify concerning the materials and information that he has reviewed, and tasks performed, in connection with forming his opinions in this case, and he is expected to testify consistently with any deposition which he gives in this case. Mr. Miceli is expected to testify that his opinions and testimony in this matter will be based on those activities and review of materials in this case which include, but are not limited to:

- A. Plaintiff's Complaint;
- B. Transcript of IRCP 30(b)(6) deposition of Plaintiff's designee Steven King, dated August 17, 2015;
- C. Transcript of IRCP 30(b)(6) deposition of Plaintiff's designee Joe Wickenden, dated August 17, 2015;
- D. Plaintiff's Answers and Responses to Defendant's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission and any supplemental responses thereto;
- E. Records produced by Plaintiff in this matter, including those Bates numbered H2O 001 to H2O 113 and attached as Exhibit 10 to the deposition of Joe Wickenden;
- F. Any and all written correspondence between Vertex and Plaintiff and between Plaintiff and Defendant Farm Supply;
- G. Any other transcripts of depositions that may be taken in this matter;
- H. Any and all pleadings or matters on file with the Court in this matter;

- I. Any and all items produced or to be produced in discovery in this matter;
- J. Discovery is ongoing in this matter, and Plaintiff has failed to produce requested information and documents, and Defendant reserves the right to revise and update this disclosure as new information is developed or obtained; and
- K. Exhibit 2 and 3.

Mr. Miceli is also expected to respond to and address the reports and opinions of Plaintiff's experts. He is expected to testify that Plaintiff's invoices to Defendant Farm Supply had a variety of unreasonable charges as more fully set forth in Mr. Miceli's report attached hereto as **Exhibit 2** and explained below:

A. GapVax - In July and August 2014, H2O utilized a rate of \$235/hour for the Guzzler Vac Tank (GapVax). In November 2012 and February 2013, H2O utilized a rate of \$175/hour. Maxum Offshore Services, LLC has a rate of \$150/hour. The average cost for the four rates is \$183.75/hour. VERTEX applied a 5% markup due to the limited data points available for the GapVax within the rate sheets reviewed. Based on this information, and for the summer of 2014 in Boise, Idaho, the rate of \$195/hour was reasonable, and H2O's rate of \$235/hour was not reasonable.

B. 70 BBL Vacuum Truck - In July 2014, H2O utilized a rate of \$165/hour for the 70 BBL Vac Tanker (ER). Maxum Offshore Services, LLC has a rate of \$70/hour which VERTEX applied the 60% H2O ER markup to for a total cost of \$112/hour. VERTEX also applied a 15% markup due to the limited data points available for the 70 BBL Vacuum Truck within the rate sheets reviewed, for a total hourly rate of \$128/hour as identified in

our August 2014 Invoice Review Table. Based on this information, and for the summer of 2014 in Boise, Idaho, the rate of \$128/hour was reasonable, and H2O's rate of \$165/hour was not reasonable.

C. Powerwasher - In July 2014, H2O utilized a rate of \$70/hour (\$560/day) for the powerwasher. H2O utilized a rate of \$115/day in February 2013 and \$440/day in November 2012. NWFF Environmental has a rate of \$75/day, Sunbelt has a rate of \$120/day and Olympus has a rate of \$30/day. The average cost for the five rates (excluding H2O's August 2014 rate as VERTEX utilized more than three additional data points) is \$156/day. Based on this information, and for the summer of 2014 in Boise, Idaho, the rate of \$155/day was reasonable, and H2O's rate of \$70/hour (\$560/day) was not reasonable.

D. Crew Truck - In July and August 2014, H2O utilized a rate of \$75/hour for the crew truck. H2O utilized a rate of \$150/day (\$18.75/hour) in February 2013 and \$35/hour in November 2012. NWFF Environmental has a rate of \$31/hour, Olympus has a rate of \$95/day plus mileage at \$11.40 for a rate of \$13.30/hour and BB&A has a rate of \$12.50/hour. The average cost for the five rates (excluding H2O's August 2014 rate as VERTEX utilized more than three additional data points) is \$22.11/hour. Based on this information, and for the summer of 2014 in Boise, Idaho, the rate of \$22.50/hour was reasonable, and H2O's rate of \$75/hour was not reasonable.

E. PPE - In July and August 2014, H2O utilized a rate of \$45 per PPE usage. NWFF Environmental has a rate of \$10 per PPE and Olympus has a rate of \$35 per PPE. The average cost for the three rates is \$30 per PPE, the amount VERTEX identified as reasonable in our August 2014 Invoice Review Table. Based on this

information, and for the summer of 2014 in Boise, Idaho, the rate of \$30 per PPE was reasonable, and H2O's rate of \$45 per PPE was not reasonable.

F. Project Manager Admin Time - VERTEX identified labor hours identified as Project Manager - "Admin" time (39.5 hours). In VERTEX's professional opinion, these administrative efforts as described in Steve King's August 14, 2014 email to VERTEX (Bates No. H2O 004) ("organizing sub-contractor payments", "management of vendor receipts", "review of previous invoicing", "review of employee timesheets", and "compiling data to do the final invoicing") are not reasonable since they are not directly related to the remediation of the alleged loss. These costs appear to be associated with the "cost of doing business" and are considered as overhead business expenses which are not reasonably passed along to clients.

In Steve King's above referenced email, it was also cited that these admin costs (unspecified portion) were also related to "Scheduling labor and equipment to complete the final task of the project", "Writing the Spill report", and "Phone correspondence with Ada County Hwy District, Department of Environmental Quality, City of Boise Sewer District and Maverik Country Store regarding up-date on the status of the project and scheduling coordination for the final task". Since these administrative utilizations were not broken out into their respective explanations, VERTEX completed an assessment of the overall costs in an effort to identify potentially reasonable administrative costs that were not associated with perceived overhead business expenses. VERTEX concluded that 4 hours of project management time would be reasonable to complete the limited spill report and to complete the coordination with Ada County Hwy District, Department of Environmental Quality, City of Boise Sewer District and Maverik Country

Store. In an effort to calculate reasonable utilization with "Scheduling labor and equipment to complete the final task of the project", VERTEX applied 15% to the total emergency response technician hours (41.5) to estimate that a project manager would have been necessary for a total of 6.225 hours of coordination. We rounded this amount up to 7 hours and applied this total to the aforementioned 4 hours of report writing and coordination time to find a total of 11 reasonable PM - Admin hours. The remaining 28.5 hours of PM- Admin time was unreasonable, and H2O provided no documentation that the time was spent performing reasonable remediation-related activities.

Whenever possible, VERTEX utilized multiple data points for each calculation to determine a reasonable rate for Boise, Idaho in the summer of 2014. VERTEX utilized rate sheets from the following companies: H2O Environmental (H2O) (2013 and 2012); Sunbelt rentals in Meridian, Idaho; NWFF Environmental in Grants Pass, Oregon; Olympus Technical Services in Boise, Idaho; Maxum Offshore Services, LLC in New Iberia, Louisiana, and BB&A Environmental in Wilsonville, Oregon. Please note Maxum Offshore Services, LLC applies a 25% fuel and insurance charge to their equipment rates which VERTEX would not typically find as a reasonable remedial cost and therefore did not factor into our assessment of the reasonable costs.

The rates sheets and other data and information Mr. Miceli relied upon in reaching the opinions contained in this disclosure are attached hereto as **Exhibit 3**.

Publications authored by Mr. Miceli within the preceding 10 years: None

Other cases in which Mr. Miceli has testified as an expert at trial or by deposition within the preceding four years: None

Rate of compensation: \$142 per hour base rate and \$213 per hour for testimony.

DATED this 9th day of September, 2015.

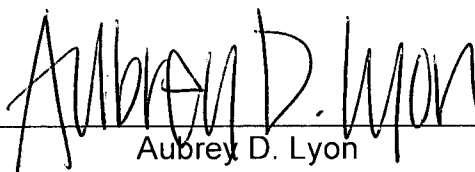
CAREY PERKINS LLP

By Aubrey D. Lyon
Aubrey D. Lyon, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2015, I served a true and correct copy of the foregoing DEFENDANT FARM SUPPLY DISTRIBUTORS, INC.'S EXPERT WITNESS DISCLOSURE by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Nicholas A. Warden	<input type="checkbox"/>	Hand-Delivered
FISHER RAINEY HUDSON	<input type="checkbox"/>	Overnight Mail
950 W. Bannock Street, Ste. 630	<input type="checkbox"/>	Facsimile (208) 297-2689
Boise, Idaho 83702		
Telephone: (208) 345-7000		
<i>Attorneys for Plaintiff</i>		


Aubrey D. Lyon

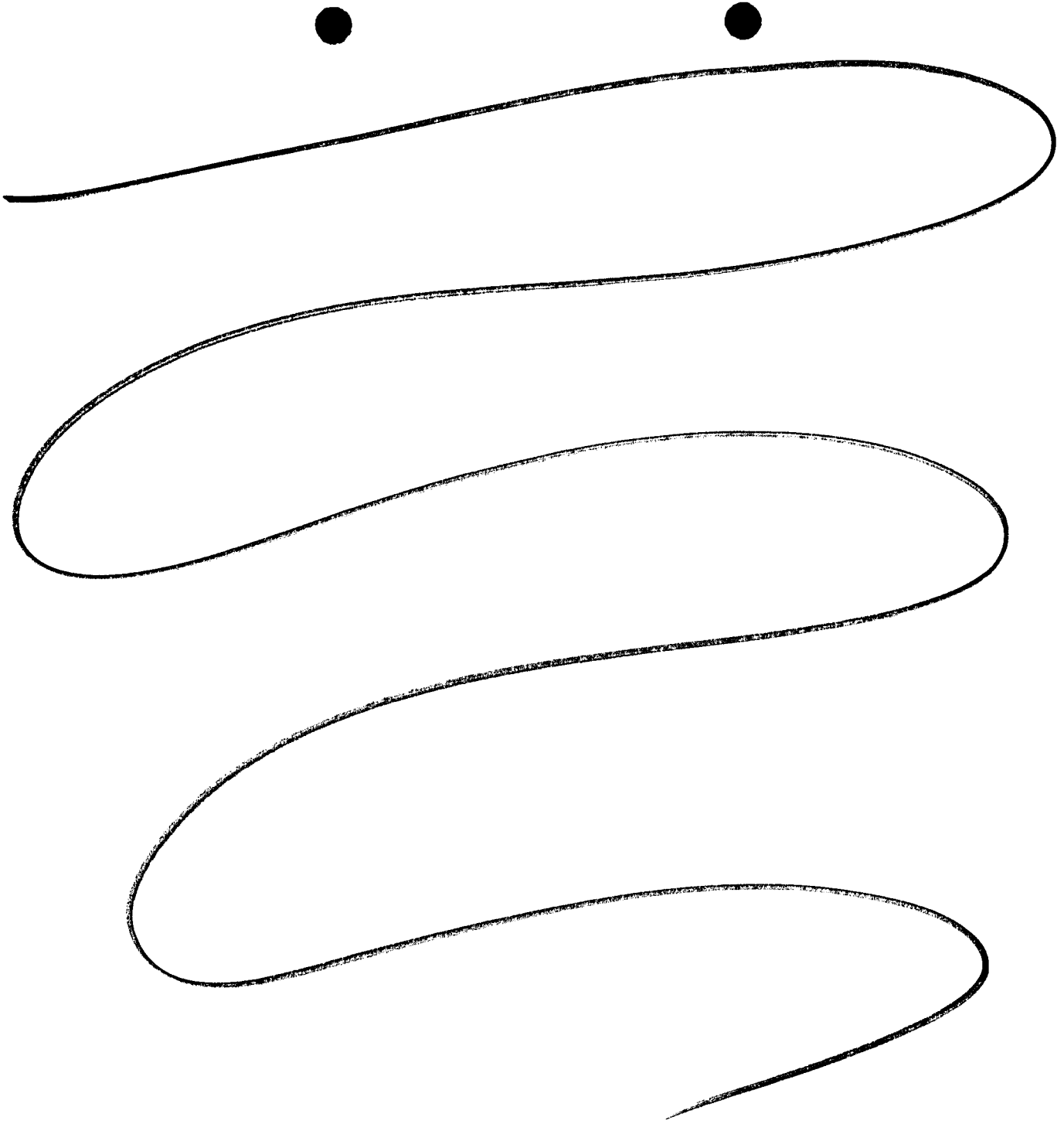


EXHIBIT 1



Christopher Miceli
Vice President / NJ Office Manager

[cmiceli@vertexeng.com / 732-414-2224]

Highlights:

Catastrophic Response Management Experience
 Claims Management Services
 Claims Investigation Services
 Subsurface Investigation Expertise
 Nationwide Due Diligence Experience
 Project Management Experience Nationwide
 Emergency Management Expertise

Expertise:

Phase I ESAs
 Phase II LSI
 Claim Investigation
 Environmental Loss Control
 Litigation Support & Expert Testimony (Insurance Support)
 Pollution C&O Investigations
 Pollution Claim Management
 Remedial Option Feasibility Analysis
 Third-Party Impact Investigation
 Hazardous Materials/Waste Litigation Support & Expert Testimony (Environmental)
 UST Removal

Education/Training:

B.S., Marine Science, Richard Stockton College of New Jersey, 1998

Special Training:

DOT Shipping Training, 2003
 Hazardous Materials Transportation Training, 2003
 Excavation, Soil Classification, Competent Person Training
 Measurement, Site Assessment & Regulatory Training

Biography:

Mr. Miceli is a Vice President at VERTEX. He has managed numerous environmental and professional liability claims in New Jersey, New York and across the United States. His responsibilities include client management, schedule coordination, and staffing of field investigations, claim investigations, and claim management projects. Claims have included cause and origin investigations, subrogation analysis, petroleum remediation of first and third party losses, pollution policies, cost cap policies, and indoor air quality claims.

Mr. Miceli has been responsible for the supervision, direction and budgetary control of more than 800 remedial actions. He was directly responsible for all phases of each project including proposal writing/bidding, remedial action assessment/design, remedial action implementation, field sampling and directives, regulatory reporting and correspondence with all applicable parties including clients, insurance companies, attorneys, and regulatory agents.

Licenses/Certifications:

NJDEP Licensed, Underground Storage Tank Closure/Evaluation, NJ
 OSHA Emergency Spill Response and First Responder Status
 First Aid & CPR Trained, American Red Cross
 40 Hour OSHA Hazardous Waste Operator (HAZWOPER) Certification
 8 Hour OSHA Supervisor

Associations:

Society of Military Engineers (SAME), Member NJ Post

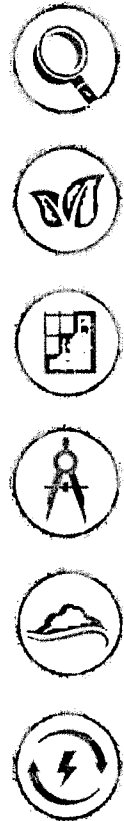
Relevant Experience:

[ENVIRONMENTAL CLAIMS] -

Senior project manager for numerous environmental claims both in New Jersey and across the United States. Claims included cause & origin investigations, subrogation analysis, petroleum remediation of first and third party losses, pollution policies, cost cap policies, and indoor air quality claims.

[ENVIRONMENTAL & PROFESSIONAL LIABILITY—OVERSIGHT] -

Office Manager responsible for the senior oversight of numerous environmental and professional liability claims. Responsibilities include client management, schedule coordination, and staffing of field investigations, claim investigations,



and claim management projects.

[REMEDIAL ACTIONS] -

Mr. Miceli has been responsible for the supervision, direction and budgetary control of more than 800 remedial actions. He was directly responsible for all phases of each project including proposal writing/bidding, remedial action assessment/design, remedial action implementation, field sampling and directives, regulatory reporting and correspondence with all applicable parties including clients, insurance companies, attorneys, and regulatory agents.

[CONSTRUCTION MANAGEMENT] -

Construction Manager for the installation and operation of a dual phase remediation system at JFK International Airport for the Port Authority of New York and New Jersey. The system treated contaminated soil vapor, groundwater, and jet-fuel. This system was installed in an active refueling station located in an "Air Operations Area" requiring close coordination with Port Authority and Federal personnel.

[REMEDIAL INVESTIGATION –MANUFACTURING PLANT] -

Project Manager and Regulatory Specialist for the remedial investigation and remediation at a former rubber manufacturing facility in Painesville, OH. This project included the sampling, and characterization of six process sludge lagoons totaling 37.5 million gallons, the full remedial investigation of the entire plant, the stabilization of over 150,000 cubic yards of sludge, and the capping of over 20 acres of landfill.

[CHEMICAL FACILITY] -

Site Supervisor and Regulatory Specialist for the demolition and site closure of a chemical dye manufacturing facility in Newark, NJ. This project included the pre-demolition abatement and off-site disposal of hazardous entities generated during process line and tank decommissioning (UST and AST), asbestos abatement, and assistance with remedial design.

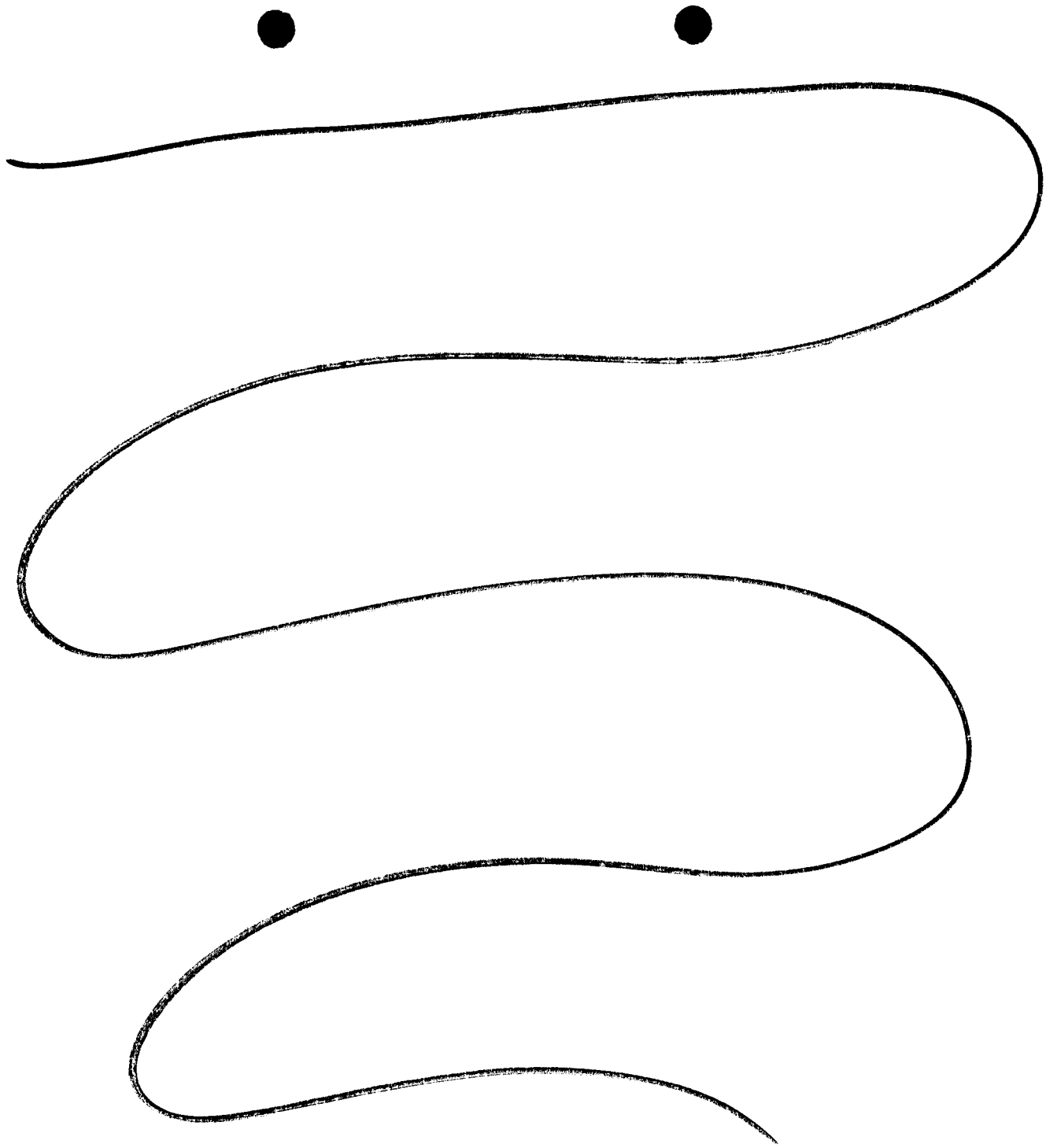


EXHIBIT 2

Farm Supply Distributors, Inc.

Contractor	Invoice No.	Invoice Amount	Total Reasonable Amount	Total Disputed Amount
H2O	8393501	\$30,987.24	\$26,530.53	\$4,456.71
H2O	8393741	\$14,840.96	\$11,943.02	\$2,897.94
TOTAL		\$45,828.19	\$38,473.55	\$7,354.64

Farm Supply Distributors, Inc.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
7/12/2014	PM	9.5	\$150.00	\$1,425.00	9.5	\$150.00	\$1,425.00	\$0.00	Costs appear reasonable.	
7/12/2014	ET	7	\$97.50	\$682.50	7	\$97.50	\$682.50	\$0.00	Costs appear reasonable.	
7/12/2014	Guzzler Vac Tank (ER)	9	\$375.00	\$3,375.00	9	\$312.00	\$2,808.00	\$567.00	A portion of the invoiced costs (\$567.00) appear excessive. VERTEX recommends \$195/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$195/hour in order to determine the reasonable amount.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/12/2014	70 BBL Vac Tanker (ER)	9	\$165.00	\$1,485.00	9	\$128.00	\$1,152.00	\$333.00	A portion of the invoiced costs (\$333.00) appear excessive. VERTEX recommends \$80/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$80/hour in order to determine the reasonable amount.	
7/12/2014	Roto Rooter	1.2	\$955.00	\$1,146.00	1.1	\$955.00	\$1,050.50	\$95.50	A portion of the invoiced costs (\$191.00) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/12/2014	Power washer (ER)	4	\$70.00	\$280.00	1	\$248.00	\$248.00	\$32.00	A portion of the invoiced costs (\$32.00) appear excessive. VERTEX recommends \$155/day. VERTEX has applied H2O's 60% Emergency Response Markup to \$155/day in order to determine the reasonable amount.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/12/2014	Crew truck (ER)	9.5	\$90.00	\$855.00	9.5	\$36.00	\$342.00	\$513.00	A portion of the invoiced costs (\$513.00) appear excessive. VERTEX recommends \$22.50/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$22.50/hour in order to determine the reasonable amount.	
7/12/2014	Traffic Control	1.2	\$361.40	\$433.68	1.1	\$361.40	\$397.54	\$36.14	A portion of the invoiced costs (\$72.28) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/13/2014	PM (ER)	6	\$150.00	\$900.00	6	\$150.00	\$900.00	\$0.00	Costs appear reasonable.	

Farm Supply Distributors, Inc.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
7/13/2014	120 BBl Vac Tanker (ER)	6	\$195.00	\$1,170.00	6	\$184.00	\$1,104.00	\$66.00	A portion of the invoice costs (\$66.00) associated with an excessive emergency response markup of 70% appears excessive. VERTEX recommends and has applied an Emergency Response mark up of 60%.	VERTEX applied H2O's Standard Emergency Response Markup.
7/13/2014	Roto Rooter	1.2	\$670.00	\$804.00	1.1	\$670.00	\$737.00	\$67.00	A portion of the invoiced costs (\$134.00) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/13/2014	Crew Truck (ER)	6	\$90.00	\$540.00	6	\$36.00	\$216.00	\$324.00	A portion of the invoiced costs (\$324.00) appear excessive. VERTEX recommends \$22.50/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$22.50/hour in order to determine the reasonable amount.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/13/2014	40 LF of Hydrophobic boom	1	\$260.00	\$260.00	1	\$260.00	\$260.00	\$0.00	Costs appear reasonable.	
7/14/2014	PM(ST)	7.5	\$85.00	\$637.50	7.5	\$85.00	\$637.50	\$0.00	Costs appear reasonable.	
7/14/2014	PM (OT)	6.5	\$127.50	\$828.75	6.5	\$127.50	\$828.75	\$0.00	Costs appear reasonable.	
7/14/2014	ET (ST)	6.5	\$50.00	\$325.00	6.5	\$50.00	\$325.00	\$0.00	Costs appear reasonable.	
7/14/2014	ET (OT)	6.5	\$75.00	\$487.50	6.5	\$75.00	\$487.50	\$0.00	Costs appear reasonable.	
7/14/2014	Guzzler Vac Tank (ST)	6.5	\$235.00	\$1,527.50	6.5	\$195.00	\$1,267.50	\$260.00	A portion of the invoiced costs (\$567.00) appear excessive. VERTEX recommends \$195/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/14/2014	Guzzler Vac Tank (OT)	6.5	\$352.50	\$2,291.25	6.5	\$292.50	\$1,901.25	\$390.00	A portion of the invoiced costs (\$390.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour. VERTEX has applied H2O's 50% Overtime Markup to \$195/hour in order to determine the reasonable amount.	
7/14/2014	120 BBL Vac Tank (ST)	6.5	\$115.00	\$747.50	6.5	\$115.00	\$747.50	\$0.00	Costs appear reasonable.	
7/14/2014	120 BBL Vac Tank (OT)	6	\$172.50	\$1,035.00	6	\$172.50	\$1,035.00	\$0.00	Costs appear reasonable.	

Farm Supply Distributors, Inc.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
7/14/2014	Crew truck with gate lift (ST)	7.5	\$75.00	\$562.50	7.5	\$22.50	\$168.75	\$393.75	A portion of the invoiced costs (\$324.00) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/14/2014	Crew truck w lift gate (OT)	6.5	\$90.00	\$585.00	6.5	\$33.75	\$219.38	\$365.63	A portion of the invoiced costs (\$324.00) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour. VERTEX has applied H2O's 50% Overtime Markup to determine the reasonable rate.	
7/14/2014	Traffic Service	1.2	\$1,105.90	\$1,327.08	1.1	\$1,105.90	\$1,216.49	\$110.59	A portion of the invoiced costs (\$221.18) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/14/2014	Roto Rooter	1.2	\$2,120.00	\$2,544.00	1.1	\$2,120.00	\$2,332.00	\$212.00	A portion of the invoiced costs (\$424.00) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/14/2014	Power washer	4	\$70.00	\$280.00	1	\$155.00	\$155.00	\$125.00	A portion of the invoiced costs (\$32.00) appear excessive of standard industry rates. The standard industry rate for a power washer is \$155/day.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/14/2014	Simple green	1.2	\$211.58	\$253.90	1.1	\$211.58	\$232.74	\$21.16	A portion of the invoiced costs (\$42.32) is considered unreasonable due to an excessive 20% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.	
7/14/2014	hydrophobic boom	2	\$40.00	\$80.00	2	\$40.00	\$80.00	\$0.00	Costs appear reasonable.	
7/14/2014	disposal	3161	\$0.35	\$1,106.35	3161	\$0.35	\$1,106.35	\$0.00	Costs appear reasonable.	
7/15/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.	
7/15/2014	Guzzler Vac Tank	5	\$235.00	\$1,175.00	5	\$195.00	\$975.00	\$200.00	A portion of the invoiced costs (\$200.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.

Farm Supply Distributors, Inc.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
	Fuel surcharge	0.1	\$15,043.75	\$1,504.38	0.1	\$11,594.38	\$1,159.44	\$344.94	A portion of the invoiced costs (\$74.00) appear excessive. In order to determine the reasonable rate, vertex multiplied the total reasonable equipment charges by 10%.	Fuel surcharges related to disputed costs do not appear reasonable.
	Disposal	1.73	\$45.00	\$77.85	1.73	\$45.00	\$77.85	\$0.00	Costs appear reasonable.	
				Total Invoiced Amount			TOTAL REASONABLE AMOUNT	TOTAL DISPUTED AMOUNT		
				\$30,987.24			\$26,530.53	\$4,456.71		

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
7/16/2014	PM Admin	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.	
7/17/2014	PM Admin	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.	
7/18/2014	PM Admin	5	\$50.00	\$250.00	1	\$50.00	\$50.00	\$200.00	A portion of the invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	The labor descriptions provided included administrative tasks that were not related to the remedial effort. Since an hourly breakdown was not provided, VERTEX estimated and disputed the time spent on non-remedial administrative tasks.
7/21/2014	PM Admin	2	\$50.00	\$100.00	0	\$50.00	\$0.00	\$100.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	
7/22/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.	
7/23/2014	PM Admin	2	\$50.00	\$100.00	0	\$50.00	\$0.00	\$100.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	The labor descriptions provided included administrative tasks that were not related to the remedial effort. Since an hourly breakdown was not provided, VERTEX estimated and disputed the time spent on non-remedial administrative tasks.
7/24/2014	PM Admin	2.5	\$50.00	\$125.00	0	\$50.00	\$0.00	\$125.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	
7/25/2014	PM Admin	1.5	\$50.00	\$75.00	0	\$50.00	\$0.00	\$75.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	
NA	Guzzler Vac Tank	3	\$235.00	\$705.00	3	\$195.00	\$585.00	\$120.00	A portion of the invoiced costs (\$120.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
NA	10% Fuel Surcharge	0.1	\$705.00	\$70.50	0.1	\$585.00	\$58.50	\$12.00	A portion of the invoiced costs (\$12.00) appears excessive. In order to determine the reasonable fuel surcharge, VERTEX multiplied the total reasonable equipment costs by 10%.	Fuel surcharges related to disputed costs do not appear reasonable.
7/14/2014	Waste Disposal	3781	\$0.35	\$1,323.35	0.35	\$3,781.00	\$1,323.35	\$0.00	Costs appear reasonable.	

Farm Supply Distributors

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
7/25/2014	Waste Disposal	289.9	\$0.35	\$101.47	0.35	\$282.90	\$99.02	\$2.45	A portion of the invoiced costs (\$2.45) appear excessive in the absence of supporting documentation.	
7/28/2014	PM Admin	1	\$50.00	\$50.00	0	\$50.00	\$0.00	\$50.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	
7/29/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.	
7/30/2014	ET	7.5	\$50.00	\$375.00	7.5	\$50.00	\$375.00	\$0.00	Costs appear reasonable.	
7/30/2014	ET (OT)	6	\$50.00	\$300.00	6	\$50.00	\$300.00	\$0.00	Costs appear reasonable.	
7/30/2014	PM	2	\$85.00	\$170.00	2	\$85.00	\$170.00	\$0.00	Costs appear reasonable.	
7/30/2014	PM Admin	4	\$50.00	\$200.00	0	\$50.00	\$0.00	\$200.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	The labor descriptions provided included administrative tasks that were not related to the remedial effort. Since an hourly breakdown was not provided, VERTEX estimated and disputed the time spent on non-remedial administrative tasks.
7/30/2014	Guzzler Vac Tank	7.5	\$235.00	\$1,762.50	7.5	\$195.00	\$1,462.50	\$300.00	A portion of the invoiced costs (\$300.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/30/2014	Roll off truck	2.5	\$95.00	\$237.50	2.5	\$95.00	\$237.50	\$0.00	Costs appear reasonable.	
7/30/2014	Transport and Disposal of light pole	1	\$100.00	\$100.00	1	\$100.00	\$100.00	\$0.00	Costs appear reasonable.	
7/30/2014	PPE	2	\$45.00	\$90.00	2	\$30.00	\$60.00	\$30.00	A portion of the invoiced costs (\$30.00) are excessive of standard industry rates.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
7/30/2014	ADA Sand & Gravel	1.2	\$137.46	\$164.95	1.1	\$137.46	\$151.21	\$13.75	A portion of the invoiced costs (\$13.75) appears excessive due to an excessive subcontractor markup. VERTEX recommends and has applied a markup of 10%.	
7/30/2014	Waste disposal	7.18	\$40.00	\$287.20	7.18	\$40.00	\$287.20	\$0.00	Costs appear reasonable.	
7/31/2014	PM	1.5	\$85.00	\$127.50	1.5	\$85.00	\$127.50	\$0.00	Costs appear reasonable.	
8/1/2014	ET	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.	

Farm Supply Distributors

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
8/1/2014	ET (OT)	1.5	\$75.00	\$112.50	1.5	\$50.00	\$75.00	\$37.50	A portion of the invoiced costs (\$37.50) are considered excessive as the ET worked 6.5 hours and it does not appear that overtime applies.	Based on the description, it appears that use of OT was not necessary as the scope of work did not necessitate individual labor over 40 hours for the week.
8/1/2014	ET (OT)	1.5	\$75.00	\$112.50	1.5	\$50.00	\$75.00	\$37.50	A portion of the invoiced costs (\$37.50) are considered excessive as the total Environmental Technician hours did not exceed 8-hours.	VERTEX corrected the invoiced amount to match the timesheets supplied by H2O.
8/1/2014	ET	3.5	\$50.00	\$175.00	3.5	\$50.00	\$175.00	\$0.00	Costs appear reasonable.	
8/1/2014	PM	2	\$85.00	\$170.00	2	\$85.00	\$170.00	\$0.00	Costs appear reasonable.	
8/1/2014	PM Admin	3	\$50.00	\$150.00	0	\$50.00	\$0.00	\$150.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	The labor descriptions provided included administrative tasks that were not related to the remedial effort. Since an hourly breakdown was not provided, VERTEX estimated and disputed the time spent on non-remedial administrative tasks.
8/1/2014	Guzzler	5	\$235.00	\$1,175.00	5	\$195.00	\$975.00	\$200.00	A portion of the invoiced costs (\$300.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
8/1/2014	Backhoe	3.5	\$75.00	\$262.50	3.5	\$75.00	\$262.50	\$0.00	Costs appear reasonable.	
8/1/2014	Roll off with trailer	6	\$135.00	\$810.00	6	\$135.00	\$810.00	\$0.00	Costs appear reasonable.	
8/1/2014	Roll off with trailer OT	1.5	\$202.50	\$303.75	1.5	\$202.50	\$303.75	\$0.00	Costs appear reasonable.	
8/1/2014	Crew Truck	9	\$75.00	\$675.00	9	\$22.50	\$202.50	\$472.50	A portion of the invoiced costs (\$472.50) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.	VERTEX applied a rate that reflected similar contractor rates for the region and other major metropolitan areas throughout the continental United States.
8/1/2014	Crew Truck OT	1	\$90.00	\$90.00	1	\$22.50	\$22.50	\$67.50	A portion of the invoiced costs (\$67.50) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.	
8/1/2014	10% Fuel Surcharge	3316.25	\$0.10	\$331.63	0.1	\$2,576.25	\$257.63	\$74.01	A portion of the invoiced costs (\$74.00) appear excessive. In order to determine the reasonable rate, vertex multiplied the total reasonable equipment charges by 10%.	
8/1/2014	White Tyvek	4	\$14.00	\$56.00	4	\$14.00	\$56.00	\$0.00	Costs appear reasonable.	

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments	Explanation
8/1/2014	Poly Yellow Tyvek	1	\$30.00	\$30.00	1	\$30.00	\$30.00	\$0.00	Costs appear reasonable.	
8/1/2014	Green Nitrile Gloves	2	\$9.00	\$18.00	2	\$9.00	\$18.00	\$0.00	Costs appear reasonable.	
7/31/2014	Waste Disposal	15.75	\$40.00	\$630.00	15.75	\$40.00	\$630.00	\$0.00	Costs appear reasonable.	
8/4/2014	ET	3.5	\$50.00	\$175.00	3.5	\$50.00	\$175.00	\$0.00	Costs appear reasonable.	
8/4/2014	PM	1	\$85.00	\$85.00	1	\$85.00	\$85.00	\$0.00	Costs appear reasonable.	
8/5/2014	PM Admin	3.5	\$50.00	\$175.00	0	\$50.00	\$0.00	\$175.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	The labor descriptions provided included administrative tasks that were not related to the remedial effort. Since an hourly breakdown was not provided, VERTEX estimated and disputed the time spent on non-remedial administrative tasks.
8/6/2014	PM Admin	5	\$50.00	\$250.00	0	\$50.00	\$0.00	\$250.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.	
8/4/2014	Compactor	3.5	\$45.00	\$157.50	3.5	\$45.00	\$157.50	\$0.00	Costs appear reasonable.	
8/4/2014	Backfill	1.2	\$130.34	\$156.41	1.1	\$130.34	\$143.37	\$13.04	A portion of the costs (\$13.03) associated with an excessive subcontractor mark up appears excessive.	
8/4/2014	Laboratory Analysis	1	\$250.00	\$250.00	1.1	\$143.00	\$157.30	\$92.70	A portion of the invoiced costs (\$92.70) associated with an excessive mark up costs is considered unreasonable. VERTEX recommends and has applied a 10% subcontractor markup.	
8/4/2014	Waste Disposal	12.88	\$40.00	\$515.20	12.88	\$40.00	\$515.20	\$0.00	Costs appear reasonable.	
				Total Invoiced Amount			TOTAL REASONABLE AMOUNT	TOTAL DISPUTED AMOUNT		
				\$14,840.96			\$11,943.02	\$2,897.94		

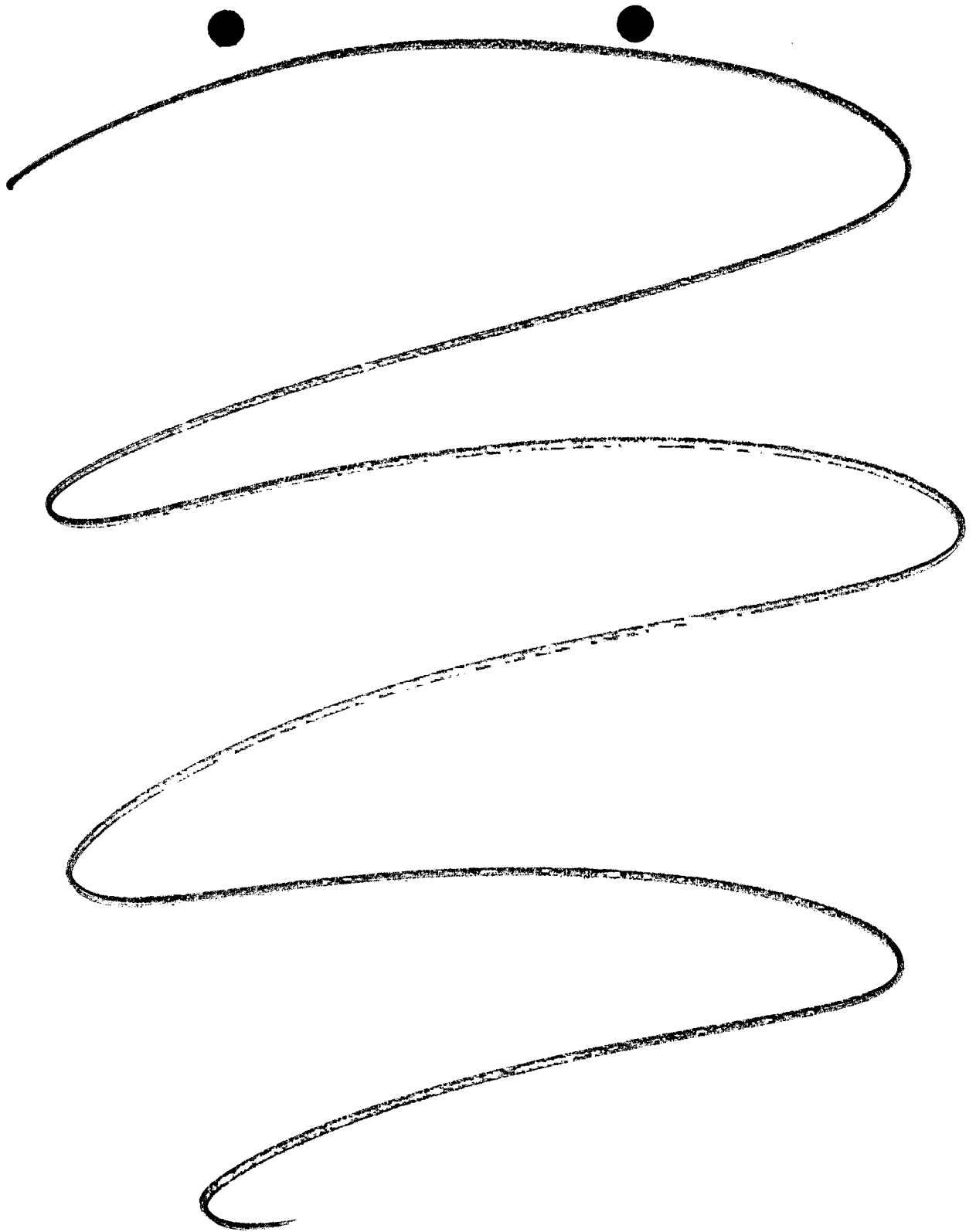


EXHIBIT 3



- 4035 Flossmoor Street, Las Vegas, NV 89115, 702-396-4148
- 3510 Barron Way, Suite #200, Reno, NV 89115, 775-351-2237
- 6679 S. Supply Way, Boise, ID 83716, 208-343-7867
- 170 West 3440 South, Suite # 170, Salt Lake City, UT 84115, 801-355-3499
- 2364 South Airport Blvd., Suite #2, Chandler, AZ 85249, 602-258-3388

Nevada License – 0052215 ♦ California License - 809096 ♦ Oregon License - 185653 ♦ Idaho License - RCE-22451

Vacuum Truck & Roll-off Service ♦ 24 Hr. HAZMAT Spill Response

www.h2ospill.com

SERVICES ESTIMATE

To:	Dana Gorra	From:	Perry Pearson		
Company:	Texmo Oil Company	Email:	ppearson@h2oenvironmental.net		
Address:		Date:	11.26.12		
Fax:		Scope:	Asphalt and soil removal from previous diesel release.		
Phone:	928.716.8473	Site:	4444 W. Sunset Road.		
Scope of work: Utilize a Vactor Vacuum Truck to effectively safe 47 x 60 size area of petroleum contaminated soil. Also utilize a walk behind blade saw to remove 47 x 60 size area of asphalt. This spill is a reportable and a Certified Environmental Manager will assist in the remediation process. a private utility company will be used as well. All solid waste will be transported to an approved landfill for disposal.					
		Rate	Quantity	UOM	Total
	Vactor Vacuum Truck / safe dig	\$175.00	24	Hrs.	\$4,200.00
	Case Back-Hoe loader	\$65.00	12	Hrs.	\$780.00
	Lowboy Transport	\$105.00	6	Hrs.	\$630.00
	Utility Truck	\$35.00	14	Hrs.	\$490.00
	Walk behind concrete saw	\$45.00	6	Hrs.	\$270.00
	Pressure Washer ie; dust control	\$55.00	14	Hrs.	\$770.00
	Side Dump 22y	\$105.00	24	Hrs.	\$2,520.00
	Equipment Operator	\$65.00	24	Hrs.	\$1,560.00
	Certified Environmental Manager	\$125.00	24	Hrs.	\$3,000.00
	Field Technician x2	\$90.00	24	Hrs.	\$2,160.00
	Private Utility				\$450.00
	Closure report to Nevada / Samples				\$1,500.00
	Disposal of petroleum contaminated soil	\$45.00	TBD	Ton.	TBD
	Fuel Surcharge @ #####	10%			\$966.00
	Line item 38 is not included in the total				\$19,296.00

Estimate Approval Signature:

Approval Date:

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- 4035 Flossmoor Street, Las Vegas, NV 89115, 702-396-4148
- 3510 Barron Way, Suite #200, Reno, NV 89115, 775-351-2237
- 6679 S. Supply Way, Boise, ID 83716, 208-343-7867
- 170 West 3440 South, Suite # 170, Salt Lake City, UT 84115, 801-355-3499
- 2364 South Airport Blvd., Suite #2, Chandler, AZ 85249, 602-258-3388

Nevada License – 0052215 ♦ California License - 809096 ♦ Oregon License - 185653 ♦ Idaho License - RCE-22451

Vacuum Truck & Roll-off Service ♦ 24 Hr. HAZMAT Spill Response

www.h2ospill.com

SERVICES ESTIMATE

To:	Dana Gorra	From:	Perry Pearson	
Company:	Texmo Oil Company	Email:	ppearson@h2oenvironmental.net	
Address:	N/A	Date:	02.13.13	
Fax:		Scope:	Ast tank removal and complete excavation of soil.	
Phone:	928.716.8473	Site:	4444 W. Sunset Road	
Scope of work: Utilize a 330 Track Hoe w/ Hammer to safely and effectively remove a 10,000 gallon above ground storage diesel tank, also to remove concrete slab storage tank is sitting on. Upon removal of concrete slab and tank all petroleum contaminated soil will be removed with the direction of a Certified Environmental Manager. All waste will be disposed of properly.				
	Rate	Quantity	UOM	Total
330 Track-Hoe	\$175.00	30	Hrs.	\$5,250.00
Hammer	\$165.00	8	Hrs.	\$1,320.00
Lowboy Transport Trailer	\$105.00	16	Hrs.	\$1,680.00
Uni-Loader w/Bucket	\$65.00	40	Hrs.	\$2,600.00
Gapvax Vacuum Truck	\$175.00	30	Hrs.	\$5,250.00
Rocket Launcher Roll-Off	\$115.00	40	Hrs.	\$4,600.00
Utility Truck	\$150.00	4	Ea.	\$600.00
Project Manager	\$85.00	40	Hrs.	\$3,400.00
Certified Environmental Manager	\$125.00	40	Hrs.	\$5,000.00
Environmental Technician x2	\$90.00	40	Hrs.	\$3,600.00
Equipment Operator x2	\$130.00	40	Hrs.	\$5,200.00
Disposal of petroleum contaminated soil	\$32.40	100	Ton	\$3,240.00
Disposal petroleum contaminated concrete	\$30.00	35	Ton	\$1,050.00
Bin Rental x6	\$45.00	6	Ea.	\$270.00
Fuel Surcharge @ #####	10%			\$1,998.00
Total				\$45,058.00

Estimate Approval Signature:

Approval Date:

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Vacuum Truck & Roll-off Service ♦ 24 Hr. HAZMAT Spill Response

www.h2ospill.com

SERVICES ESTIMATE

To:	Dana Gorra	From:	Perry Pearson	
Company:	Texmo Oil Company	Email:	ppearson@h2oenvironmental.net	
Address:	N/A	Date:	02.13.13	
Fax:		Scope:	Backfill to grade previous excavation	
Phone:	928.716.8473	Site:	4444 W. Sunset Road	
Scope of work: Utilize type II fill to backfill to grade previous excavation site.				
	Rate	Quantity	UOM	Total
Back-Hoe	\$65.00	16	Hrs.	\$1,040.00
Wacker Compactor	\$50.00	16	Hrs.	\$800.00
Lowboy Transport	\$105.00	8	Hrs.	\$850.00
Side Dump	\$105.00	10	Hrs.	\$1,050.00
Pressure Washer	\$115.00			\$115.00
Utility Truck	\$150.00	2	Ea.	\$300.00
Equipment Operator x1	\$65.00	16	Hrs.	\$1,040.00
Project Manager	\$85.00	16	Hrs.	\$1,360.00
Environmental Technician x2	\$90.00	16	Hrs.	\$1,440.00
Type II Backfill	\$5.25	200	Ton	\$1,050.00
Fuel Surcharge @ #####	10%			\$415.50
Total				\$9,460.50

Estimate Approval Signature:

Approval Date:

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VEHICLES

BILLING RATE

[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
Response Vehicle #14	4x4 Ranger Flatbed	\$ 31.00	per hour
Response Vehicle #16	4x4 F150 Flatbed	\$ 31.00	per hour
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
Response Vehicle #18	4x4 F150 Crew Cab	\$ 31.00	per hour
[REDACTED]	[REDACTED]	\$ 38.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 36.00	[REDACTED]
Response Vehicle #21	Ford F250 (4wd, Gas)	\$ 31.00	per hour
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 36.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 38.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 38.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 31.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 31.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 31.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 60.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 150.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 150.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 350.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 350.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 250.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 400.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 350.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 450.00	[REDACTED]

[REDACTED]	[REDACTED]	\$ 300.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 300.00	[REDACTED]

		BILLING RATE	
[REDACTED]	[REDACTED]	\$ 4,800.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 400.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 1,000.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 40.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 175.00	[REDACTED]
Level "D"	[REDACTED]	\$ 10.00	each
[REDACTED]	[REDACTED]	\$ 25.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 35.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 30.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 300.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 35.75	[REDACTED]
[REDACTED]	[REDACTED]	\$ 12.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 13.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 45.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 360.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 10.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 10.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 60.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 125.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 16.00	[REDACTED]

CLEANING SUPPLIES

[REDACTED]	\$ 68.00	[REDACTED]
[REDACTED]	\$ 20.00	[REDACTED]
[REDACTED]	\$ 60.00	[REDACTED]
[REDACTED]	\$ 80.00	[REDACTED]
[REDACTED]	\$ 250.00	[REDACTED]
[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	\$ 25.00	[REDACTED]
[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	\$ 31.00	[REDACTED]
[REDACTED]	\$ 125.00	[REDACTED]
[REDACTED]	\$ 35.00	[REDACTED]
[REDACTED]	\$ 15.00	[REDACTED]
[REDACTED]	\$ 3.00	[REDACTED]
[REDACTED]	\$ 115.00	[REDACTED]
[REDACTED]	\$ 3.00	[REDACTED]
[REDACTED]	\$ 115.00	[REDACTED]
[REDACTED]	\$ 37.50	[REDACTED]
[REDACTED]	\$ 29.00	[REDACTED]
[REDACTED]	\$ 49.00	[REDACTED]
[REDACTED]	\$ 35.00	[REDACTED]
[REDACTED]	\$ 11.50	[REDACTED]
[REDACTED]	\$ 10.00	[REDACTED]

ABSORBENT MATERIALS**BILLING RATE**

[REDACTED]	\$ 94.00	[REDACTED]
[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	\$ 184.32	[REDACTED]
[REDACTED]	\$ 207.36	[REDACTED]
[REDACTED]	\$ 172.80	[REDACTED]
[REDACTED]	\$ 219.60	[REDACTED]
[REDACTED]	\$ 180.00	[REDACTED]
[REDACTED]	\$ 28.50	[REDACTED]
[REDACTED]	\$ 25.00	[REDACTED]
[REDACTED]	\$ 29.52	[REDACTED]
[REDACTED]	\$ 18.00	[REDACTED]
[REDACTED]	\$ 133.20	[REDACTED]
[REDACTED]	\$ 175.00	[REDACTED]
[REDACTED]	\$ 230.00	[REDACTED]
[REDACTED]	\$ 150.00	[REDACTED]

DRUMS**BILLING RATE**

[REDACTED]	\$ 30.00	[REDACTED]
[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	\$ 115.00	[REDACTED]
[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	\$ 55.50	[REDACTED]
[REDACTED]	\$ 165.00	[REDACTED]
[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	\$ 125.00	[REDACTED]
[REDACTED]	\$ 400.00	[REDACTED]
[REDACTED]	\$ 75.00	[REDACTED]
[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	\$ 4.00	[REDACTED]
[REDACTED]	\$ 170.00	[REDACTED]

STORAGE TANK

BILLING RATE

[REDACTED]	[REDACTED]	\$ 50.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 400.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 400.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 2,000.00	[REDACTED]

MISCELLANEOUS EQUIP

BILLING RATE

[REDACTED]	[REDACTED]	\$ 200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 46.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 60.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 15.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 10.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 25.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 23.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 40.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 10.80	[REDACTED]
[REDACTED]	[REDACTED]	\$ 150.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 2.50	[REDACTED]
[REDACTED]	[REDACTED]	\$ 40.00	[REDACTED]
Pressure Washer		\$ 75.00	per day
[REDACTED]	[REDACTED]	\$ 60.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 53.25	[REDACTED]
[REDACTED]	[REDACTED]	\$ 1.25	[REDACTED]
[REDACTED]	[REDACTED]	\$ 34.50	[REDACTED]
[REDACTED]	[REDACTED]	\$ 15.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ 15.50	[REDACTED]
[REDACTED]	[REDACTED]	\$ 195.25	[REDACTED]
[REDACTED]	[REDACTED]	\$ 40.00	[REDACTED]

MARINE EQUIPMENT

BILLING RATE

[REDACTED]	[REDACTED]	\$ [REDACTED] 2.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 1.75	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 1.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 25.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 5.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 1,200.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 500.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 0.50	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 350.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 0.25	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 130.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 15.50	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 5.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 15.00	[REDACTED]

[REDACTED]	[REDACTED]	\$ [REDACTED] 23.25	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 77.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 40.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 77.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 37.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 90.06	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 7.75	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 15.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 40.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 20.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED] 281.75	[REDACTED]

TESTING EQUIPMENT

BILLING RATE

[REDACTED]	\$ [REDACTED] 105.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 36.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 25.63	[REDACTED]

[REDACTED]	\$ [REDACTED] 15.50	[REDACTED]
[REDACTED]	\$ [REDACTED] 15.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 26.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 60.48	[REDACTED]
[REDACTED]	\$ [REDACTED] 10.00	[REDACTED]

[REDACTED]	\$ [REDACTED] 300.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 50.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]

[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 25.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 300.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 30.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 175.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 40.00	[REDACTED]
[REDACTED]	\$ [REDACTED] 100.00	[REDACTED]

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██████████	██████████
██████████	\$██████████ 65.00
██████████	\$██████████ 85.00
██████████	\$██████████ 300.00

██████████ invoices subject to State and Local taxes not included in prices.

- * 3% fee for payment by credit card
- * These rates are portal to portal
- * Prices subject to change without notice
- * All day rates are based on an 8hr operational period
- * NWFF recognizes the following holidays (If a paid holiday falls on Saturday, the preceding Friday will be observed as the holiday. If a paid holiday falls on Sunday, the holiday will be observed on the following Monday)

• New Year's Day • Memorial Day • Independence Day
• Labor Day • Veterans Day •
• Thanksgiving (Thu & Fri) • Christmas Day

FIELD TEST EQUIPMENT

[REDACTED]

[REDACTED]

SUPPORT EQUIPMENT

[REDACTED]
er

[REDACTED]

[REDACTED]

Pressure Washer

[REDACTED]

[REDACTED]

\$30.00 day

[REDACTED]

PUMPS AND HOSES

[REDACTED]

[REDACTED]

BARRELS/ DRUMS (Department of Transportation approved)

[REDACTED]

[REDACTED]

READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

AVAILABLE RENTAL EQUIPMENT

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
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READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

[REDACTED]

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READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

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READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

[REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

List Price

Discounted
Price/day

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
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[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
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[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

GAP Vac & Vacuum Trucks	
70 bbl Bob Trail Vacuum Truck and Operator	\$70.00 per hour plus 25% Fuel and Insurance
GAP Vacuum Truck and Operator	\$150.00 per hour plus 25% Fuel and Insurance
[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

READY TO MEET YOUR RENTAL & SUPPLY NEEDS 24/7!



1307 TOOL DR.
NEW IBERIA, LA 70560
Phone: 337-364-9526

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] call for pricing ****

Flatbed Truck (per day)	\$100.00
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

NO. _____ FILED _____
A.M. _____ P.M. *4:30*

Vaughn Fisher, ISB No. 7624
Nicholas A. Warden, ISB No. 9179
FISHER RAINEY HUDSON
950 W. Bannock St., Ste. 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com
Email: naw@frhtriallawyers.com
Telephone: (208) 345-7000
Facsimile: (208) 514-1900

NOV 10 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**MOTION TO FILE SUPPLEMENTAL
AFFIDAVIT IN SUPPORT OF
PLAINTIFF'S MOTION IN LIMINE**

COMES NOW the Plaintiff, H2O Environmental, Inc., by and through its counsel of record, FISHER RAINEY HUDSON, and respectfully moves this Court for an Order permitting it to file the attached Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine.

Plaintiff filed a Motion in Limine on August 25, 2015 along with the Affidavit of Nicholas A. Warden in Support of the Motion in Limine. The parties subsequently agreed to attend mediation and indefinitely delayed the hearing of three pending motions, including Plaintiff's Motion in Limine to prohibit Defendant from introducing evidence at trial regarding the

ORIGINAL

2

reasonableness of the amounts charged by the Plaintiff to the Defendant for emergency environmental remediation services.

On September 9, 2015, the Defendant for the first time prior to or during this litigation revealed the basis for its contention the fees were unreasonable by disclosing expert witness Chris Miceli. Because Mr. Miceli's opinions fall within the ambit of Plaintiff's already pending Motion in Limine and his disclosure was made after the filing of the motion, Plaintiff should be permitted to file the attached supplemental affidavit so the Court has a clear record before it.

ARGUMENT

Ordinarily, when a motion is supported by affidavit(s), the affidavit shall be served with the motion. Rule 7(b)3(B). However, when the Rules of Civil Procedure require that an act be done at or within a specified time, the court for cause shown may order the period enlarged. Rule 6(b). In making such determinations, "(t)hese rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceedings. Rule 1(a).

In the immediate case, Plaintiff filed its motion in limine to prevent Defendant from introducing evidence regarding the reasonableness of the fees in dispute because during the course of litigation and discovery Defendant refused to produce any evidence thereof. However, after the Plaintiff's motion was filed, the Defendant finally disclosed information which it had at its disposal for the last 13 months. Plaintiff moves this Court for an order permitting it to supplement the record now that Defendant has finally revealed the evidence it wishes to use to challenge the fees it was charged.

This motion and proposed affidavit are filed 14 days prior to the hearing and the information contained therein is essential to the Court's ruling on the pending motion. Further, the significance of the information contained in the supplemental affidavit could not have been

known at the time the original affidavit was filed because Defendant had not yet revealed that it would rely on Chris Miceli of Vertex to provide opinions in this case. For all of the reasons set forth herein, Plaintiff's Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine should be granted.

DATED this 10th day of November, 2015.

FISHER RAINEY HUDSON



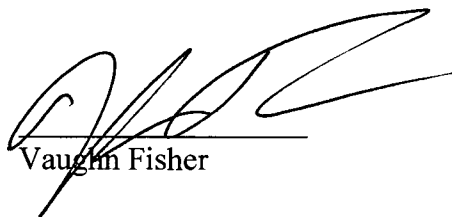
Vaughn Fisher
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of November, 2015, I caused a true and correct copy of the foregoing MOTION TO FILE SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION IN LIMINE to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Aubrey Lyon
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email


Vaughn Fisher

services to Defendant. Chris Miceli, the expert disclosed by Defendant on September 9, 2015 is copied on this email. He is identified in Defendant's expert disclosure as an employee of Vertex.

5. Attached hereto as Exhibits "B" and "C" are copies of the two disputed invoices in this case with mark-ups created by Defendant's consultant [Vertex].

6. Attached hereto as Exhibit "D" is a copy of the letter that I sent to Vertex on October 22, 2014 indicating that H2O's inquiries regarding the discrepancy had not been answered.

7. Attached hereto as Exhibit "E" is a copy of the email sent to me by Chris Miceli of Vertex and Exhibit "F" a copy of the attached spreadsheet of the disputed charges. The spreadsheet is dated August 2014 and was created, upon information and belief, by Vertex and possibly Mr. Miceli. The vast majority of the comments indicate that the charges exceed the amount "recommend(ed)" by Vertex.

8. Attached hereto as Exhibit "G" is a copy of the email that I sent to Mr. Miceli of Vertex on October 24, 2014 in response. Mr. Miceli is invited to call or email me to discuss further.

9. Attached hereto as Exhibit "H" is a copy of the email that I send to Defendant's insurance company ("Zurich") on October 29, 2014, which indicates that, "I remain open to continuing discussions with you and I will be happy to receive any of the information you have promised." The email chain at the bottom of the exhibit shows that Zurich promised that it, "would request from Vertex their supporting documentation to show that the rates charged by H2O are unreasonable and inconsistent with what is used in the industry." Further down the email chain on the same exhibit is my October 28, 2014 email

10. Attached hereto as Exhibit "I" is the April 15, 2015 letter we sent to Defendant's attorneys regarding a Rule 30b6 deposition. The proposed notice requests Defendant designate a representative to, amongst other things, testify as to all matters known or reasonably available to Defendant regarding any information known by Defendant that demonstrates the disputed charges were unreasonable.

11. Attached hereto as Exhibit "J" is a copy of the letter we sent to Defendant's attorneys regarding the Rule 30b6 deposition and our position that Defendant must appoint someone to testify regarding the reasonableness of the charges which were apparently being disputed by Defendant's insurance company or its consultant (Vertex). The letter continues that, "the information from its insurance company is "reasonably available" to (defendant) as contemplated by the rule. As well, (defendant) may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert [Vertex] as a justification for not paying the invoice, then (defendant) has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify."

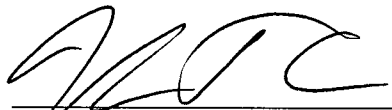
12. Attached hereto as Exhibit "K" is a copy of the letter we sent to Defendant's attorneys on May 29, 2015. The correspondence again points out that Defendant could appoint a member of the insurance company or its expert (Vertex) to testify about the reasonableness of the charges. The letter also expresses our position that is the information is available to the insurance company, then it is reasonably available to the Defendant.

13. On July 8, 2015, Plaintiff took the deposition of Defendant pursuant to Rule 30b6, which was convened in Enterprise, OR at Defendant's insistence. Defendant failed to provide any testimony regarding the reasonableness of the fees.

14. On September 9, 2015 Defendant's first filed their expert witness disclosure indicating that Chris Miceli would testify to the reasons that Vertex believed the charges at dispute in this case were unreasonable.

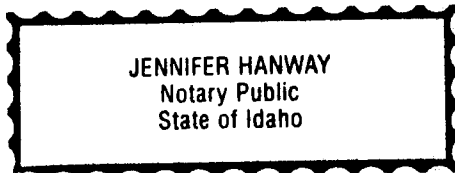
15. Further your affiant sayeth naught.


DATED this 10 day of November, 2015.



Vaughn Fisher

SWORN AND SUBSCRIBED before me this 10th day of November, 2015.





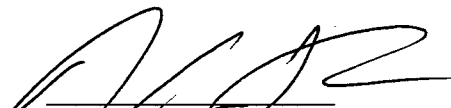
Notary Public for Idaho
Residing at: Mendon, Idaho
My Commission Expires: 7/25/17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of November, 2015, I caused a true and correct copy of the foregoing Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell
Aubrey Lyon
CAREY PERKINS LLP
300 N. 6th St., Ste. 200
PO Box 519
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email



Vaughn Fisher

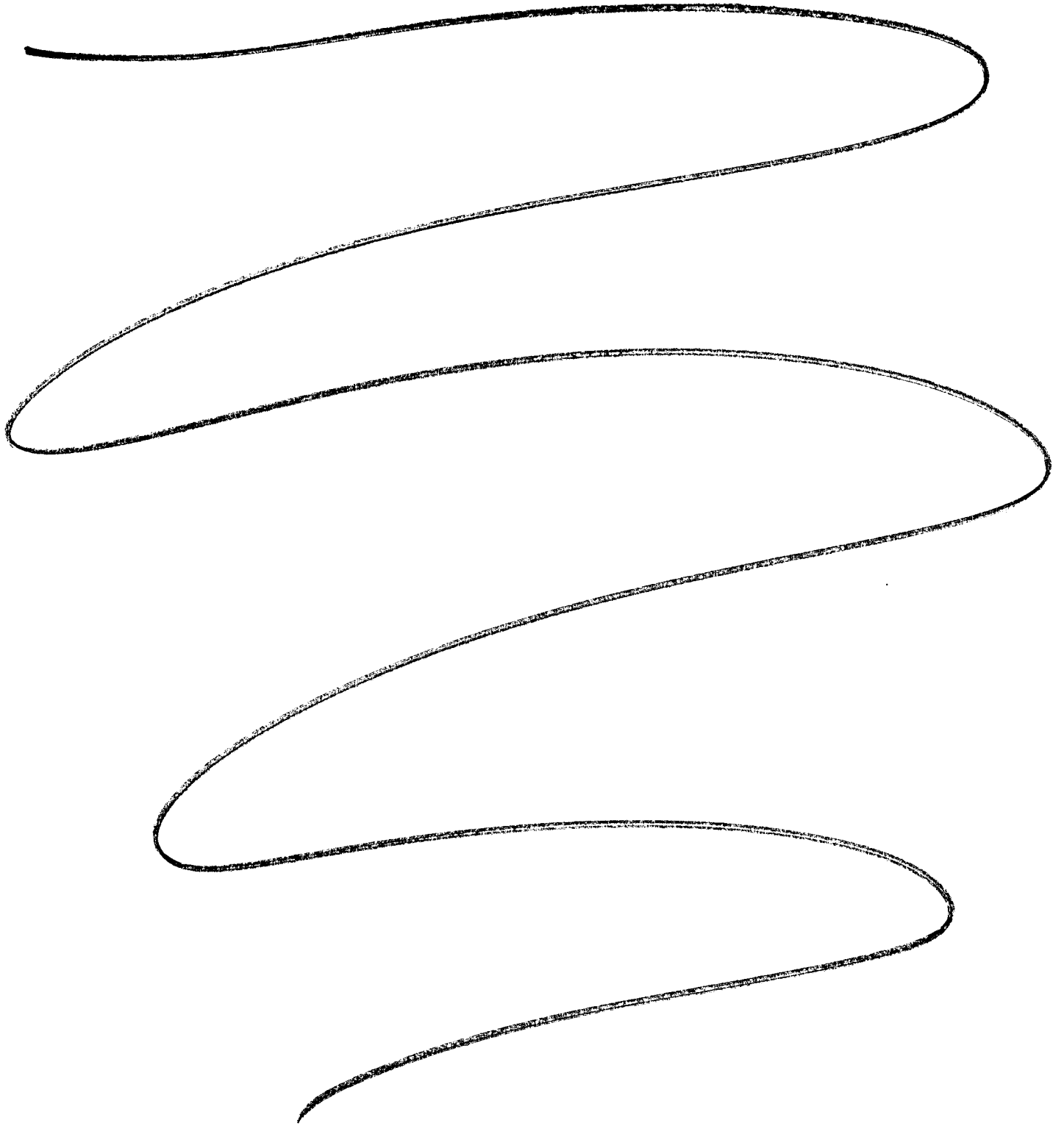


Exhibit A

Steve King

From: Kathryn Johnsen--Vertex <kjohnsen@vertexeng.com>
Sent: Wednesday, July 16, 2014 1:02 PM
To: Steve King - 1
Cc: Chris Miceli--Vertex
Subject: Zurich claim No. 4120003656; Farm Supply Distributors, Inc.; Boise, Idaho; Vertex No. TBD

Steve,

Thank you for taking the time to speak with me this afternoon. As discussed, VERTEX has been retained by Farm Supply Distributors, Inc.'s insurance carrier (Zurich) to conduct an investigation of the above referenced claim. In order to complete our investigation, VERTEX respectfully requests that you provide the following documentation:

- All invoicing associated with remediation of the alleged loss, including the following supporting documentation:
 - Timesheet/Timecards that include the following: a list of personnel performing site activities, titles and labor rates for personnel, equipment used to perform work, and equipment rates.
 - Copies of subcontractor invoicing;
 - Copies of waste disposal manifests, including weight and description of material disposed of; and
 - Copies of receipts for disposable material expended throughout the project.
- Proposals associated with future remedial work efforts;
- Copies of Ada County Directives and/or correspondence;
- Copies of the Idaho DEQ directives and/or correspondence; and
- A copy of the Release Report.

Please feel free to contact our office with questions.

Thank you,

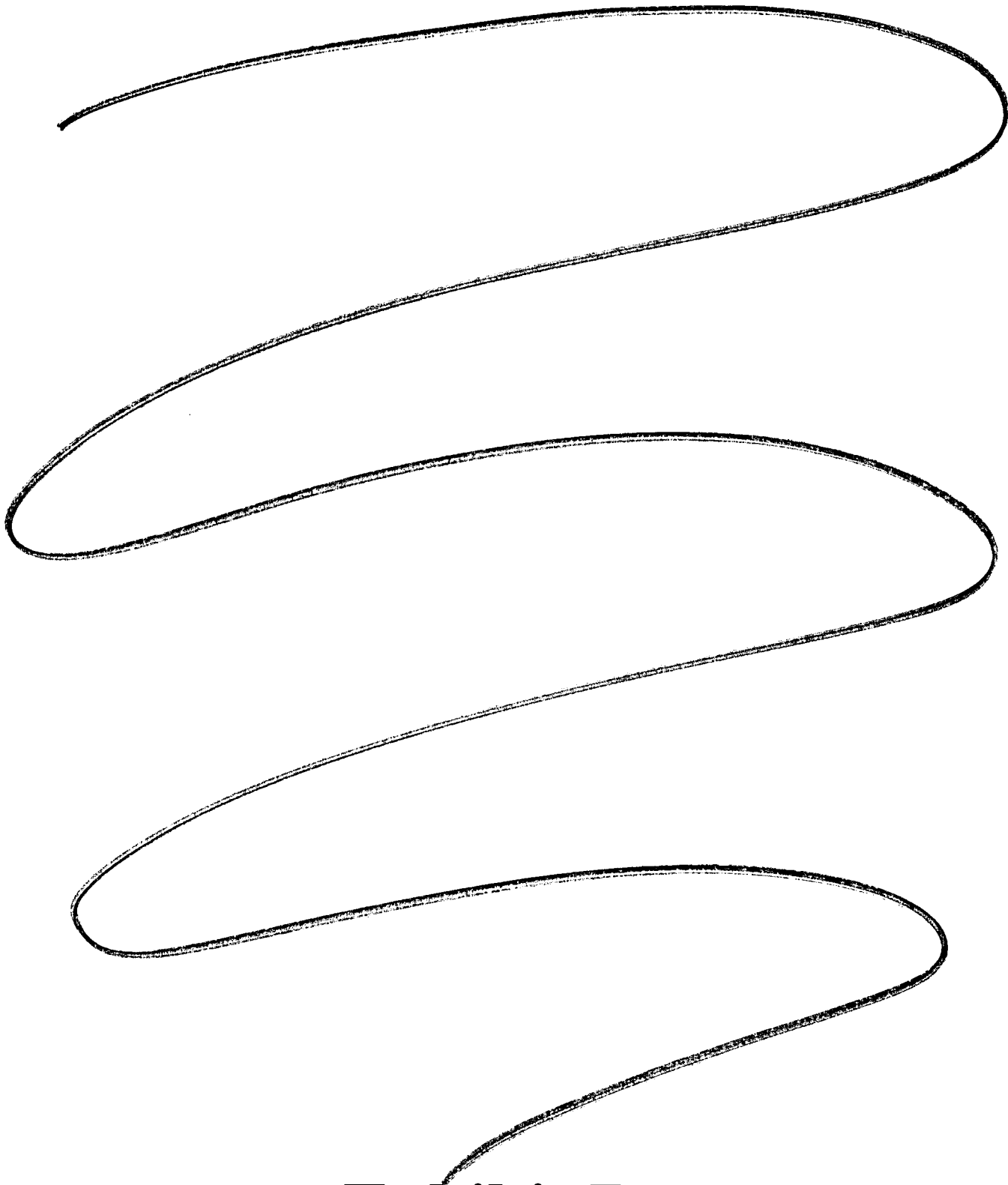
~~~~~  
**Kathryn Johnsen**  
Assistant Project Manager

**VERTEX**

The Vertex Companies, Inc.  
20 Gibson Place; Suite 201 | Freehold, NJ 07728 | USA

OFFICE 732.391.1646 | MOBILE 732.239.7936

[Website](#) | [LinkedIn](#) | [Map](#)



# **Exhibit B**





# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 7/18/2014 |
| Invoice #    | 008393501 |
| Due Date     | 8/17/2014 |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

**Bill To:**  
 FARM SUPPLY DISTRIBUTORS  
 CAROL WARD  
 65179 ALDER SLOPE ROAD  
 ENTERPRISE, OR 97828

**Service Address:**  
 FARM SUPPLY DISTRIBUTORS  
 12127 W FRANKLIN RD  
 BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest #      | Terms                |
|--------------|-------------------------|---------------|--------|-----------------|----------------------|
| 7/12/2014    | J54702 > MAVERICK BOISE | 1002777       |        |                 | Net 30               |
|              |                         |               |        | Billing Phone # | 541-426-5915 CARO... |

| Description                                                                                                 | Price                 | Quantity | Amount   |
|-------------------------------------------------------------------------------------------------------------|-----------------------|----------|----------|
| <b>EMERGENCY RESPONSE TO FUEL SPILL AT MAVERICK COUNTRY STORE #470</b>                                      |                       |          |          |
| 7/12/14                                                                                                     |                       |          |          |
| PROJECT MANAGER - STEVEN KING (ER/OT)                                                                       | 150.00                | 9.5      | 1,425.00 |
| ENVIRONMENTAL TECHNICIAN - RYAN PIPER (ER/OT)                                                               | 97.50                 | 7        | 682.50   |
| GUZZLER VAC-TANKER W/ OPERATOR (ER/OT) - CRAIG SIMMONS                                                      | <del>312</del> 375.00 | 9        | 3,375.00 |
| 70 BBL VAC-TANKER (ER/OT) - JAMES TRAVER                                                                    | <del>128</del> 165.00 | 9        | 1,485.00 |
| ROTO-ROOTER JETTER SERVICES <i>Cost + 10%</i>                                                               | 955.00                | 1.2      | 1,146.00 |
| POWER WASHER 4K PSI <i>\$155/day + 60% ER Markup</i>                                                        | <del>280</del> 70.00  | 1        | 280.00   |
| CREW TRUCK (ER)                                                                                             | <del>36</del> 90.00   | 9.5      | 855.00   |
| IDAHO TRAFFIC CONTROL, FLAGGERS AND EQUIPMENT <i>Cost + 10%</i>                                             | 361.40                | 1.2      | 433.68   |
| <b>EMERGENCY RESPONSE TO FUEL SPILL AT MAVERICK COUNTRY STORE #470 - SOUTH TO NORTH LINE &amp; CLEANING</b> |                       |          |          |
| 7/13/14                                                                                                     |                       |          |          |
| PROJECT MANAGER - STEVEN KING (ER/OT)                                                                       | 150.00                | 6        | 900.00   |
| 120 BBL VAC-TANKER ER (ER/OT) - CRAIG SIMMONS                                                               | <del>184</del> 195.00 | 6        | 1,170.00 |
| ROTO-ROOTER JETTER SERVICES <i>Cost + 10%</i>                                                               | 670.00                | 1.2      | 804.00   |
| CREW TRUCK (ER)                                                                                             | <del>36</del> 90.00   | 6        | 540.00   |
| 40 LF OF 8" HYDROPHOBIC BOOM 4X10' EA                                                                       | 260.00                | 1        | 260.00   |

**REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201  
P.O. BOX 220, BETTENDORF, IA 52722**

**Total**

**PLEASE MAKE YOUR PAYMENT WITHIN THE TERMS STATED ABOVE.**  
 Past due accounts will be assessed a finance charge of 1.5% of the outstanding balance per month.

For billing inquiries, please call (208) 343-7867  
 Remit payment to: Dept. #201, P.O. Box 220, Bettendorf, IA 52722  
 We sincerely appreciate your business.



# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 7/18/2014 |
| Invoice #    | 008393501 |
| Due Date     | 8/17/2014 |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

**Bill To:**  
 FARM SUPPLY DISTRIBUTORS  
 CAROL WARD  
 65179 ALDER SLOPE ROAD  
 ENTERPRISE, OR 97828

**Service Address:**  
 FARM SUPPLY DISTRIBUTORS  
 12127 W FRANKLIN RD  
 BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest # | Terms  |
|--------------|-------------------------|---------------|--------|------------|--------|
| 7/12/2014    | J54702 > MAVERICK BOISE | 1002777       |        |            | Net 30 |

Billing Phone # 541-426-5915 CARO...

| Description                                                                                       | Price                  | Quantity | Amount   |
|---------------------------------------------------------------------------------------------------|------------------------|----------|----------|
| RE-CLEANING ALL LINES - MAVERICK COUNTRY STORE #470<br>7/14/14                                    |                        |          |          |
| PROJECT MANAGER - STEVEN KING (STRAIGHT TIME, ST)                                                 | 85.00                  | 7.5      | 637.50   |
| PROJECT MANAGER - STEVEN KING (OT)                                                                | 127.50                 | 6.5      | 828.75   |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER                                                         | 50.00                  | 6.5      | 325.00   |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER (OT)                                                    | 75.00                  | 6.5      | 487.50   |
| GUZZLER VAC-TANKER W/ OPERATOR (ST) - RYAN PIPER                                                  | <del>195</del> 235.00  | 6.5      | 1,527.50 |
| GUZZLER VAC-TANKER W/ OPERATOR (OT) - RYAN PIPER                                                  | <del>292</del> 352.50  | 6.5      | 2,291.25 |
| 120 BBL VAC-TANKER (ST) - JAMES TRAVER                                                            | 115.00                 | 6.5      | 747.50   |
| 120 BBL VAC-TANKER (OT) - JAMES TRAVER                                                            | 172.50                 | 6        | 1,035.00 |
| CREW TRUCK W/ LIFT GATE                                                                           | <del>22.50</del> 75.00 | 7.5      | 562.50   |
| CREW TRUCK W/ LIFT GATE (OT)                                                                      | <del>33.75</del> 90.00 | 6.5      | 585.00   |
| TRAFFIC PRODUCTS SERVICES <i>cost + 10%</i>                                                       | 1,105.90               | 1.2      | 1,327.08 |
| ROTO-ROOTER JETTER SERVICES <i>cost + 10%</i>                                                     | 2,120.00               | 1.2      | 2,544.00 |
| POWER WASHER 4K PSI <i>155 daily rate</i>                                                         | <del>155</del> 70.00   | 4        | 280.00   |
| SIMPLE GREEN DEODORIZER/CLEANER (20 GAL) <i>cost + 10%</i>                                        | 211.58                 | 1.2      | 253.90   |
| HYDROPHOBIC BOOMS 2X10'                                                                           | 40.00                  | 2        | 80.00    |
| DISPOSAL CHARGES - L&R DISPOSAL OF HYDROCARBON CONTAMINATED LIQUIDS (3,161 GAL) - MANIFEST #58211 | 0.35                   | 3,161    | 1,106.35 |
| REMOVE BOOMS AN DUMP SOLIDS FROM GUZZLER TRUCK AND CLEAN OUT. ACHD INSPECTION.<br>7/15/14         |                        |          |          |

REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201  
P.O. BOX 220, BETTENDORF, IA 52722

**Total**

**PLEASE MAKE YOUR PAYMENT WITHIN THE TERMS STATED ABOVE.**  
 Past due accounts will be assessed a finance charge of 1.5% of the outstanding balance per month.

For billing inquiries, please call (208) 343-7867

Remit payment to: Dept. #201, P.O. Box 220, Bettendorf, IA 52722

We sincerely appreciate your business.



# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 7/18/2014 |
| Invoice #    | 008393501 |
| Due Date     | 8/17/2014 |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

**Bill To:**  
 FARM SUPPLY DISTRIBUTORS  
 CAROL WARD  
 65179 ALDER SLOPE ROAD  
 ENTERPRISE, OR 97828

**Service Address:**  
 FARM SUPPLY DISTRIBUTORS  
 12127 W FRANKLIN RD  
 BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest # | Terms  |
|--------------|-------------------------|---------------|--------|------------|--------|
| 7/12/2014    | J54702 > MAVERICK BOISE | 1002777       |        |            | Net 30 |

Billing Phone # 541-426-5915 CARO...

| Description                                                                                      | Price                | Quantity | Amount   |
|--------------------------------------------------------------------------------------------------|----------------------|----------|----------|
| PROJECT MANAGER - STEVEN KING (ST)                                                               | 85.00                | 3        | 255.00   |
| GUZZLER VAC-TANKER W/ OPERATOR (ST) - RYAN PIPER                                                 | <del>235.00</del>    | 5        | 1,175.00 |
| 10% FUEL SURCHARGE (FOR SERVICES RENDERED 7/12/14 THROUGH 1/15/14)                               | <del>11,594.38</del> | 0.1      | 1,504.38 |
| DISPOSAL CHARGES - IWS DISPOSAL OF HYDROCARBON CONTAMINATED SOLIDS/LIQUIDS. 1.73 TONS, 3,460 LBS | 45.00                | 1.73     | 77.85    |

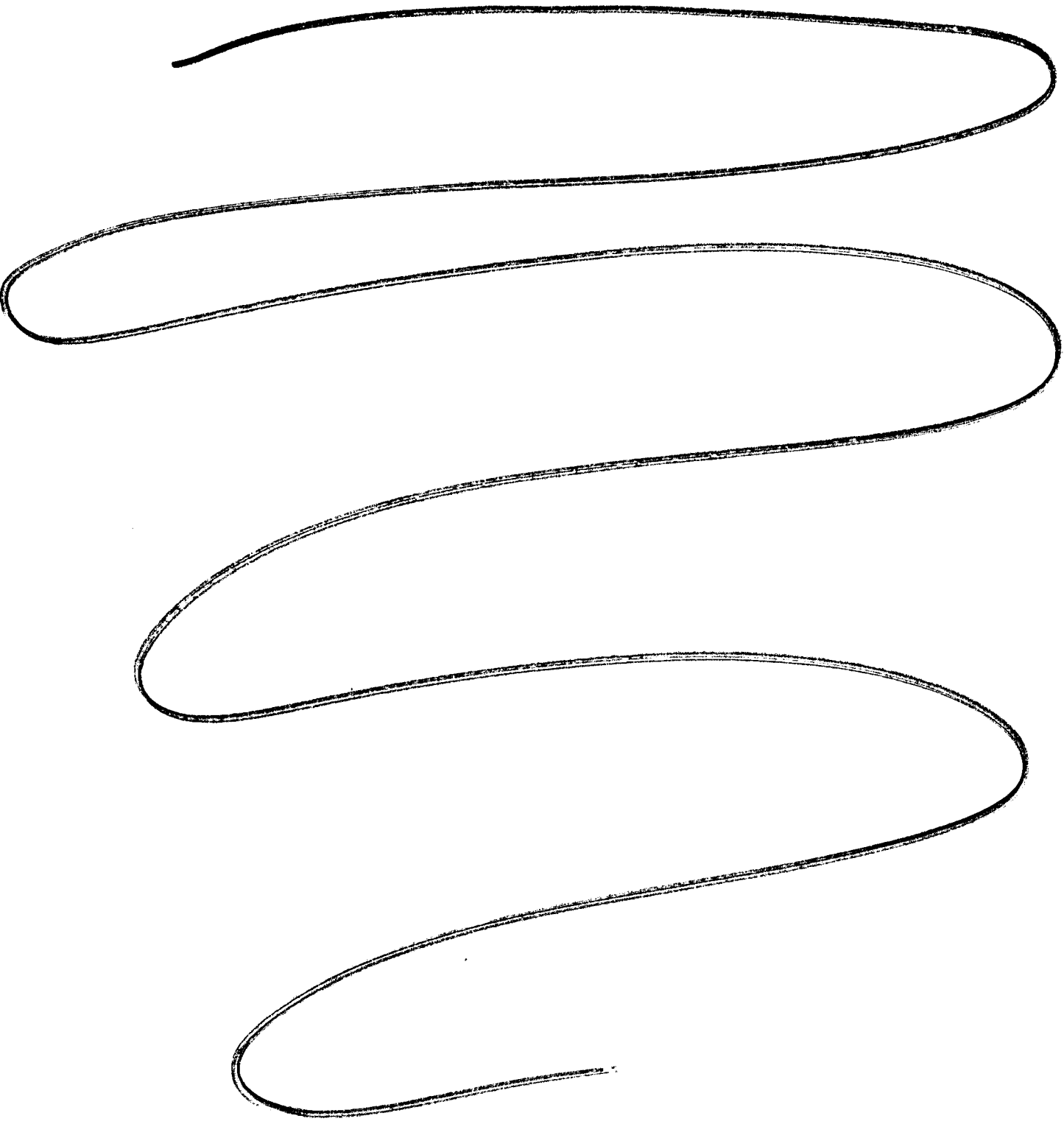
975-  
1,594.38

**REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201  
P.O. BOX 220, BETTENDORF, IA 52722**

**Total \$30,987.24**  
26,530.53

**PLEASE MAKE YOUR PAYMENT WITHIN THE TERMS STATED ABOVE.**  
 Past due accounts will be assessed a finance charge of 1.5% of the outstanding balance per month.

For billing inquiries, please call (208) 343-7867  
 Remit payment to: Dept. #201, P.O. Box 220, Bettendorf, IA 52722  
 We sincerely appreciate your business.



# Exhibit C



Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 8/7/2014  |
| Invoice #    | 008393741 |
| Due Date     | 9/6/2014  |

Bill To:

FARM SUPPLY DISTRIBUTORS  
CAROL WARD  
65179 ALDER SLOPE ROAD  
ENTERPRISE, OR 97828

Service Address:

FARM SUPPLY DISTRIBUTORS  
12127 W FRANKLIN RD  
BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest # | Terms  |
|--------------|-------------------------|---------------|--------|------------|--------|
| 7/16/2014    | J54702 > MAVERICK BOISE |               |        |            | Net 30 |

Billing Phone # 541-426-5915 CARO...

| Description                                                                                                                                                                                                                                                                      | Price  | Quantity | Amount       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|----------|--------------|
| PROJECT MANAGEMENT AND PM ADMINISTRATIVE HOURS RELATED TO THE MANAGEMENT OF THE SPILL AT MAVERICK COUNTRY STORE. TRANSPORTATION AND DISPOSAL OF CONTAMINATED LIQUIDS FOR CLEANING OUT STORM DRAIN LINE AND SEPARATOR SYSTEM. FINAL SEPARATOR SYSTEM CLEAN OUT.<br>7/16 - 7/25/14 |        |          |              |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/16/14                                                                                                                                                                                                                                     | 50.00  | 5        | 250.00       |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/17/14                                                                                                                                                                                                                                     | 50.00  | 5        | 250.00       |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/18/14                                                                                                                                                                                                                                     | 50.00  | 5        | 250.00       |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/21/14                                                                                                                                                                                                                                     | 50.00  | 20       | 1000.00      |
| STEVEN KING ON SITE ACHD MEETING 7/22/14                                                                                                                                                                                                                                         | 85.00  | 3        | 255.00       |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/23/14                                                                                                                                                                                                                                     | 50.00  | 20       | 1000.00      |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/24/14                                                                                                                                                                                                                                     | 50.00  | 250      | 12500.00     |
| STEVEN KING PROJECT MANAGEMENT ADMIN 7/25/14                                                                                                                                                                                                                                     | 50.00  | 150      | 7500.00      |
| GUZZLER VAC TANKER W/ OPERATOR - JAMES TRAVER                                                                                                                                                                                                                                    | 235.00 | 3        | 705.00       |
| 10% FUEL SURCHARGE                                                                                                                                                                                                                                                               | 205.00 | 0.1      | 70.50        |
| WASTE DISPOSAL CHARGES (7/14/14) - LIQUIDS - DISPOSAL AT L&R (3781 GAL) - MANIFEST #58210                                                                                                                                                                                        | 0.35   | 3,781    | 1,323.35     |
| WASTE DISPOSAL CHARGES (7/25/14) - LIQUIDS - DISPOSAL AT L&R (289.9 GAL) - MANIFEST #58638                                                                                                                                                                                       | 0.35   | 289.9    | 101.47       |
| ADMINISTRATIVE TASKS RELATED TO PROJECT MANAGEMENT, MEET W/ CITY OF BOISE, ACHD AND MAVERICK.<br>7/28/14                                                                                                                                                                         |        |          |              |
| <b>REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201<br/>P.O. BOX 220, BETTENDORF, IA 52722</b>                                                                                                                                                                                      |        |          | <b>Total</b> |

**PLEASE MAKE YOUR PAYMENT WITHIN THE TERMS STATED ABOVE.**

Past due accounts will be assessed a finance charge of 1.5% of the outstanding balance per month.

For billing inquiries, please call (208) 343-7867

Remit payment to: Dept. #201, P.O. Box 220, Bettendorf, IA 52722

We sincerely appreciate your business.



# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 8/7/2014  |
| Invoice #    | 008393741 |
| Due Date     | 9/6/2014  |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

Bill To:

FARM SUPPLY DISTRIBUTORS  
CAROL WARD  
65179 ALDER SLOPE ROAD  
ENTERPRISE, OR 97828

Service Address:

FARM SUPPLY DISTRIBUTORS  
12127 W FRANKLIN RD  
BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest #      | Terms                |
|--------------|-------------------------|---------------|--------|-----------------|----------------------|
| 7/16/2014    | J54702 > MAVERICK BOISE |               |        |                 | Net 30               |
|              |                         |               |        | Billing Phone # | 541-426-5915 CARO... |

| Description                                                                                                    | Price                    | Quantity     | Amount   |
|----------------------------------------------------------------------------------------------------------------|--------------------------|--------------|----------|
| STEVEN KING PROJECT MANAGEMENT ADMIN                                                                           | 50.00                    | 1            | 50.00    |
| STEVEN KING PROJECT MANAGER (ON SITE 7/29/14)                                                                  | 85.00                    | 3            | 255.00   |
| REMOVE AND DISPOSE OF LAMP POST FOUNDATION, HYDROEXCAVATE<br>CONTAMINATED SOILS, HAND SHOVEL AROUND UTILITIES. |                          |              |          |
| 7/30/14                                                                                                        |                          |              |          |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER                                                                      | 50.00                    | 7.5          | 375.00   |
| ENVIRONMENTAL TECHNICIAN - JAMES TRAVER                                                                        | 50.00                    | 6            | 300.00   |
| PROJECT MANAGER - STEVEN KING                                                                                  | 85.00                    | 2            | 170.00   |
| PROJECT MANAGER ADMIN - STEVEN KING                                                                            | 50.00                    | 4            | 200.00   |
| GUZZLER TRUCK W/ OPERATOR - RYAN PIPER                                                                         | \$ 195 <del>235.00</del> | 7.5          | 1,762.50 |
| ROLL OFF TRUCK W/ OPERATOR - JAMES TRAVER                                                                      | 95.00                    | 2.5          | 237.50   |
| REMOVAL, TRANSPORT AND DISPOSAL OF LIGHT POLE FOUNDATION<br>PPE                                                | 100.00                   | 1            | 100.00   |
| ADA SAND & GRAVEL <i>Cost + 10%</i>                                                                            | \$ 30 <del>45.00</del>   | 2            | 90.00    |
| WASTE DISPOSAL CHARGES - SOIL/WATER MIXTURE (7.18 YARDS) -<br>MANIFEST #58639                                  | 1.70                     | 137.46       | 164.95   |
|                                                                                                                | 40.00                    | 7.18         | 287.20   |
| MET W/ MAVERICK - TRAVIS GOFF - RISK BASED MANAGEMENT                                                          |                          |              |          |
| 7/31/14                                                                                                        |                          |              |          |
| PROJECT MANAGER - STEVEN KING                                                                                  | 85.00                    | 1.5          | 127.50   |
| <b>REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201<br/>P.O. BOX 220, BETTENDORF, IA 52722</b>                    |                          | <b>Total</b> |          |

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 We sincerely appreciate your business.



# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 8/7/2014  |
| Invoice #    | 008393741 |
| Due Date     | 9/6/2014  |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

**Bill To:**  
 FARM SUPPLY DISTRIBUTORS  
 CAROL WARD  
 65179 ALDER SLOPE ROAD  
 ENTERPRISE, OR 97828

**Service Address:**  
 FARM SUPPLY DISTRIBUTORS  
 12127 W FRANKLIN RD  
 BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest # | Terms  |
|--------------|-------------------------|---------------|--------|------------|--------|
| 7/16/2014    | J54702 > MAVERICK BOISE |               |        |            | Net 30 |

Billing Phone # 541-426-5915 CARO...

| Description                                                                                                                                               | Price                      | Quantity | Amount       |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|----------|--------------|
| HYDROEXCAVATION, BACKHOE, HAND DIG AROUND UTILITIES TO EXCAVATE 20 YARDS OF CONTAMINATED SOILS, BACK FILL AND COMPACT 16 CUBIC YDS OF TOP SOIL.<br>8/1/14 |                            |          |              |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER                                                                                                                 | 50.00                      | 5        | 250.00       |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER (OT) <i>Not OT</i>                                                                                              | <del>75.00</del>           | 1.5      | 112.50       |
| ENVIRONMENTAL TECHNICIAN - JAMES TRAVER (OT) <i>Not OT</i>                                                                                                | <del>75.00</del>           | 1.5      | 112.50       |
| ENVIRONMENTAL TECHNICIAN - RYAN PIPER                                                                                                                     | 50.00                      | 3.5      | 175.00       |
| PROJECT MANAGER - STEVEN KING                                                                                                                             | 85.00                      | 2        | 170.00       |
| PROJECT MANAGER ADMIN - STEVEN KING                                                                                                                       | 50.00                      | 3        | 150.00       |
| GUZZLER W/ OPERATOR - RYAN PIPER                                                                                                                          | <del>195</del> 235.00      | 5        | 1,175.00     |
| BACKHOE                                                                                                                                                   | 75.00                      | 3.5      | 262.50       |
| ROLL OFF W/ TRAILER - JAMES TRAVER                                                                                                                        | 135.00                     | 6        | 810.00       |
| ROLL OFF W/ TRAILER - RYAN PIPER (OT)                                                                                                                     | 202.50                     | 1.5      | 303.75       |
| CREW TRUCK                                                                                                                                                | <del>22.50</del> 75.00     | 9        | 675.00       |
| CREW TRUCK (OT)                                                                                                                                           | <del>90.00</del>           | 1        | 90.00        |
| 10% FUEL SURCHARGE                                                                                                                                        | <del>257.25</del> 3,316.25 | 0.1      | 331.63       |
| WHITE TYVEK                                                                                                                                               | 14.00                      | 4        | 56.00        |
| POLY YELLOW TYVEK                                                                                                                                         | 30.00                      | 1        | 30.00        |
| GREEN NITRILE GLOVES                                                                                                                                      | 9.00                       | 2        | 18.00        |
| WASTE DISPOSAL CHARGES - DIESEL CONTAMINATED SOIL - MANIFEST #58273                                                                                       | 40.00                      | 15.75    | 630.00       |
| <b>REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201<br/>P.O. BOX 220, BETTENDORF, IA 52722</b>                                                               |                            |          | <b>Total</b> |

75-  
75-  
0-  
975-  
202.50  
22.50  
257.25

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# INVOICE

|              |           |
|--------------|-----------|
| Invoice Date | 8/7/2014  |
| Invoice #    | 008393741 |
| Due Date     | 9/6/2014  |

Industrial & Hazardous Waste: Remediation - Transport - Disposal  
24-Hour Emergency Response

**Bill To:**  
 FARM SUPPLY DISTRIBUTORS  
 CAROL WARD  
 65179 ALDER SLOPE ROAD  
 ENTERPRISE, OR 97828

**Service Address:**  
 FARM SUPPLY DISTRIBUTORS  
 12127 W FRANKLIN RD  
 BOISE, ID 83708

| Service Date | Job                     | Sales Order # | P.O. # | Manifest # | Terms  |
|--------------|-------------------------|---------------|--------|------------|--------|
| 7/16/2014    | J54702 > MAVERICK BOISE |               |        |            | Net 30 |

Billing Phone # 541-426-5915 CARO...

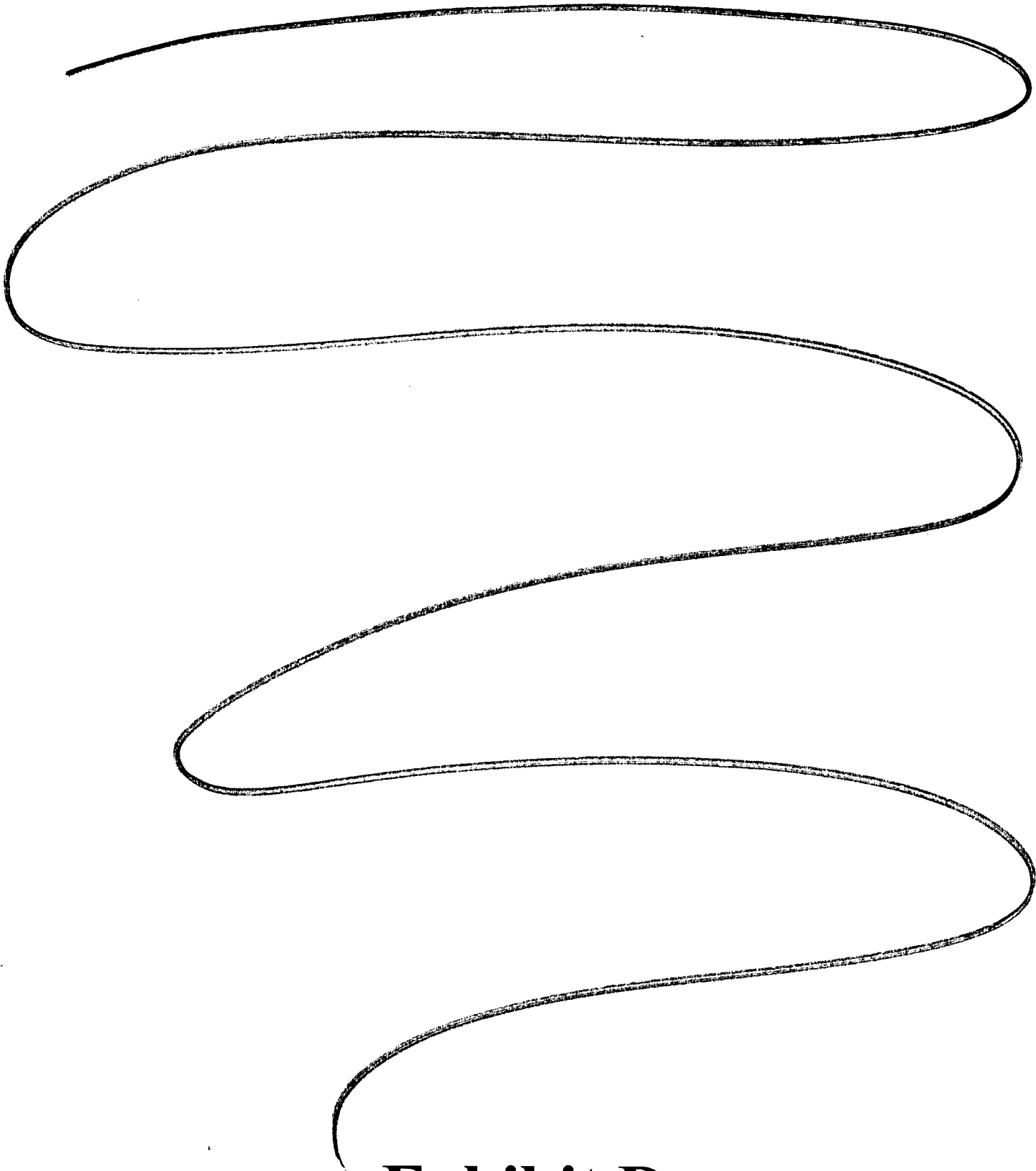
| Description                                                                                   | Price                 | Quantity         | Amount                                 |
|-----------------------------------------------------------------------------------------------|-----------------------|------------------|----------------------------------------|
| BACKFILL AND COMPACT THE EXCAVATED LAWN W/ CLEAN TOP SOIL.<br>PROJECT MANAGER ADMIN<br>8/4/14 |                       |                  |                                        |
| ENVIRONMENTAL TECHNICIAN - FORREST LEHMER                                                     | 50.00                 | 3.5              | 175.00                                 |
| PROJECT MANAGER - STEVEN KING (ON SITE)                                                       | 85.00                 | 1                | 85.00                                  |
| PROJECT MANAGER ADMIN - STEVE KING (8/5/14)                                                   | 50.00                 | <del>3.5</del> 0 | 175.00                                 |
| PROJECT MANAGER ADMIN - STEVE KING (8/6/14)                                                   | 50.00                 | <del>5.0</del> 0 | 250.00                                 |
| COMPACTOR                                                                                     | 45.00                 | 3.5              | 157.50                                 |
| 15.37 TONS TOP SOIL <i>cost + 10%</i>                                                         | 130.34                | <del>1.2</del> 1 | 156.41                                 |
| ESC LAB ANALYTICAL 8260/8270                                                                  | <del>143</del> 258.00 | <del>1.1</del> 1 | 250.00                                 |
| WASTE DISPOSAL CHARGES - EXCAVATED CONTAMINATED SOIL -<br>MANIFEST #58729                     | 40.00                 | 12.88            | 515.20                                 |
| <b>Total</b>                                                                                  |                       |                  | <b>\$14,840.96</b><br><i>11,943.02</i> |

**REMIT TO: H2O ENVIRONMENTAL, INC., DEPT. #201  
P.O. BOX 220, BETTENDORF, IA 52722**

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 We sincerely appreciate your business.





# **Exhibit D**



October 22, 2014

Kathryn Johnsen  
The Vertex Companies, Inc.  
20 Gibson Place, Suite 201  
Freehold, NJ 07728

RE: H2O Environmental v. Farm Supply Distributors

Ms. Johnsen,

I represent H2O Environmental, Inc. ("H2O") regarding claims they have against Farm Supply Distributors ("FSD"). I am writing to you regarding the check issued by Zurich in the amount of \$38,473.55. I am writing to you because you and Vertex apparently served in some roll adjusting claim 4120003656 and I have no contact information for Erin Brewer or anyone at Zurich.

According to the records that I have reviewed, my client issued invoices 8393501 and 8393741 to FSD for work performed pursuant to a contract between H2O and FSD. After discussions with you, H2O agreed to adjust some of the charges on invoice 8393501, reducing the total due on that invoice from \$31,529.62 to \$30,987.24.

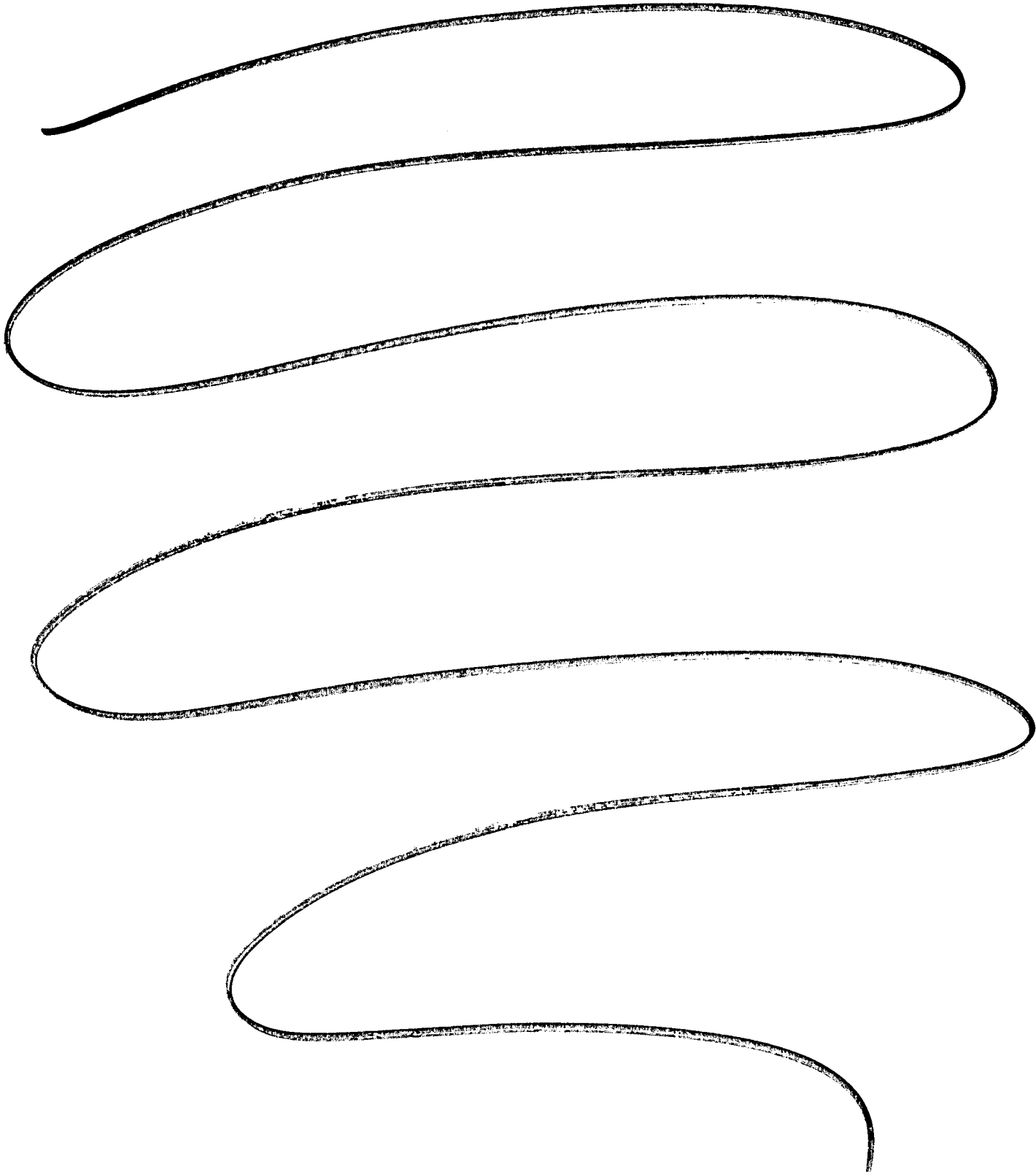
The total due on the adjusted invoice combined with invoice 8393741 was \$45,828.20. For whatever reason, Zurich's payment left \$7,354.65 unpaid. My client's inquiries to you regarding the discrepancy have gone unanswered. This letter is Zurich's last opportunity to pay the remaining balance.

I have been hired to sue FSD for the balance, along with interest and attorney fees. If I do not hear from you or Zurich by next Tuesday, October 28, 2014, I will file a lawsuit in Idaho against FSD for breach of contract for the unpaid balance.

Sincerely,

Vaughn Fisher

cc: John Bradley



**Exhibit E**

## Vaughn Fisher

---

**From:** Chris Miceli--Vertex <cmiceli@vertexeng.com>  
**Sent:** Thursday, October 23, 2014 11:55 AM  
**To:** vaughn@frhtriallawyers.com  
**Cc:** john@envcleanup.com; esavre@envcleanup.com; Kathryn Johnsen--Vertex  
**Subject:** FW: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964  
**Attachments:** 2014.07.Boise.ID.IR.FINAL.xlsx; Johnsen 10-22-2014.pdf

Mr. Fisher,

Please allow this email to serve as a response to your attached letter, dated October 22, 2014. The Vertex Companies, Inc. (VERTEX) previously prepared the attached excel table, which documents the specific charges that have been disputed in association with H2O Environmental, Inc. (H2O) invoice Nos. 008393501 and 008393741.

Between July 2014 and August 2014, VERTEX corresponded with Mr. Steven King of H2O several times to explain our rationale behind these disputed costs. In addition, VERTEX provided a detailed breakdown of disputed costs associated with H2O invoice No. 008393501 to Mr. Joseph Wickenden on July 30, 2014. Based on our previous correspondence, it was VERTEX's understanding that H2O was aware of all disputed charges.

We would be more than pleased to review additional supporting documentation or explanation on why H2O believes these costs are reasonable. Our project team can be available tomorrow, October 24, 2014, to discuss this matter further.

Please feel free to contact our office with questions.

~~~~~  
Kathryn Johnsen
Assistant Project Manager

And

Christopher J. Miceli
Assistant Vice President

VERTEX

The Vertex Companies, Inc.
20 Gibson Place; Suite 201 | Freehold, NJ 07728 | USA

OFFICE 732.391.1646 | **MOBILE** 732.239.7936
[Website](#) | [LinkedIn](#) | [Map](#)

If you are not an intended recipient of confidential and privileged information in this email, please delete it, notify us immediately at info@vertexeng.com, and do not use or disseminate such information.

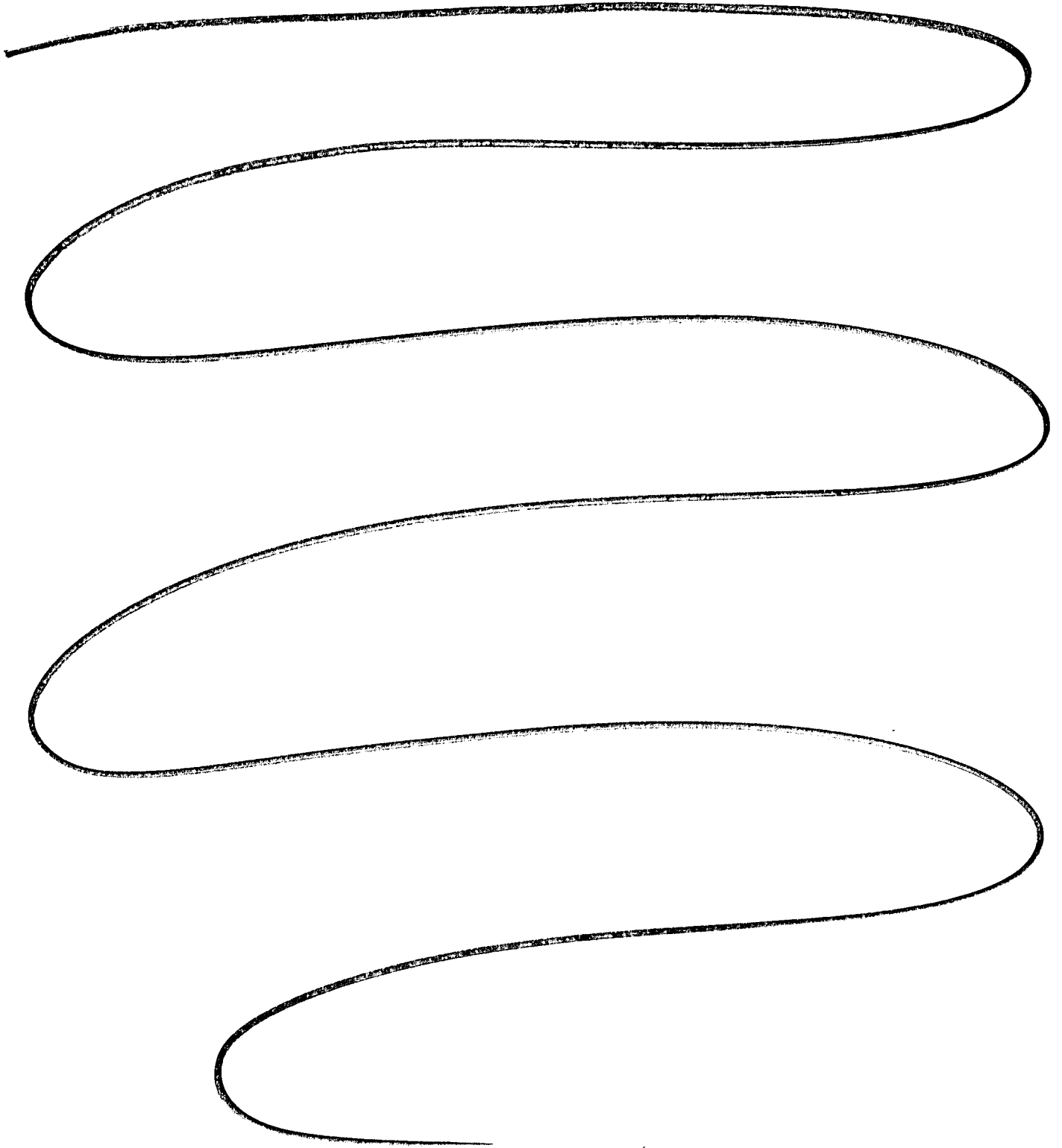


Exhibit F

Zurich Claim No. 4120003656
Farm Supply Distributors, Inc.

VERTEX No. 29964
August 2014

Contractor	Invoice No.	Invoice Amount	Total Reasonable Amount	Total Disputed Amount
H2O	8393501	\$30,987.24	\$26,530.53	\$4,456.71
H2O	8393741	\$14,840.96	\$11,943.02	\$2,897.94
TOTAL		\$45,828.19	\$38,473.55	\$7,354.64

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/12/2014	PM	9.5	\$150.00	\$1,425.00	9.5	\$150.00	\$1,425.00	\$0.00	Costs appear reasonable.
7/12/2014	ET	7	\$97.50	\$682.50	7	\$97.50	\$682.50	\$0.00	Costs appear reasonable.
7/12/2014	Guzzler Vac Tank (ER)	9	\$375.00	\$3,375.00	9	\$312.00	\$2,808.00	\$567.00	A portion of the invoiced costs (\$567.00) appear excessive. VERTEX recommends \$195/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$195/hour in order to determine the reasonable amount.
7/12/2014	70 BBL Vac Tanker (ER)	9	\$165.00	\$1,485.00	9	\$128.00	\$1,152.00	\$333.00	A portion of the invoiced costs (\$333.00) appear excessive. VERTEX recommends \$80/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$80/hour in order to determine the reasonable amount.
7/12/2014	Roto Rooter	1.2	\$955.00	\$1,146.00	1.1	\$955.00	\$1,050.50	\$95.50	A portion of the invoiced costs (\$191.00) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.
7/12/2014	Power washer (ER)	4	\$70.00	\$280.00	1	\$248.00	\$248.00	\$32.00	A portion of the invoiced costs (\$32.00) appear excessive. VERTEX recommends \$155/day. VERTEX has applied H2O's 60% Emergency Response Markup to \$155/day in order to determine the reasonable amount.
7/12/2014	Crew truck (ER)	9.5	\$90.00	\$855.00	9.5	\$36.00	\$342.00	\$513.00	A portion of the invoiced costs (\$513.00) appear excessive. VERTEX recommends \$22.50/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$22.50/hour in order to determine the reasonable amount.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/12/2014	Traffic Control	1.2	\$361.40	\$433.68	1.1	\$361.40	\$397.54	\$36.14	A portion of the invoiced costs (\$72.28) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.
7/13/2014	PM (ER)	6	\$150.00	\$900.00	6	\$150.00	\$900.00	\$0.00	
7/13/2014	120 BBI Vac Tanker (ER)	6	\$195.00	\$1,170.00	6	\$184.00	\$1,104.00	\$66.00	A portion of the invoice costs (\$66.00) associated with an excessive emergency response markup of 70% appears excessive. VERTEX recommends and has applied an Emergency Response mark up of 60%.
7/13/2014	Roto Rooter	1.2	\$670.00	\$804.00	1.1	\$670.00	\$737.00	\$67.00	A portion of the invoiced costs (\$134.00) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.
7/13/2014	Crew Truck (ER)	6	\$90.00	\$540.00	6	\$36.00	\$216.00	\$324.00	A portion of the invoiced costs (\$324.00) appear excessive. VERTEX recommends \$22.50/hour. VERTEX has applied H2O's 60% Emergency Response Markup to \$22.50/hour in order to determine the reasonable amount.
7/13/2014	40 LF of Hydrophobic boom	1	\$260.00	\$260.00	1	\$260.00	\$260.00	\$0.00	Costs appear reasonable.
7/14/2014	PM(ST)	7.5	\$85.00	\$637.50	7.5	\$85.00	\$637.50	\$0.00	Costs appear reasonable.
7/14/2014	PM (OT)	6.5	\$127.50	\$828.75	6.5	\$127.50	\$828.75	\$0.00	Costs appear reasonable.
7/14/2014	ET (ST)	6.5	\$50.00	\$325.00	6.5	\$50.00	\$325.00	\$0.00	Costs appear reasonable.
7/14/2014	ET (OT)	6.5	\$75.00	\$487.50	6.5	\$75.00	\$487.50	\$0.00	Costs appear reasonable.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/14/2014	Guzzler Vac Tank (ST)	6.5	\$235.00	\$1,527.50	6.5	\$195.00	\$1,267.50	\$260.00	A portion of the invoiced costs (\$567.00) appear excessive. VERTEX recommends \$195/hour.
7/14/2014	Guzzler Vac Tank (OT)	6.5	\$352.50	\$2,291.25	6.5	\$292.50	\$1,901.25	\$390.00	A portion of the invoiced costs (\$390.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour. VERTEX has applied H2O's 50% Overtime Markup to \$195/hour in order to determine the reasonable amount.
7/14/2014	120 BBL Vac Tank (ST)	6.5	\$115.00	\$747.50	6.5	\$115.00	\$747.50	\$0.00	Costs appear reasonable.
7/14/2014	120 BBL Vac Tank (OT)	6	\$172.50	\$1,035.00	6	\$172.50	\$1,035.00	\$0.00	Costs appear reasonable.
7/14/2014	Crew truck with gate lift (ST)	7.5	\$75.00	\$562.50	7.5	\$22.50	\$168.75	\$393.75	A portion of the invoiced costs (\$324.00) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.
7/14/2014	Crew truck w lift gate (OT)	6.5	\$90.00	\$585.00	6.5	\$33.75	\$219.38	\$365.63	A portion of the invoiced costs (\$324.00) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour. VERTEX has applied H2O's 50% Overtime Markup to determine the reasonable rate.
7/14/2014	Traffic Service	1.2	\$1,105.90	\$1,327.08	1.1	\$1,105.90	\$1,216.49	\$110.59	A portion of the invoiced costs (\$221.18) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.

H2O Invoice No. 008393501

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/14/2014	Roto Rooter	1.2	\$2,120.00	\$2,544.00	1.1	\$2,120.00	\$2,332.00	\$212.00	A portion of the invoiced costs (\$424.00) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.
7/14/2014	Power washer	4	\$70.00	\$280.00	1	\$155.00	\$155.00	\$125.00	A portion of the invoiced costs (\$32.00) appear excessive of standard industry rates. The standard industry rate for a power washer is \$155/day.
7/14/2014	Simple green	1.2	\$211.58	\$253.90	1.1	\$211.58	\$232.74	\$21.16	A portion of the invoiced costs (\$42.32) is considered unreasonable due to an excessive 30% markup. VERTEX recommends and has applied a 10% subcontractor markup to these costs.
7/14/2014	hydrophobic boom	2	\$40.00	\$80.00	2	\$40.00	\$80.00	\$0.00	Costs appear reasonable.
7/14/2014	disposal	3161	\$0.35	\$1,106.35	3161	\$0.35	\$1,106.35	\$0.00	Costs appear reasonable.
7/15/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.
7/15/2014	Guzzler Vac Tank	5	\$235.00	\$1,175.00	5	\$195.00	\$975.00	\$200.00	A portion of the invoiced costs (\$200.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.
	Fuel surcharge	0.1	\$15,043.75	\$1,504.38	0.1	\$11,594.38	\$1,159.44	\$344.94	A portion of the invoiced costs (\$74.00) appear excessive. In order to determine the reasonable rate, vertex multiplied the total reasonable equipment charges by 10%.
	Disposal	1.73	\$45.00	\$77.85	1.73	\$45.00	\$77.85	\$0.00	Costs appear reasonable.
				Total Invoiced Amount			TOTAL REASONABLE AMOUNT	TOTAL DISPUTED AMOUNT	
				\$30,987.24			\$26,530.53	\$4,456.71	

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/16/2014	PM Admin	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.
7/17/2014	PM Admin	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.
7/18/2014	PM Admin	5	\$50.00	\$250.00	1	\$50.00	\$50.00	\$200.00	A portion of the invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/21/2014	PM Admin	2	\$50.00	\$100.00	0	\$50.00	\$0.00	\$100.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/22/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.
7/23/2014	PM Admin	2	\$50.00	\$100.00	0	\$50.00	\$0.00	\$100.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/24/2014	PM Admin	2.5	\$50.00	\$125.00	0	\$50.00	\$0.00	\$125.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/25/2014	PM Admin	1.5	\$50.00	\$75.00	0	\$50.00	\$0.00	\$75.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
NA	Guzzler Vac Tank	3	\$235.00	\$705.00	3	\$195.00	\$585.00	\$120.00	A portion of the invoiced costs (\$120.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
NA	10% Fuel Surcharge	0.1	\$705.00	\$70.50	0.1	\$585.00	\$58.50	\$12.00	A portion of the invoiced costs (\$12.00) appears excessive. In order to determine the reasonable fuel surcharge, VERTEX multiplied the total reasonable equipment costs by 10%.
7/14/2014	Waste Disposal	3781	\$0.35	\$1,323.35	0.35	\$3,781.00	\$1,323.35	\$0.00	Costs appear reasonable.
7/25/2014	Waste Disposal	289.9	\$0.35	\$101.47	0.35	\$282.90	\$99.02	\$2.45	A portion of the invoiced costs (\$2.45) appear excessive in the absence of supporting documentation.
7/28/2014	PM Admin	1	\$50.00	\$50.00	0	\$50.00	\$0.00	\$50.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/29/2014	PM	3	\$85.00	\$255.00	3	\$85.00	\$255.00	\$0.00	Costs appear reasonable.
7/30/2014	ET	7.5	\$50.00	\$375.00	7.5	\$50.00	\$375.00	\$0.00	Costs appear reasonable.
7/30/2014	ET (OT)	6	\$50.00	\$300.00	6	\$50.00	\$300.00	\$0.00	Costs appear reasonable.
7/30/2014	PM	2	\$85.00	\$170.00	2	\$85.00	\$170.00	\$0.00	Costs appear reasonable.
7/30/2014	PM Admin	4	\$50.00	\$200.00	0	\$50.00	\$0.00	\$200.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
7/30/2014	Guzzler Vac Tank	7.5	\$235.00	\$1,762.50	7.5	\$195.00	\$1,462.50	\$300.00	A portion of the invoiced costs (\$300.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.
7/30/2014	Roll off truck	2.5	\$95.00	\$237.50	2.5	\$95.00	\$237.50	\$0.00	Costs appear reasonable.
7/30/2014	Transport and Disposal of light pole	1	\$100.00	\$100.00	1	\$100.00	\$100.00	\$0.00	Costs appear reasonable.

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
7/30/2014	PPE	2	\$45.00	\$90.00	2	\$30.00	\$60.00	\$30.00	A portion of the invoiced costs (\$30.00) are excessive of standard industry rates.
7/30/2014	ADA Sand & Gravel	1.2	\$137.46	\$164.95	1.1	\$137.46	\$151.21	\$13.75	A portion of the invoiced costs (\$13.75) appears excessive due to an excessive subcontractor markup. VERTEX recommends and has applied a markup of 10%.
7/30/2014	Waste disposal	7.18	\$40.00	\$287.20	7.18	\$40.00	\$287.20	\$0.00	Costs appear reasonable.
7/31/2014	PM	1.5	\$85.00	\$127.50	1.5	\$85.00	\$127.50	\$0.00	Costs appear reasonable.
8/1/2014	ET	5	\$50.00	\$250.00	5	\$50.00	\$250.00	\$0.00	Costs appear reasonable.
8/1/2014	ET (OT)	1.5	\$75.00	\$112.50	1.5	\$50.00	\$75.00	\$37.50	A portion of the invoiced costs (\$37.50) are considered excessive as the ET worked 6.5 hours and it does not appear that overtime applies.
8/1/2014	ET (OT)	1.5	\$75.00	\$112.50	1.5	\$50.00	\$75.00	\$37.50	A portion of the invoiced costs (\$37.50) are considered excessive as the total Environmental Technician hours did not exceed 8-hours.
8/1/2014	ET	3.5	\$50.00	\$175.00	3.5	\$50.00	\$175.00	\$0.00	Costs appear reasonable.
8/1/2014	PM	2	\$85.00	\$170.00	2	\$85.00	\$170.00	\$0.00	Costs appear reasonable.
8/1/2014	PM Admin	3	\$50.00	\$150.00	0	\$50.00	\$0.00	\$150.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
8/1/2014	Guzzler	5	\$235.00	\$1,175.00	5	\$195.00	\$975.00	\$200.00	A portion of the invoiced costs (\$300.00) appear excessive of standard industry rates. The standard industry rate for a guzzler vac tank is \$195/hour.
8/1/2014	Backhoe	3.5	\$75.00	\$262.50	3.5	\$75.00	\$262.50	\$0.00	Costs appear reasonable.
8/1/2014	Roll off with trailer	6	\$135.00	\$810.00	6	\$135.00	\$810.00	\$0.00	Costs appear reasonable.

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
8/1/2014	Roll off with trailer OT	1.5	\$202.50	\$303.75	1.5	\$202.50	\$303.75	\$0.00	Costs appear reasonable.
8/1/2014	Crew Truck	9	\$75.00	\$675.00	9	\$22.50	\$202.50	\$472.50	A portion of the invoiced costs (\$472.50) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.
8/1/2014	Crew Truck OT	1	\$90.00	\$90.00	1	\$22.50	\$22.50	\$67.50	A portion of the invoiced costs (\$67.50) appear excessive of standard industry rates. The standard industry rate for a Crew Truck \$22.50/hour.
8/1/2014	10% Fuel Surcharge	3316.25	\$0.10	\$331.63	0.1	\$2,576.25	\$257.63	\$74.01	A portion of the invoiced costs (\$74.00) appear excessive. In order to determine the reasonable rate, vertex multiplied the total reasonable equipment charges by 10%.
8/1/2014	White Tyvek	4	\$14.00	\$56.00	4	\$14.00	\$56.00	\$0.00	Costs appear reasonable.
8/1/2014	Poly Yellow Tyvek	1	\$30.00	\$30.00	1	\$30.00	\$30.00	\$0.00	Costs appear reasonable.
8/1/2014	Green Nitrile Gloves	2	\$9.00	\$18.00	2	\$9.00	\$18.00	\$0.00	Costs appear reasonable.
7/31/2014	Waste Disposal	15.75	\$40.00	\$630.00	15.75	\$40.00	\$630.00	\$0.00	Costs appear reasonable.
8/4/2014	ET	3.5	\$50.00	\$175.00	3.5	\$50.00	\$175.00	\$0.00	Costs appear reasonable.
8/4/2014	PM	1	\$85.00	\$85.00	1	\$85.00	\$85.00	\$0.00	Costs appear reasonable.
8/5/2014	PM Admin	3.5	\$50.00	\$175.00	0	\$50.00	\$0.00	\$175.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.
8/6/2014	PM Admin	5	\$50.00	\$250.00	0	\$50.00	\$0.00	\$250.00	The invoiced costs appear excessive. These costs appear to be related to general administrative work and not associated with remediation of the alleged loss.

H2O Invoice No. 008393741

Date	Title	Invoiced Quantity	Invoice Rate	Invoiced Amount	Reasonable Quantity	Reasonable Rate	Reasonable Amount	Disputed Amount	VERTEX Comments
8/4/2014	Compactor	3.5	\$45.00	\$157.50	3.5	\$45.00	\$157.50	\$0.00	Costs appear reasonable.
8/4/2014	Backfill	1.2	\$130.34	\$156.41	1.1	\$130.34	\$143.37	\$13.04	A portion of the costs (\$13.03) associated with an excessive subcontractor mark up appears excessive.
8/4/2014	Laboratory Analysis	1	\$250.00	\$250.00	1.1	\$143.00	\$157.30	\$92.70	A portion of the invoiced costs (\$92.70) associated with an excessive mark up costs is considered unreasonable. VERTEX recommends and has applied a 10% subcontractor markup.
8/4/2014	Waste Disposal	12.88	\$40.00	\$515.20	12.88	\$40.00	\$515.20	\$0.00	Costs appear reasonable.
				Total Invoiced Amount			TOTAL REASONABLE AMOUNT	TOTAL DISPUTED AMOUNT	
				\$14,840.96			\$11,943.02	\$2,897.94	

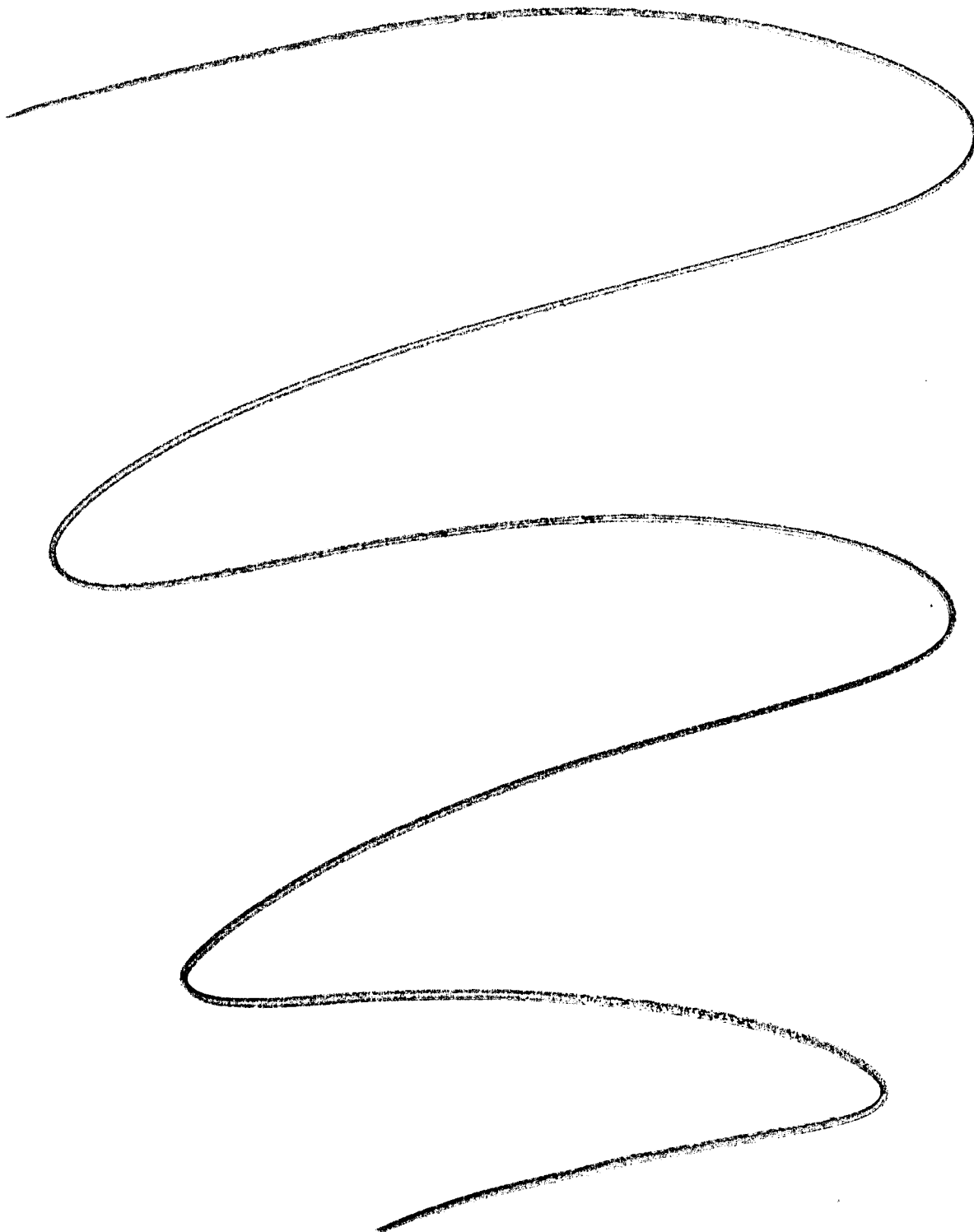


Exhibit G

Vaughn Fisher

From: Vaughn Fisher <vaughn@frhtriallawyers.com>
Sent: Friday, October 24, 2014 2:22 PM
To: Chris Miceli--Vertex
Cc: john@envcleanup.com; esavre@envcleanup.com; Kathryn Johnsen--Vertex
Subject: Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Hi Chris:

Thank you for promptly responding to my letter. No one at H2O ever agreed to reduce the charges beyond what was set forth in the adjusted Invoice #8393501.

I have reviewed your email and spreadsheet with my client. With all do respect, your client's insured was charged based upon a contract which it entered into with my client. My client does not agree that those agreed-upon, contract rates are excessive and apparently Farm Supply Distributors did not either. I further note that your rationale for H2O accepting less than what it contractually agreed to be paid is based upon rates your company "recommends". With all do respect, yet again, then your company should have come out here and performed the same services at those rates. H2O's rates are reasonable, competitive and based on the actual market.

In short, it is not rationale for you to expect a company to enter into a contract for services, perform based on that contract and then be told months later that the party that asked for and agreed to the services and rates now wants to amend the contract because its insurance company's consultant has arbitrarily decided the original contract rates were too high. Farm Supply Distributors signed the contract and requested and received the services. Farm Supply Distributors is legally obligated to pay the remaining balance. If Zurich will not pay it, I have been directed to file suit against the company that signed the contract.

Which leads me to wonder if Farm Supply Distributors even is aware that their insurance company is not covering the entirety of the loss. I think its only fair that someone at Zurich explain to Farm Supply Distributors that they are going to be sued because Zurich didn't like the rates in the contract Farm Supply Distributors signed.

I strongly encourage Zurich to reassess their position and ask themselves if its really fair to ask someone to change their rates after the work was performed. If you would like to discuss this further, then please feel free to call or email me. If my client does not receive payment next week, then your client's insured will sued.

Thanks,
Vaughn

From: Chris Miceli--Vertex
Sent: Thursday, October 23, 2014 11:55 AM
To: vaughn@frhtriallawyers.com
Cc: john@envcleanup.com ; esavre@envcleanup.com ; Kathryn Johnsen--Vertex
Subject: FW: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Mr. Fisher,

Please allow this email to serve as a response to your attached letter, dated October 22, 2014. The Vertex Companies, Inc. (VERTEX) previously prepared the attached excel table, which documents the specific charges that have been disputed in association with H2O Environmental, Inc. (H2O) invoice Nos. 008393501 and 008393741.

Between July 2014 and August 2014, VERTEX corresponded with Mr. Steven King of H2O several times to explain our rationale behind these disputed costs. In addition, VERTEX provided a detailed breakdown of disputed costs associated with H2O invoice No. 008393501 to Mr. Joseph Wickenden on July 30, 2014. Based on our previous correspondence, it was VERTEX's understanding that H2O was aware of all disputed charges.

We would be more than pleased to review additional supporting documentation or explanation on why H2O believes these costs are reasonable. Our project team can be available tomorrow, October 24, 2014, to discuss this matter further.

Please feel free to contact our office with questions.

~~~~~  
**Kathryn Johnsen**  
Assistant Project Manager

And

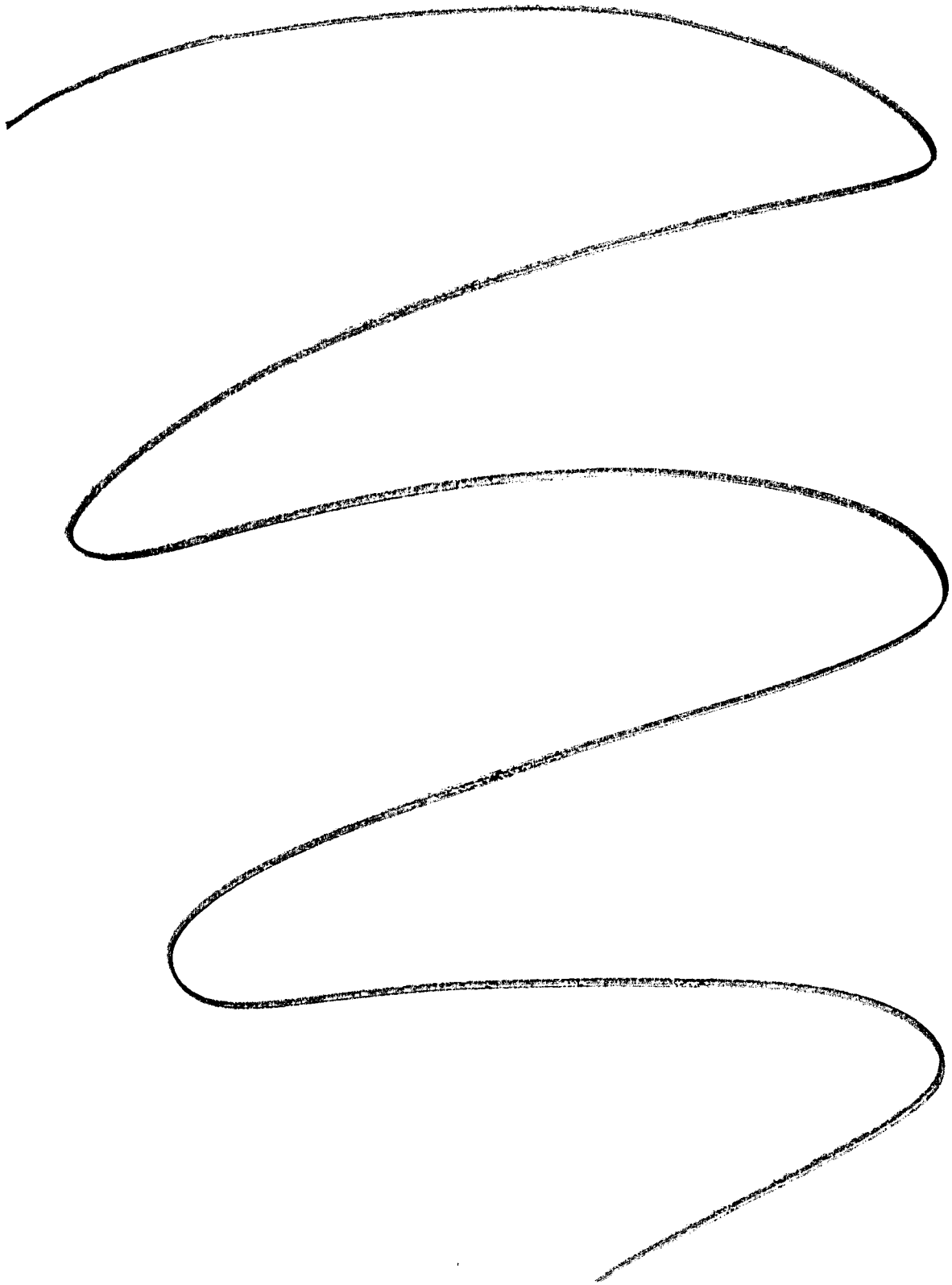
**Christopher J. Miceli**  
Assistant Vice President

**VERTEX**

The Vertex Companies, Inc.  
20 Gibson Place, Suite 201 | Freehold, NJ 07728 | USA

**OFFICE** 732.391.1646 | **MOBILE** 732.239.7936  
[Website](#) | [LinkedIn](#) | [Map](#)

If you are not an intended recipient of confidential and privileged information in this email, please delete it, notify us immediately at [info@vertexeng.com](mailto:info@vertexeng.com), and do not use or disseminate such information.



# **Exhibit H**

## Vaughn Fisher

---

**From:** Vaughn Fisher <vaughn@frhtriallawyers.com>  
**Sent:** Wednesday, October 29, 2014 4:24 PM  
**To:** Erin Brewer  
**Cc:** Ed Savre; John Bradley  
**Subject:** Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Thanks for the email Erin.

Again, to ensure no confusion, you informed me that Zurich would be making no further payments and you left no impression whatsoever that my client would be paid, regardless of any ongoing dialogue. I also told you my client had a contract to be paid those rates, my client can prove the rates are reasonable and if you had an objection, it should have been raised prior to the work being performed. My client and your consultant continue to disagree on whether my client agreed to the reduced payment. You have provided me with no evidence that H2O agreed to the reduced rates on other files.

If you wanted to pay the people helping Farm Supply Distributors a lower rate, you should have voiced the objection prior to the commencement of the work.

I remain open to continuing discussions with you and I will be happy to receive any of the information you have promised. However, my client intends to sue Farm Supply Distributors for breach of contract, prejudgment interest and attorney fees because you said my client would not be paid on the remainder of the invoice.

Thanks,  
Vaughn

**From:** Erin Brewer  
**Sent:** Wednesday, October 29, 2014 6:29 AM  
**To:** vaughn@frhtriallawyers.com  
**Cc:** Ed Savre ; John Bradley  
**Subject:** Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Good Morning Mr. Fisher:

Please allow this correspondence to confirm that you are choosing to close our dialogue by filing suit after I advised you that I would request from Vertex their supporting documentation to show that the rates charged by H2O are unreasonable and inconsistent with what is used in the industry. In addition, as I stated to you previously, H2O has not only agreed to the rates on this claim, but they have agreed to the same rates on other claims that they have worked with Zurich in the past. Please forward me a copy of all court documents that are filed.

Sincerely,

Erin L. Brewer, J.D.

Environmental Claims Specialist  
Zurich North America  
P.O. Box 4034  
Deerfield, Illinois 60015  
Phone: (847) 605-6900  
Fax: (888) 515-1452

erin.brewer@zurichna.com

From: "Vaughn Fisher" <vaughn@frhtriallawyers.com>  
To: "Erin Brewer" <erin.brewer@zurichna.com>  
Cc: "John Bradley" <john@envcleanup.com>, "Ed Savre" <esavre@envcleanup.com>  
Date: 10/28/2014 04:10 PM  
Subject: Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

---

Hi Erin:

Thanks for the email and thanks for taking the time to speak with me yesterday. For the record, I want to confirm that H2O never agreed to a reduction of its invoice beyond the one described in my letter to Vertex. Secondly, H2O's rates are reasonable and consistent with the market. Vertex was unable to produce any document, studies or other data indicating the rates Vertex "recommended" were based upon anything other than Vertex' arbitrary opinion. Finally, and most saliently, your insured signed a contract at those rates and no one from Farm Supply Distributors or Zurich ever complained of or challenged the rates until well after the work was done.

I want to finally confirm that Zurich has been put on notice that its insured, Farm Supply Distributors, will be sued for the remaining amount of the invoices, that Zurich is aware its insured will be sued and that Zurich has been notified that its inactions are the reason its insured is going to be sued.

If you have any questions, please feel free to contact me.

Sincerely,  
Vaughn

**From:** Erin Brewer  
**Sent:** Monday, October 27, 2014 2:52 PM  
**To:** vaughn@frhtriallawyers.com  
**Subject:** Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Good Afternoon Mr. Fisher:

Pursuant to our telephone conference, please find my contact information below. Should you have any questions or concerns, feel free to contact me at any time.

Sincerely,

Erin L. Brewer, J.D.

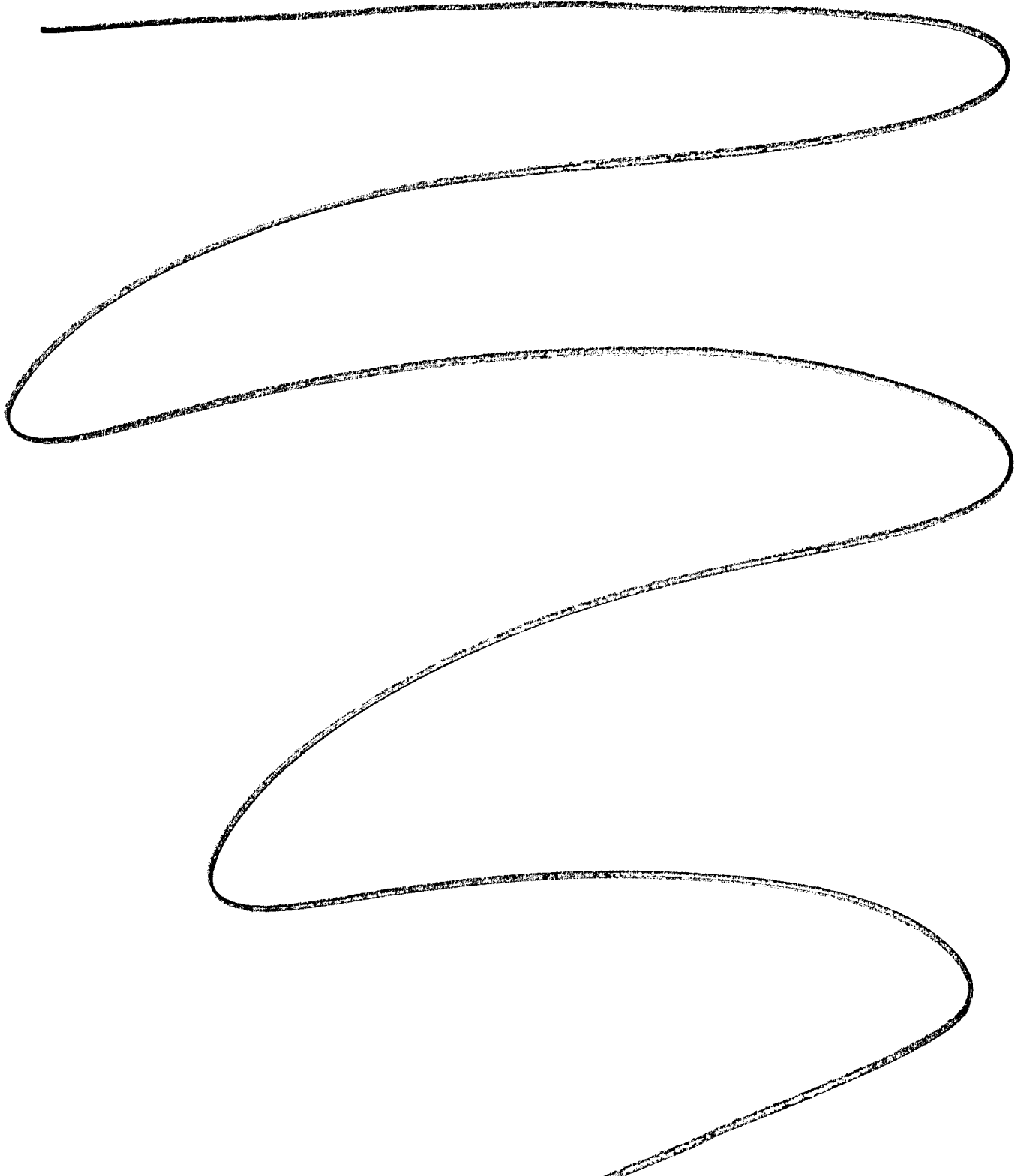
Environmental Claims Specialist  
Zurich North America  
P.O. Box 4034  
Schaumburg, Illinois 60168  
Phone: (847) 605-6900  
Fax: (888) 515-1452  
erin.brewer@zurichna.com

\*\*\*\*\* PLEASE NOTE \*\*\*\*\*

This message, along with any attachments, may be confidential or legally privileged. It is intended only for the named person(s), who is/are the only authorized recipients. If this message has reached you in error, kindly destroy it without review and notify the sender immediately. Thank you for your help.

\*\*\*\*\* PLEASE NOTE \*\*\*\*\*

This message, along with any attachments, may be confidential or legally privileged. It is intended only for the named person(s), who is/are the only authorized recipients. If this message has reached you in error, kindly destroy it without review and notify the sender immediately. Thank you for your help.



# Exhibit I



**FISHER RAINEY HUDSON**

April 15, 2015

Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 N. 6th St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Notice of 30(b)(6) deposition

Dear Jessica,

Enclosed please find a Notice of Deposition pursuant to Rule 30(b)(6). The deposition has been noticed at your office for your convenience. If the date and time noticed is not possible, please respond within 7 days with an alternative date and time. If I don't hear from you within 7 days, I will assume the date and time noticed are agreeable.

Best regards,

Nick Warden

Enclosed: Notice of Deposition pursuant to Rule 30(b)(6)



Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
910 W. Main St., Ste. 254  
Boise, ID 83702  
Email: vaughn@frhtriallylawyers.com  
Email: naw@frhtriallylawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 297-2689

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**NOTICE OF DEPOSITION PURSUANT  
TO RULE 30(b)(6)**

To: Farm Supply Distributors, Inc. c/o Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701

**PLEASE TAKE NOTICE** that Plaintiff, by and through its counsel of record, FISHER RAINEY HUDSON, will take the testimony on oral examination of those witnesses so designated by Defendant Farm Supply Distributors, Inc., pursuant to Idaho Rule of Civil Procedure 30(b)(6), at the offices of Carey Perkins, LLP, Capitol Park Plaza, 300 North 6<sup>th</sup> St., Ste. 200,

Boise, Idaho 83701, commencing at 10:00 a.m. on April 30, 2015, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

Pursuant to Rule 30(b)(6), plaintiff requests that Farm Supply Distributors, Inc. designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. The person(s) so designated shall testify as to matters known or reasonably available to the organization regarding the following topics:

1. Any information known by Farm Supply Distributors that demonstrates the amount charged by H2O Environmental for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho was unreasonable.
2. The validity and accuracy of the amount invoiced by H2O Environmental, Inc. for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho.
3. All evidence upon which the Defendant relies in making the denials listed in paragraphs 1 – 16 of Farm Supply Distributor, Inc.'s Answer and Demand for Jury trial.
4. All evidence upon which the Defendant relies that serves as a basis for the affirmative defenses asserted in Defendant's Answer and Demand for Jury Trial.
5. The identities of any witnesses that may have discoverable information about any of the topics listed in the previous 5 paragraphs.

DATED this \_\_\_\_\_ day of April, 2015.

FISHER RAINEY HUDSON

\_\_\_\_\_  
Nicholas Warden, of the firm  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_ day of April, 2015, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION PURSUANT TO RULE 30(b)(6)** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Jessica E. Pollack  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

\_\_\_\_\_  
Nicholas Warden



**Exhibit J**



## FISHER RAINEY HUDSON

May 8, 2015

Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 N. 6th St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Motion for Protective Order

Dear Jessica,

I am writing in response to the motion for protective order, pursuant to Rule 37(a)(2) and in a good faith effort to resolve a discovery dispute without court intervention.

- As I stated in my April 21, 2015, email we are agreeable to having the deposition in Enterprise. I am uncertain why you believe this is still an issue.
- As to items 3, 4, and 5 on the 30(b)(6) deposition notice, we are content to receive that information in response to written discovery and will prepare the appropriate interrogatories.
- The crux of this matter is your client's obligation to appoint a designee to answer items 1 and 2 on the 30(b)(6) deposition notice. Your client has refused to pay the charges based, we believe, upon the insurance company's (or its expert Vertex's) assessment the charges were unreasonable. If there is some other reason your client has refused to meet its contractual obligations then please let me know.
- Otherwise, the information from its insurance company is "reasonably available" to your client as contemplated by the rule. As well, your client may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert as a

justification for not paying the invoice, then your client has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify.

This is a good faith effort to resolve a discovery dispute. We also believe this two item 30(b)(6) deposition is the most efficient way to conduct the limited discovery necessary to prepare this case for trial. Please withdraw your motion and work with us to schedule the 30(b)(6) deposition for items 1 and 2 in Enterprise, OR.

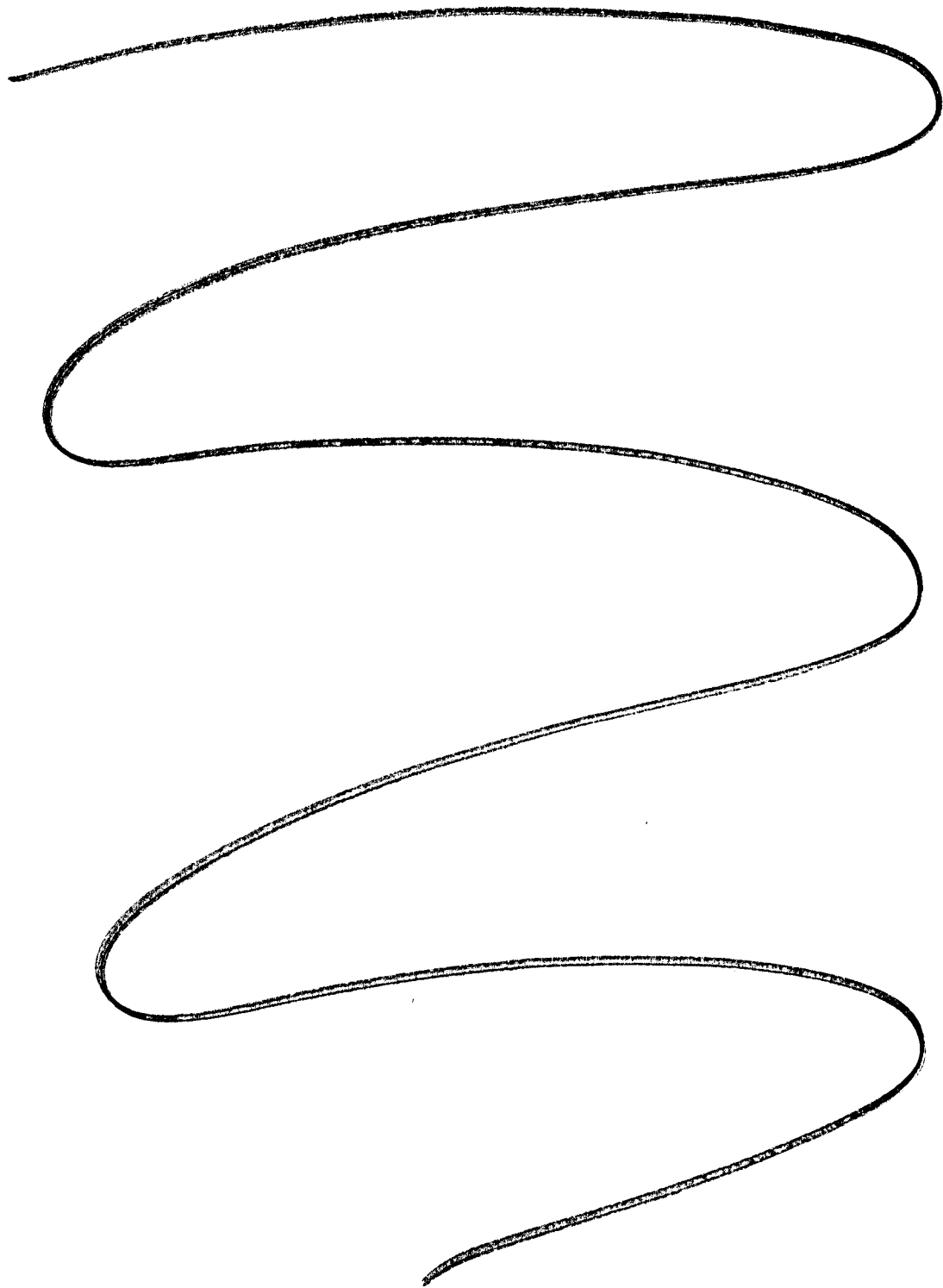
Also, if your client is not relying on the insurance company and its expert, then please tell us why it is not paying the invoice. In your motion your client makes an admission that it, "has no knowledge regarding the reasonableness of the amount charged by Plaintiff..." If that is the case and your client is not relying on the information reasonably available to it from its insurance carrier, then there appears to be no good faith basis for your client's decision to continue this litigation and summary judgment is appropriate.

I look forward to hearing from you.

Best regards,



Nick Warden



# Exhibit K



# FISHER RAINEY HUDSON

May 29, 2015

Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 N. 6th St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Motion for Protective Order

Dear Jessica,

Thank you for your letter of May 15, 2015. Enclosed is a Notice of 30(b)(6) deposition set seven (7) days after the scheduling conference set for June 17<sup>th</sup>. In response to your letter:

- You asked that the deposition be conducted in Enterprise, Oregon. We agreed.
- You asked that the proposed deposition topics be narrowed. We agreed to remove three of the five proposed topics.
- You raised concerns regarding Farm Supply's ability to comply with Rule 30(b)(6) because nobody who works at Farm Supply can be designated. We have explained that under the Rule Farm Supply may appoint "other persons who consent to testify on its behalf" including a member of Farm Supply's insurance company, or that company's expert. If someone at the insurance company has knowledge of why H2O's bill is unreasonable, then that information is reasonably available to your client and it should appoint the most appropriate person from the insurance company to testify.
- Though I believe you fully understand the information we seek by our proposed topics, per your request for further clarification, we seek information regarding the facts that serve as the basis for your claim that what H2O charged Farm



Supply is unreasonable. We are also seeking the basis for Farm Supply's "red-lining" or revision of invoices it received from H2O.

Your client refuses to pay a bill. Your position appears to be that there is either nobody with knowledge of the reasons for why the bill has not been paid, or that the reasons for nonpayment are privileged or otherwise non-discoverable. We consider this position untenable and ask once again that you cooperate with us to complete this short deposition so that we can get this \$9000 dispute resolved quickly. If you insist on bringing this matter to the court's attention, we ask that you schedule the hearing on your motion for protective order at the time currently designated by the court for the upcoming scheduling conference.

Your anticipated cooperation is greatly appreciated.

Best regards,

A handwritten signature in cursive script, appearing to read "Nick Warden".

Nick Warden

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Plaintiff*

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

**MAGISTRATE DIVISION**

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**NOTICE OF DEPOSITION PURSUANT  
TO RULE 30(b)(6)**

To: Farm Supply Distributors, Inc. c/o Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701

**PLEASE TAKE NOTICE** that Plaintiff, by and through its counsel of record, FISHER RAINEY HUDSON, will take the testimony on oral examination of those witnesses so designated by Defendant Farm Supply Distributors, Inc., pursuant to Idaho Rule of Civil Procedure 30(b)(6), at the FSD Headquarters located at 65179 Alder Slope Rd., Enterprise, OR 97828,

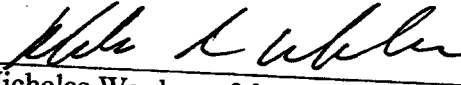
commencing at 10:00 a.m. on June 24, 2015, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

Pursuant to Rule 30(b)(6), plaintiff requests that Farm Supply Distributors, Inc. designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. The person(s) so designated shall testify as to matters known or reasonably available to the organization regarding the following topics:

1. Any information known by Farm Supply Distributors that demonstrates the amount charged by H2O Environmental for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho was unreasonable.
2. The validity and accuracy of the amount invoiced by H2O Environmental, Inc. for emergency remediation services performed in response to a fuel spill at a Maverik store in Boise, Idaho.

DATED this 29 day of May, 2015.

FISHER RAINEY HUDSON

  
\_\_\_\_\_  
Nicholas Warden, of the firm  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29 day of May, 2015, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION PURSUANT TO RULE 30(b)(6)** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Jessica E. Pollack  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

  
\_\_\_\_\_  
Nicholas Warden

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 206

NOV 17 2015

CHRISTOPHER D. RICH, Clerk  
By JAMIE MARTIN  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION IN LIMINE

I.  
INTRODUCTION

Defendant Farm Supply Distributors, Inc. respectfully requests that this Court deny Plaintiff's motion in limine to exclude evidence based on the quasi-estoppel doctrine because Plaintiff has not proven application of the doctrine. Quasi-estoppel requires proof that a party took a position inconsistent with a prior position with knowledge of the facts and its rights, to the detriment of the person seeking application of the doctrine. Here, Plaintiff failed to prove any of these three elements.

AS

For the convenience of the Court and the parties, Farm Supply has enclosed herewith copies of its April 28, 2015 Motion for Protective Order and Affidavit of Jessica Pollock in Support of the Motion, papers which were previously filed with this Court.

**II.**  
**FACTUAL BACKGROUND**

This case involves a contract dispute between Plaintiff and Defendant Farm Supply. Farm Supply paid Plaintiff approximately \$38,000 to clean up a fuel spill (Compl. ¶ 9), and Plaintiff sued Farm Supply to recover an additional \$7,354.65 that Plaintiff claims is due pursuant to a contract. (Compl. ¶ 12.) Farm Supply has denied a contract existed and asserted as a defense that it has already paid Plaintiff the reasonable value for its services. (Answer 4.)

On April 15, 2015, Plaintiff issued an Idaho R. Civ. P. 30(b)(6) notice of deposition of Farm Supply. (Aff. Of Jessica Pollock in Support of Mot. For Protective Order April 28, 2015, Ex. A.) Categories 1 and 2 on the notice sought information regarding the reasonableness of Plaintiff's charges for environmental remediation services. (*Id.*) After reviewing the notice, Farm Supply's counsel called and spoke with Plaintiff's counsel regarding the notice and advised Plaintiff's counsel that because Farm Supply is not a fuel spill remediation company, a Farm Supply designee would not be able to provide any testimony regarding the reasonableness of the amount charged by the Plaintiff for the fuel remediation services it performed because Farm Supply had no such institutional knowledge. (Pollock Aff. ¶ 6.) Farm Supply's counsel also stated the same was true for the category identifying information regarding the validity and accuracy of the amount invoiced by Plaintiff for fuel remediation services. (*Id.*) Counsel corresponded back and forth regarding the issues with the notice of deposition, and on April 28, 2015, because the

parties were unable to reach a solution, Farm Supply filed a motion for protective order related to the notice of deposition. (*Id.* ¶ 8–10.)

Argument in Farm Supply's motion for protective order included that Farm Supply did not have knowledge of the categories raised in Plaintiff's notice of deposition. (Def.'s Mot. For Protective Order April 28, 2015.) Farm Supply provided legal authority and explained that it "is a freight shipping and hauling company. As such, Farm Supply has no knowledge regarding the reasonableness of the amount charged by Plaintiff H2O Environmental for fuel remediation services." (*Id.* ¶ 4.) Farm Supply also pointed out that Plaintiff's notice improperly sought expert testimony. (*Id.*)

Plaintiff's counsel inquired regarding the motion for protective order, (Lyon Aff. In Opposition to Plf.'s Mot. In Limine Ex. 1), and Farm Supply's counsel responded, again explaining that Farm Supply had no corporate knowledge regarding the reasonableness of Plaintiff's charges and that Plaintiff's notice improperly encroached into expert opinion testimony. (Lyon Aff. Ex. 2.) Plaintiff's counsel responded with an amended notice of deposition and a letter stating that Plaintiff believed Farm Supply could designate a representative of its insurer to testify on its behalf at the 30(b)(6) deposition. (Warden Aff. In Support of Plf.'s Mot. In Limine, Ex. 3.) Farm Supply agreed to designate an individual to testify to the categories of Plaintiff's notice, but again warned that Farm Supply's designee's knowledge would be "quite limited." (Lyon Aff. Ex. 3.)

On June 15, 2015, Plaintiff issued a second amended notice of deposition (Warden Aff. Ex. 2), and the 30(b)(6) deposition occurred on July 8, 2015. (Lyon Aff. Ex. 4, Craig Willis dep. 1.) As had been clearly discussed with Plaintiff's counsel, at deposition

Farm Supply's designee testified that Farm Supply did not have knowledge regarding the reasonableness of Plaintiff's charges. (See Willis dep. 37:11–40:20.)

Plaintiff filed the instant motion in limine on August 25, 2015. Consistent with this Court's scheduling order, Farm Supply served and filed its expert witness disclosure on September 9, 2015. (Def.'s Expert Disclosure Sept. 9, 2015.)

### III. LEGAL STANDARD

"A trial court has broad discretion in determining whether to admit or exclude evidence, and its judgment in the fact finding role will only be disturbed on appeal when there has been a clear abuse of discretion." *State v. Abdullah*, \_\_ Idaho \_\_, 348 P.3d 1, 117 (2015) (internal citations omitted). "The test for determining whether the district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason." *White v. Mock*, 140 Idaho 882, 888, 104 P.3d 356, 362 (2004).

### IV. ARGUMENT

#### A. **Plaintiff's motion to exclude evidence should be denied because Plaintiff has not proven the application of the doctrine of quasi-estoppel**

The doctrine of quasi-estoppel applies when the party asserting the doctrine proves each element of a three-element test: (1) a person asserts a claim inconsistent with a position previously taken by that person (2) with knowledge of the facts and his or her rights, (3) to the detriment of the person seeking application of the doctrine. *Highlands*,



*Inc. v. Hosac*, 130 Idaho 67, 70 (1997). The party asserting application of quasi-estoppel has the burden of proof. *Willig v. Department of Health & Welfare*, 127 Idaho 259, 261–62 (1995). Plaintiff has not established any of these elements.

1. *Farm Supply's position has been consistent*

The first element of quasi-estoppel that Plaintiff must prove is that Farm Supply asserts a claim inconsistent with a position previously taken. Plaintiff has not and cannot prove this element because Farm Supply has been consistent in its position that Plaintiff's charges were unreasonable but has never asserted its own institutional knowledge in that regard. Plaintiff misstates the record in stating that Farm Supply had no evidentiary basis to contest the accuracy of Plaintiff's bills and that Farm Supply had no basis to contest whether Plaintiff charged a reasonable amount for its services. (Plf.'s Mot. In Limine 2–3.) Rather, in response to a question from Plaintiff's counsel regarding the value of Plaintiff's services, Craig Willis, Farm Supply's 30(b)(6) designee, testified that he did not have any knowledge regarding the reasonable value of Plaintiff's services. (Warden Aff. In Support of Plf.'s Mot. In Limine, Ex. 4, Willis dep. 38:8–13.) Mr. Willis further testified that he had no knowledge whether Plaintiff's charges for its services were unreasonable. (*Id.* at 40:6–11.) In a portion of the deposition transcript which Plaintiff did not offer for this Court to review, Mr. Willis clearly testified that he "would have no knowledge to the reasonableness of the billing." (Lyon Aff. In Opposition to Plf.'s Mot. In Limine, Ex. 1, Willis dep. 37:23–24; see also Willis dep. 37:11–40:20.)

Plaintiff's questions to Mr. Willis regarding the reasonableness of Plaintiff's charges were akin to asking a medical malpractice plaintiff whether a doctor's conduct in a complicated and arcane surgery was a breach of the standard of health care practice.

A lay plaintiff probably would not have the training and experience to competently testify on the standard of health care practice and would need to rely on qualified experts for evidence regarding breach. Similarly, here Farm Supply did not have independent knowledge or reasonable access to information to respond to Plaintiff's 30(b)(6) category. Idaho R. Civ. P. 30(b)(6) limits the scope of a deposition of an organization to information known or reasonably available to the organization and expressly informed Plaintiff of such prior to the deposition on multiple occasions.

Plaintiff was well aware of Farm Supply's position on this matter and that Farm Supply's designee would have little information responsive to Plaintiff's 30(b)(6) category. Farm Supply's counsel time and again informed Plaintiff's counsel of the lack of information Farm Supply had and that Plaintiff's 30(b)(6) notice improperly sought expert witness opinions. Farm Supply even filed a Motion for Protective Order further setting forth its position. Farm Supply agreed to go forward with the deposition because it believed an agreement had been reached with Plaintiff regarding the limited information its designee would be able to provide. Then, on schedule Farm Supply duly disclosed its expert witness opinions through its expert witness disclosure and supported its contention that Plaintiff's charges were unreasonable. Farm Supply's position has been unwaveringly consistent, and Plaintiff has not shown that Farm Supply has changed positions on any issue.

2. *Plaintiff has not proven that Farm Supply had knowledge of the facts and its rights*

Plaintiff has also failed to prove the second part of the quasi-estoppel test, that is that, even if Mr. Willis's testimony can be construed as inconsistent with prior positions taken by Farm Supply, Mr. Willis was fully aware of his rights and all the facts at the time the statement was made.

3. *Plaintiff did not suffer a detriment*

Finally, Plaintiff failed to prove the third element: that Farm Supply's alleged inconsistent position has been to Plaintiff's detriment. In its Motion in Limine, Plaintiff did not even address this aspect of the test for quasi-estoppel. Indeed, Plaintiff suffered no detriment because it has known all along that Farm Supply contests the reasonableness of Plaintiff's charges, and Farm Supply duly disclosed its expert witness opinions regarding the unreasonableness of Plaintiff's charges as required by this Court's scheduling order. (See Def.'s Expert Witness Disclosure Sept. 9, 2015.)

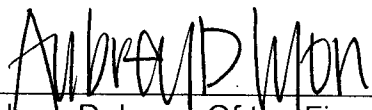
**V.  
CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's motion in limine to exclude evidence of the unreasonableness of Plaintiff's charges and invoices in this matter.

DATED this 17<sup>th</sup> day of November, 2015.

CAREY PERKINS LLP

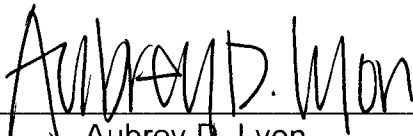
By

  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

  
\_\_\_\_\_  
Aubrey D. Lyon

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

NO. \_\_\_\_\_  
AM. \_\_\_\_\_ FILED \_\_\_\_\_  
PM. 206

NOV 17 2015

CHRISTOPHER D. RICH, Clerk  
By JAMIE MARTIN  
DEPUTY

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

AFFIDAVIT OF AUBREY D. LYON IN  
OPPOSITION TO PLAINTIFF'S  
MOTION IN LIMINE

STATE OF IDAHO )  
                                          : ss.  
County of Ada    )

**AUBREY D. LYON**, having been first duly sworn upon oath, deposes and  
says:

1. I am an attorney with the firm Carey Perkins LLP, counsel of record  
for Defendant Farm Supply Distributors, Inc. in this matter, and the following statements  
are true and correct and made from personal knowledge.

*Handwritten mark*

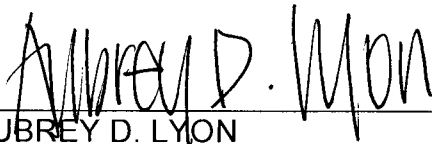
2. Attached hereto as **Exhibit 1** is a true and correct copy of a letter from Plaintiff's counsel received on or about May 8, 2015.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a letter from Jessica Pollock of my firm dated May 15, 2015.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a letter from Jessica Pollock of my firm dated June 9, 2015.

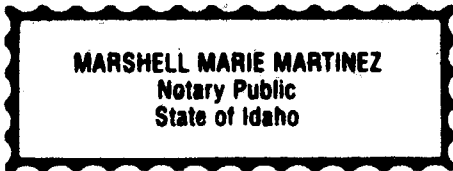
5. Attached hereto as **Exhibit 4** is a true and correct copy of pages 1 and 37-40 of the transcript of the July 8, 2015 IRCP 30(b)(6) deposition of Farm Supply with Craig Willis as designee.

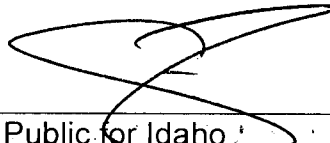
FURTHER your Affiant saith not.

  
\_\_\_\_\_  
AUBREY D. LYON

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of November, 2015.

(SEAL)

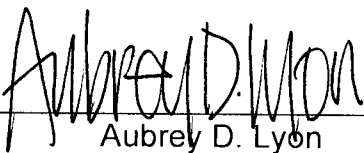


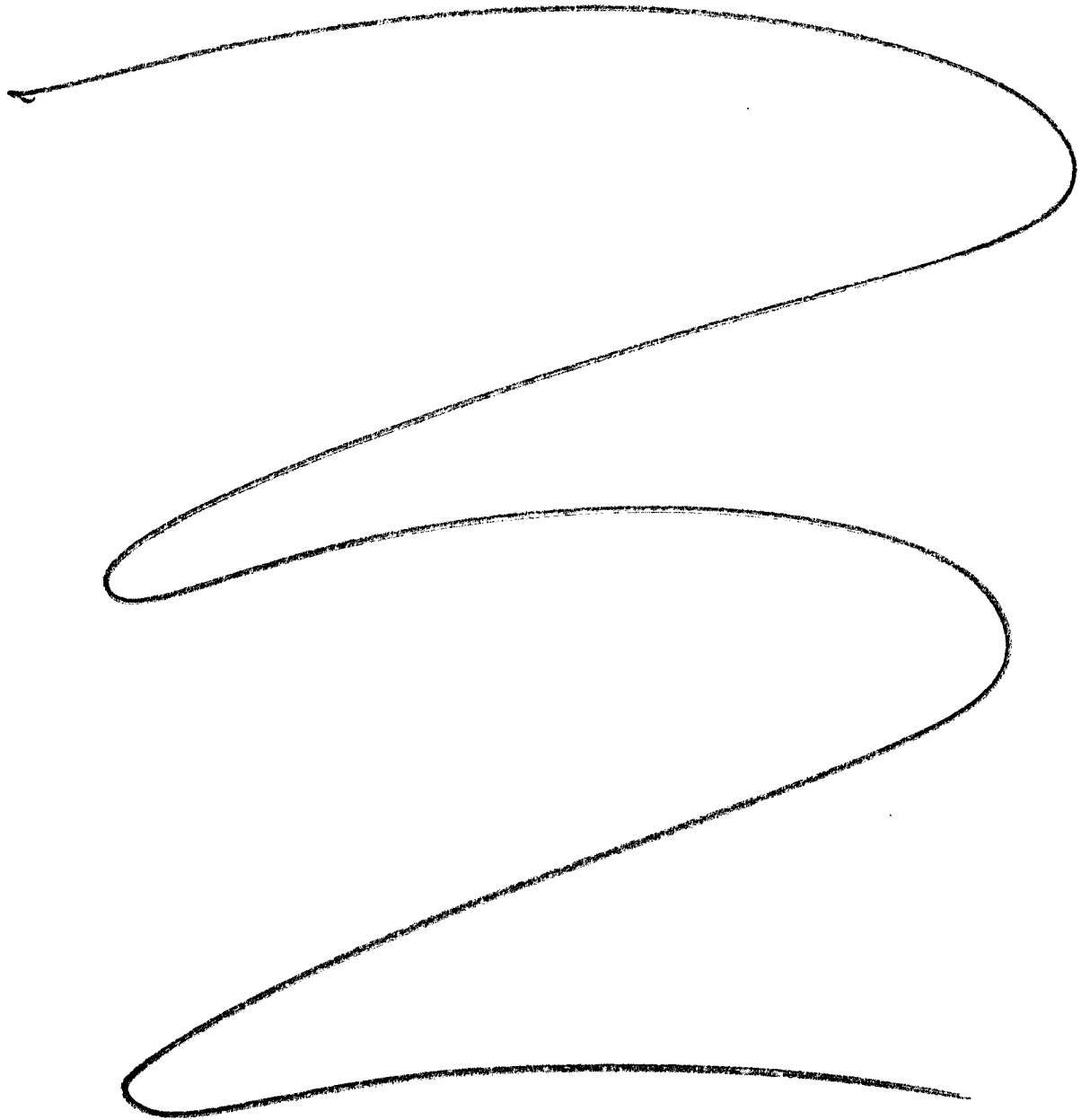
  
\_\_\_\_\_  
Notary Public for Idaho,  
Residing at Boise, Idaho  
Commission expires 04/15/2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing AFFIDAVIT OF AUBREY D. LYON IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

  
Aubrey D. Lyon



# EXHIBIT 1



**FISHER RAINEY HUDSON**

May 8, 2015

Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 N. 6th St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Motion for Protective Order

Dear Jessica,

I am writing in response to the motion for protective order, pursuant to Rule 37(a)(2) and in a good faith effort to resolve a discovery dispute without court intervention.

- As I stated in my April 21, 2015, email we are agreeable to having the deposition in Enterprise. I am uncertain why you believe this is still an issue.
- As to items 3, 4, and 5 on the 30(b)(6) deposition notice, we are content to receive that information in response to written discovery and will prepare the appropriate interrogatories.
- The crux of this matter is your client's obligation to appoint a designee to answer items 1 and 2 on the 30(b)(6) deposition notice. Your client has refused to pay the charges based, we believe, upon the insurance company's (or its expert Vertex's) assessment the charges were unreasonable. If there is some other reason your client has refused to meet its contractual obligations then please let me know.
- Otherwise, the information from its insurance company is "reasonably available" to your client as contemplated by the rule. As well, your client may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert as a

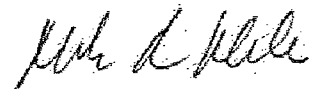
justification for not paying the invoice, then your client has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify.

This is a good faith effort to resolve a discovery dispute. We also believe this two item 30(b)(6) deposition is the most efficient way to conduct the limited discovery necessary to prepare this case for trial. Please withdraw your motion and work with us to schedule the 30(b)(6) deposition for items 1 and 2 in Enterprise, OR.

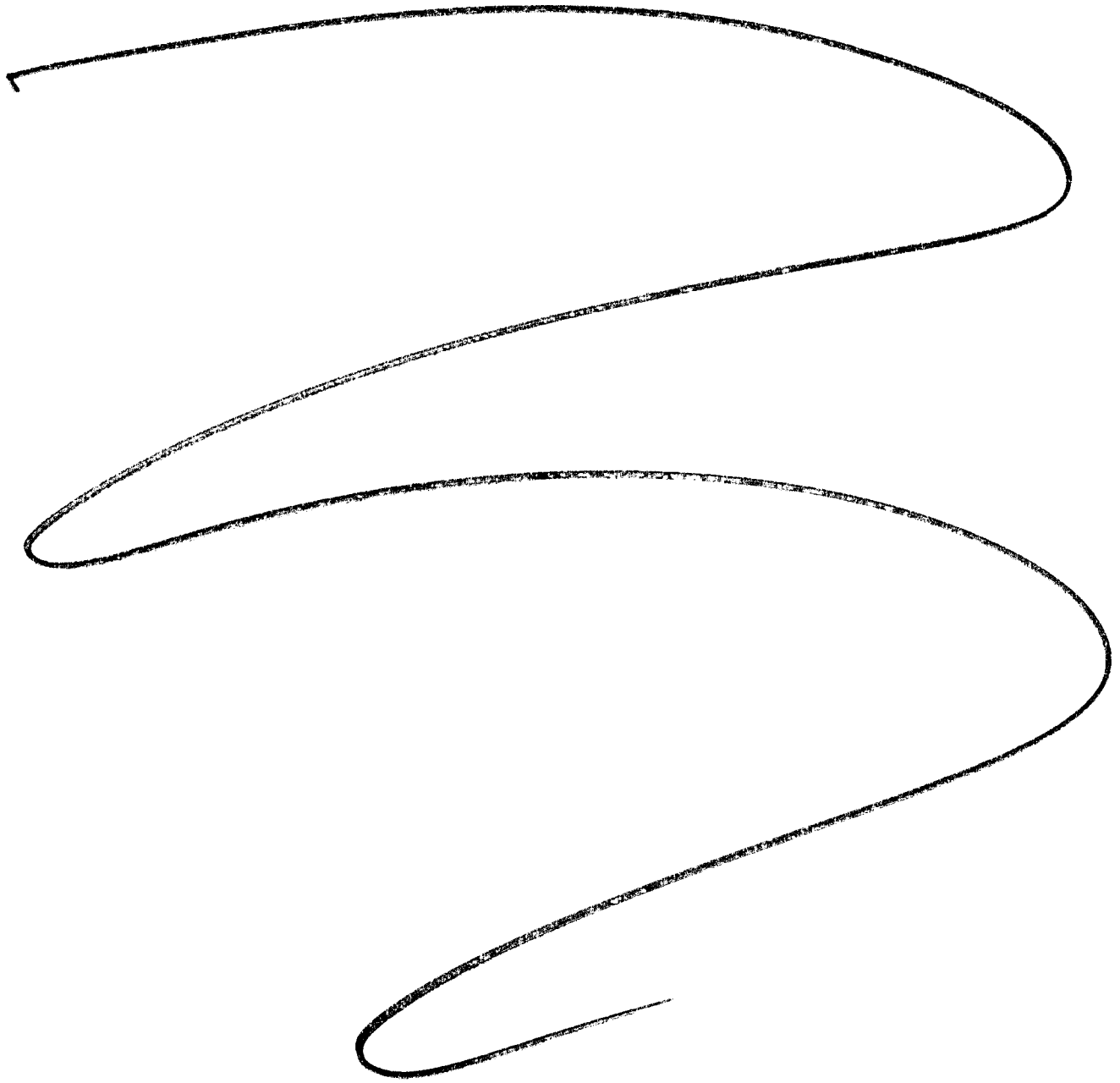
Also, if your client is not relying on the insurance company and its expert, then please tell us why it is not paying the invoice. In your motion your client makes an admission that it, "has no knowledge regarding the reasonableness of the amount charged by Plaintiff..." If that is the case and your client is not relying on the information reasonably available to it from its insurance carrier, then there appears to be no good faith basis for your client's decision to continue this litigation and summary judgment is appropriate.

I look forward to hearing from you.

Best regards,



Nick Warden



# EXHIBIT 2

# CAREY PERKINS LLP

ATTORNEYS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH 6<sup>TH</sup> STREET, SUITE 200  
P. O. BOX 519  
BOISE, IDAHO 83701-0519  
TELEPHONE (208) 345-8600  
FACSIMILE (208) 345-8660  
www.careyperkins.com  
email: info@careyperkins.com

E. B. SMITH (1896-1975)  
LESLIE S. BROWN  
DONALD F. CAREY\*  
MARISA S. CRECELIUS  
WILLIAM K. FLETCHER  
DAVID W. KNOTTS  
AUBREY D. LYON  
BRUCE R. McALLISTER  
HANS A. MITCHELL  
DAVID S. PERKINS  
CARSTEN A. PETERSON  
JESSICA E. POLLACK  
WILLIAM G. POPE  
LINDSEY R. ROMANKIW  
DINA L. SALLAK  
RICHARD L. STUBBS  
TRACY L. WRIGHT

OFFICES IN  
IDAHO FALLS, IDAHO 83405-1388  
980 PIER VIEW DRIVE, SUITE B  
P. O. BOX 51388  
TELEPHONE (208) 529-0000  
FACSIMILE (208) 529-0005

WITH ATTORNEYS ADMITTED  
TO PRACTICE LAW IN  
IDAHO, OREGON, UTAH,  
WASHINGTON AND WYOMING

\*ADMITTED TO PRACTICE IN  
IDAHO AND WYOMING

May 15, 2015

## VIA FACSIMILE

Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702

Re: ***H2O Environmental, Inc. vs. Farm Supply Distributors, Inc.***  
Case No.: CV-OC-1500236  
Our File No.: 1004/26-987

Dear Nick:

Thank you for your letter of May 8. We welcome your efforts to reach a mutually agreeable solution regarding your proposed Rule 30(b)(6) deposition. We will be happy to withdraw our Motion for Protective Order if we are able to find a mutually agreeable solution. We will not set the Motion for hearing unless, and until, an impasse is reached.

With regard to the location of the deposition, it was a bit unclear whether this issue was resolved based on your April 23 e-mail stating "I will go ahead and notice the deposition for a date, time and place of my choosing." That was the reason the location issue was included in our Motion for Protective Order. Based on your May 8 letter, we will consider that issue resolved.

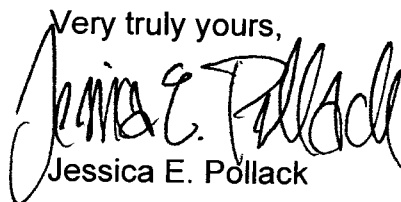
Based on your letter, H2O will conduct written discovery regarding the subjects identified in paragraphs 3, 4, and 5 of your proposed 30(b)(6) deposition, which narrows the scope of topics for your proposed Rule 30(b)(6) deposition to those identified in paragraphs 1 and 2. As you know, Rule 30(b)(6) obligates Farm Supply to designate a person or persons who can testify regarding matters that are discoverable and within its "corporate knowledge." If the information sought by paragraphs 1 and 2 is motivated by the

Nicholas A. Warden  
FISHER RAINEY HUDSON  
May 15, 2015  
Page 2

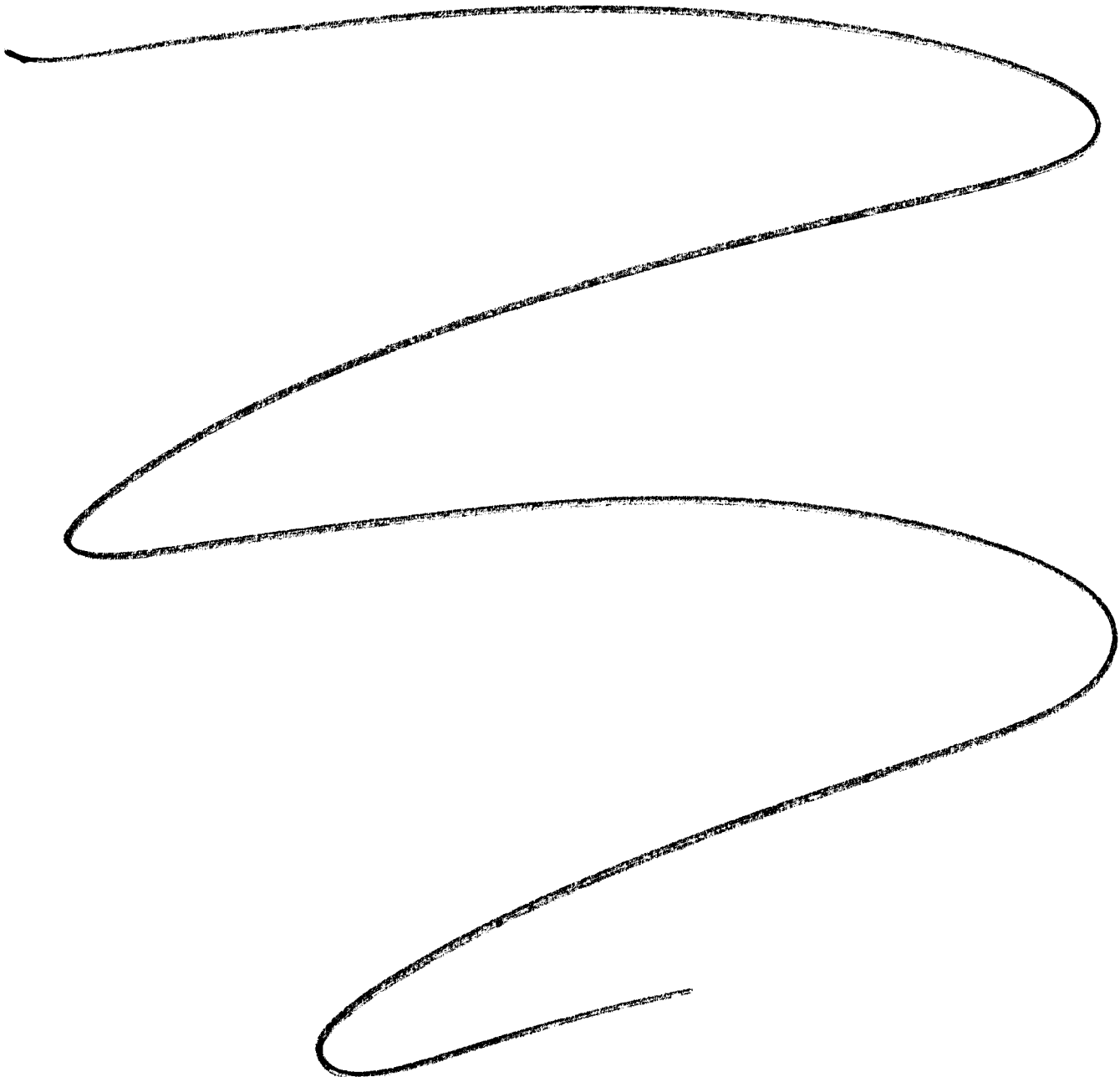
affirmative defense in paragraph 4 of Farm Supply's Answer, it may be possible to designate a deponent that can testify regarding facts known or reasonably obtainable by Farm Supply pertaining to that defense. However, as written, these proposed deposition topics seek much more than facts known or knowable by Farm Supply—they also seem to seek information that would constitute an expert opinion not known or reasonably obtainable by Farm Supply, or a legal opinion, which is protected from discovery.

As discussed in our Motion for Protective Order, Farm Supply is not a fuel remediation company and does not have independent corporate knowledge of what may constitute "reasonable" remediation charges or the "validity and accuracy" of H2O's own invoices. Any facts that support Farm Supply's fourth affirmative defense were gathered and shared with Farm Supply by our law firm. Thus, we are concerned that your proposed line of inquiry will overlap with topics protected by the attorney-client privilege and work-product doctrine. If Farm Supply were to designate an officer, director, or managing agent on those topics, without any narrowing or refining of the scope, Farm Supply risks being found in violation of its duty to designate. This is the reason for the motion for protective order—we wish to avoid any surprises or disappointment, by either party, associated with a proposed 30(b)(6) deposition of Farm Supply. Not to mention either side unnecessarily incurring attorney fees. We will, of course, designate experts in due course.

In the meantime, if your proposed deposition topics can be narrowed to account for the concerns discussed above and focus on factual discovery, which is the intended use of a 30(b)(6) deposition, we will be happy to withdraw our Motion and work with you to schedule the requested deposition. Please feel free to contact me if you would like to discuss these matters in further detail.

Very truly yours,  
  
Jessica E. Pollack

JEP:nn



# EXHIBIT 3

# CAREY PERKINS LLP

E. B. SMITH (1896-1975)  
LESLIE S. BROWN  
DONALD F. CAREY\*  
MARISA S. CRECELIUS  
WILLIAM K. FLETCHER  
DAVID W. KNOTTS  
AUBREY D. LYON  
BRUCE R. McALLISTER  
HANS A. MITCHELL  
DAVID S. PERKINS  
CARSTEN A. PETERSON  
JESSICA E. POLLACK  
WILLIAM G. POPE  
LINDSEY R. ROMANKIW  
DINA L. SALLAK  
RICHARD L. STUBBS  
TRACY L. WRIGHT

ATTORNEYS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH 6<sup>TH</sup> STREET, SUITE 200  
P. O. BOX 519  
BOISE, IDAHO 83701-0519  
TELEPHONE (208) 345-8600  
FACSIMILE (208) 345-8660  
www.careyperkins.com  
email: info@careyperkins.com

OFFICES IN  
IDAHO FALLS, IDAHO 83405-1388  
980 PIER VIEW DRIVE, SUITE B  
P. O. BOX 51388  
TELEPHONE (208) 529-0000  
FACSIMILE (208) 529-0005

WITH ATTORNEYS ADMITTED  
TO PRACTICE LAW IN  
IDAHO, OREGON, UTAH,  
WASHINGTON AND WYOMING

\*ADMITTED TO PRACTICE IN  
IDAHO AND WYOMING

June 9, 2015

## VIA FACSIMILE

Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702

Re: ***H2O Environmental, Inc. vs. Farm Supply Distributors, Inc.***  
Case No.: CV-OC-1500236  
Our File No.: 1004/26-987

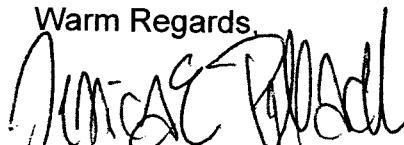
Dear Nick:

Based on your explanation and further clarification in your May 29 letter regarding the scope of your proposed deposition topics, we feel we are able to select a designee to testify on behalf of Farm Supply. Farm Supply's designee will prepare to testify regarding the two topics identified in your deposition notice, as those topics are clarified in your letter. However, pursuant to our previous conversations on this issue, I believe you are aware that the facts known or reasonably available to Farm Supply on these topics is quite limited.

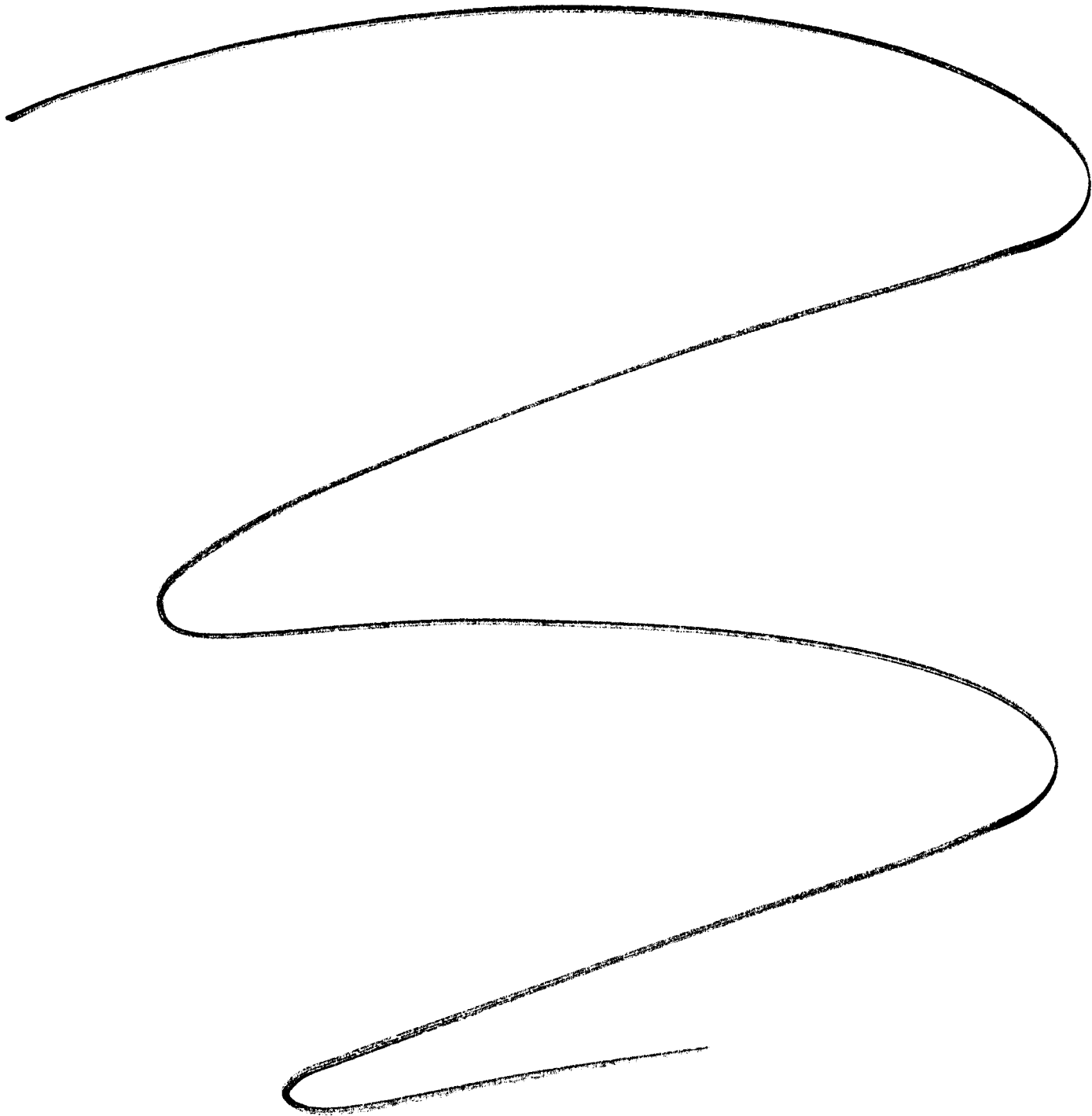
In speaking with my client, it appears Farm Supply's designee for the Rule 30(b)(6) deposition has a scheduling conflict on June 24. Therefore, if it works with your schedule, I propose that the deposition be reset for 10:00 a.m. PST on June 30. Furthermore, Farm Supply's office does not have a conference room, but I am told there may be suitable space available at the courthouse in Enterprise, the chamber of commerce, or one of the local hotels. I have no preference regarding which of these locations you choose.

Please let me know whether you are available on June 30.

Warm Regards,



Jessica E. Pollack



# EXHIBIT 4



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

|                                                       |   |               |
|-------------------------------------------------------|---|---------------|
| H2O ENVIRONMENTAL, INC., an Idaho Corporation,        | ) |               |
|                                                       | ) |               |
| Plaintiff,                                            | ) |               |
|                                                       | ) | No.           |
| vs.                                                   | ) |               |
|                                                       | ) | CV OC 1500236 |
| FARM SUPPLY DISTRIBUTORS, INC., an Oregon corporation | ) |               |
|                                                       | ) |               |
| Defendant.                                            | ) |               |
|                                                       | ) |               |

30(b)(6) DEPOSITION OF CRAIG WILLIS  
Taken at the instance of the Plaintiff

July 8, 2015  
2:25 p.m.  
1200 Highland Avenue  
Enterprise, Oregon

BRIDGES REPORTING & LEGAL VIDEO  
Certified Shorthand Reporters  
P. O. Box 223  
Pendleton, Oregon 97801  
(541) 276-9491 - (800) 358-2345

1 today's deposition?

2 A. I think I did at the office.

3 Q. Okay. And what does it appear to be?

4 A. An invoice.

5 Q. Is it an invoice from H2O?

6 A. Yes.

7 Q. Is it an invoice -- Does it appear to be an  
8 invoice from H2O for environmental remediation  
9 services?

10 A. Yes.

11 Q. Again, beginning with page 1, are there any  
12 charges on page 1, any itemized charges on page 1,  
13 that you have any reason to believe are unreasonable?

14 A. No.

15 Q. I'm going to ask you to turn to page 2, and  
16 review those itemized charges on page 2 that you the  
17 same question.

18 Are there any itemized charges on page 2  
19 that you have any reason to believe are unreasonable?

20 A. No.

21 Q. Okay. Same question for page 3. Any  
22 unreasonable charges on page 3?

23 A. I would have no knowledge to the  
24 reasonableness of the billing.

25 Q. Okay. So, for the entirety of the invoice,

1 there were no charges that you were able to identify  
2 as unreasonable?

3 A. That's correct.

4 Q. Okay. Do you have any reason to believe  
5 that the itemized charges within the, the itemized  
6 charges contained in Exhibit 4 are somehow inaccurate?

7 A. No.

8 Q. Do you have any knowledge of the reasonable  
9 value of environmental remediation services?

10 A. Do I have any knowledge of the reasonable  
11 value?

12 Q. Of environmental remediation services?

13 A. No.

14 Q. Okay.

15 A. I don't own an environmental company. I  
16 can tell you, if you want a gallon of gas hauled from  
17 Portland, Oregon, to Boise, Idaho, I've got a  
18 reasonable knowledge of the value of that.

19 Q. I believe it. Do you have any reason to  
20 believe that there is somebody, an individual at  
21 Vertex, with knowledge relevant to the reasonableness  
22 of charges for environmental remediation services  
23 performed by H2O?

24 A. No.

25 Q. Same question for Zurich. Do you have any

1 reason to believe that there is anybody at Zurich with  
2 knowledge regarding the reasonableness of charges for  
3 environmental remediation services?

4 A. I wouldn't have knowledge of it.

5 Q. Okay.

6 A. But I'll go back to my response that I gave  
7 a little bit ago. I doubt there is anybody from  
8 Vertex and Zurich that knows what it costs to haul a  
9 gallon of gas from Portland, Oregon, to Boise, Idaho,  
10 either.

11 Q. Right.

12 A. It's not what they do, and that isn't what  
13 I do.

14 Q. So, it's not what they do?

15 A. They don't haul fuel.

16 Q. They also don't conduct environmental  
17 remediation services, correct?

18 A. I have no idea what they do.

19 Q. Okay.

20 A. I know what I do.

21 Q. Okay. So, they may?

22 A. They may.

23 Q. Okay.

24 A. I have no knowledge of it.

25 Q. Okay. Fair enough. I'm going to spare you

1 the boredom and torture of going through item through  
2 item the services performed by H2O and asking you  
3 whether or not the amount they charged is reasonable;  
4 and instead, I'm going to ask you, generally, once  
5 more, do you have any reason to believe that the  
6 itemized charges that H2O -- Well, do you have any  
7 reason to believe what H2O charged Farm Supply for the  
8 environmental remediation services it performed in  
9 response to the spill, were unreasonable, in any way  
10 unreasonable?

11 A. I wouldn't have any knowledge of that.

12 Q. Okay. So, you have no reason to -- Do you  
13 have any -- Well, let me -- My question is a little  
14 different.

15 Do you have any reason to believe that  
16 those charges were unreasonable?

17 A. No. Not other than the correspondence that  
18 was, has been sent on to our office. That's the only  
19 reason I would have to believe that there is a matter  
20 in dispute about it.

21 Q. Is this correspondence between your  
22 organization and counsel?

23 A. No.

24 Q. Okay. So, what the --

25 A. I'm talking about from H2O to our office to

Vaughn Fisher, ISB No. 7624  
 Nicholas A. Warden, ISB No. 9179  
 FISHER RAINEY HUDSON  
 950 W. Bannock St., Ste. 630  
 Boise, ID 83702  
 Email: vaughn@frhtriallawyers.com  
 Email: naw@frhtriallawyers.com  
 Telephone: (208) 345-7000  
 Facsimile: (208) 514-1900

NO. \_\_\_\_\_  
 AM. \_\_\_\_\_ FILED \_\_\_\_\_  
 P.M. \_\_\_\_\_

NOV 20 2015

CHRISTOPHER D. RICH, Clerk  
 By JAMIE MARTIN  
 DEPUTY

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
 Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
 an Oregon corporation

Defendant.

Case No. CV OC 1500236

**PLAINTIFF'S REPLY IN SUPPORT OF  
 MOTION IN LIMINE**

COMES NOW the Plaintiff, H2O Environmental, Inc., by and through its counsel of record, FISHER RAINEY HUDSON, and files this Reply in Support of Motion in Limine and shows this Court as follows:

**ARGUMENT**

Defendant should be prohibited from introducing evidence at trial which has been readily available to it for more than one year and which it has purposely failed to disclose. Specifically,

*MB*

Defendant should be prohibited from introducing the testimony of Chris Miceli to refute the reasonableness of the prices Plaintiff charged to the Defendant in this case.

#### FACTS

- Plaintiff provided emergency environmental services to Defendant from July 12 through August 4, 2014 for a gas spill caused by one of Defendant's trucks at a Boise gas station.
- As early as July 16, 2014 Chris Miceli was involved in evaluating the prices being charged by the Plaintiff. See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine, Exhibit A.
- Sometime prior to October 2014, Vertex (Mr. Miceli's company) marked up the invoices prepared by Plaintiff in this case, contesting the amount charged were not reasonable. *Id.*, Exhibit B and C.
- On October 22, 2014 Plaintiff's counsel sent a letter to Mr. Miceli's company (Vertex) indicating that Plaintiff's inquiries regarding the marked-down amount have gone unanswered. *Id.* Exhibit D.
- Mr. Miceli sent an email to Plaintiff's counsel on October 23, 2014 and provided a spreadsheet of the disputed charges but provided no information as to why he took the position those charges were unreasonable. *Id.*, Exhibit E. Indeed the vast majority of the spreadsheet contains notations that "Vertex recommends" a rate different than Plaintiff charged without providing any basis for that recommendation. *Id.*, Exhibit F.
- On October 28, 2014 Plaintiff's counsel sent an email to Defendant's insurance company and informed them that, "Vertex was unable to produce any document, studies or other data indicating the rates Vertex "recommended" were based upon anything other than Vertex' arbitrary opinion." On October 29, 2014 Defendant's insurance company

indicates by email that it would "request from Vertex their supporting documentation to show that the rates charged by H2O are unreasonable and inconsistent with what is used in the industry". Plaintiff's counsel wrote back that day that he would be happy to receive any of the information you have promised. *Id.*, Exhibit H.

- On February 4, 2015 Defendant filed its Answer to this lawsuit. Its fourth affirmative defense indicated that "Plaintiff has been fully compensated for the reasonable value of goods and services provided." See Answer and Demand for Jury Trial.
- In a series of letter from April 15 through May 29, 2015 Plaintiff's attorney tried to get Defendant to appoint Mr. Miceli or anyone pursuant to Rule 30(b)6 to testify as to why Defendant, its insurance company and Vertex all took the position that the rates charged by H2O were unreasonable. One letter directly said, "the information from its insurance company is "reasonably available" to (defendant) as contemplated by the rule. As well, (defendant) may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert [Vertex] as a justification for not paying the invoice, then (defendant) has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify." See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine, Exhibits I, J and K.
- Nonetheless, Defendant refused to provide the information or designate the insurance company's expert to testify even though Defendant's defense largely rested on its contention that the rates charged were unreasonable. See Affidavit of Nicholas A Warden in Support of Motion in Limine, Exhibit 4.



- Plaintiff originally filed this motion on August 25, 2015 requesting that Defendant be prohibited from introducing evidence regarding the reasonableness of the rates charged by H2O because of its failure to produce any such evidence during the litigation.
- More than two weeks later on September 9, 2015, the last day for expert disclosure, eleven months after it was requested from Zurich, nine months after the lawsuit was filed, eight months after FSD adopted the position of its insurer and consultant and three months after FSD refused to designate its insurance company or consultant to testify. FSD disclosed that Chris Miceli would be its expert and would testify that H2O's rates were unreasonable. Further, Mr. Miceli based his opinion on a handful of heavily redacted price sheets from companies that he believes compete with H2O and apparently nothing else. See expert disclosure filed with the Court on September 9, 2015.

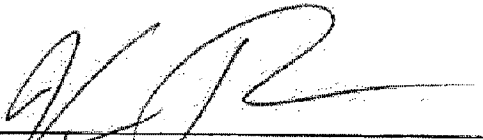
#### CONCLUSION

Defendant's insurance company should have provided the backup to Mr. Miceli's opinion when it first refused to pay the invoice. It also had the opportunity to provide the information in October 2014 when it represented in a letter that it would request the information from Mr. Miceli and provide it. It should have provided the information when Defendant filed an Answer to the lawsuit and took the position that it had already paid the reasonable amounts for the services provided. Finally, the information should have been provided when Plaintiff took the 30(b)(6) deposition of Defendant after Plaintiff's counsel repeatedly asked Defendant to have Vertex appointed to respond. Defendant was unwilling to produce this evidence and took the position at its deposition that it did not know why the rates charged were unreasonable. Plaintiff's motion should be granted.

In the event this motion is not granted, Plaintiff should be provided the opportunity to depose Mr. Miceli, to disclose rebuttal testimony and should be compensated for traveling to Enterprise, OR to take Defendant's 30(b)(6) when Defendant refused to appoint Mr. Miceli for deposition and refused to produce the information that was readily available to Defendant and its attorneys.

DATED this 20 day of <sup>Nov</sup>~~August~~, 2015.

FISHER RAINEY HUDSON




Vaughn Fisher  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20 day of November, 2015, I caused a true and correct copy of the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION IN LIMINE to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email



\_\_\_\_\_  
Vaughn Fisher

DEC 03 2015

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE PRICE  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.  
FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**ORDER RE: MOTIONS IN LIMINE**

Plaintiff and Defendant's Motions in Limine were heard by this Court on November 24, 2015. Plaintiff and Defendant both appeared through their counsel of record, Vaughn Fisher and Hans Mitchell respectively.

Plaintiff filed a Motion in Limine asking the Court to preclude Defendant from offering evidence that the amounts charged by Plaintiff for emergency remediation services were unreasonable.

Defendant filed a Motion in Limine asking the Court to preclude the Plaintiff from offering evidence regarding work performed on the job, how and when invoices 3501 and 3741 were provided to the Defendant, communications regarding spill remediation and the pricing used by the Plaintiffs, and the provision of a fee schedule to Defendant, beyond that which was testified to by Plaintiff's Rule 30(b)(6) representative.

**ORIGINAL**

After the original filing of the two motions in limine, Defendant filed an expert witness disclosure for Chris Miceli.

**IT IS HEREBY ORDERED**, that Plaintiff's motion is **GRANTED** to the extent that it seeks to preclude evidence which the Defendant has not produced during the course of discovery in this matter. Consistent with this Order, Defendant will be permitted to offer expert witness testimony as disclosed in its September 9, 2015 expert witness disclosure. However, Defendant shall make the expert available to Plaintiff in Boise, ID, the day before the trial to be deposed for one hour.

**IT IS HEREBY ORDERED**, that Defendant's motion is **GRANTED** to the extent that it seeks to preclude evidence which the Plaintiff has not produced during the course of discovery in this matter. Consistent with this Order, Plaintiff may offer testimony which rebuts expert witness testimony disclosed in Defendant's September 9, 2015 expert witness disclosure. However, Plaintiff shall make any rebuttal witness available to Defendant in Boise, ID, the day before the trial to be deposed for one hour.

DATED this 2<sup>nd</sup> day of December, 2015.

By: Patricia Young  
Hon. Patricia Young  
Magistrate Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3 day of December, 2015, I caused a true and correct copy of the foregoing **ORDER RE: MOTIONS IN LIMINE** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

Nicholas Warden  
FISHER RAINEY HUDSON  
950 W. Bannock St. Ste. 630  
Boise, ID 83702

- Via U.S. Mail
- Via Facsimile - (208) 514-1900
- Via Overnight Mail
- Via Hand Delivery
- Email

  
Clerk of the Court  
IDAHO COUNTY DISTRICT JUDICIAL

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

DEC 04 2015

CHRISTOPHER D. RICH, Clerk  
By STACEY LAFFERTY  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236


DEFENDANT FARM SUPPLY  
DISTRIBUTORS, INC.'S MOTION TO  
EXCLUDE EXPERTS

(ORAL ARGUMENT REQUESTED)

COMES NOW Defendant Farm Supply Distributors, Inc., by and through it  
counsel of record, Carey Perkins LLP, and hereby moves this Court, pursuant to Rule 26  
of the Idaho Rules of Civil Procedure, for its order excluding all expert evidence which  
Plaintiff H2O Environmental may offer at the trial of this matter.

Idaho R. Civ. P. 26(e)(1)(B) provides that a party is under a continuing duty  
to seasonably supplement a discovery response with respect to any question directly  
addressed to the identity of each person expected to be called as an expert witness at trial,

DEFENDANT FARM SUPPLY DISTRIBUTORS, INC.'S MOTION TO EXCLUDE  
EXPERTS - 1

the subject matter on which the person is expected to testify, and the substance of the person's testimony. On May 8, 2015, Farm Supply served discovery requests seeking, among other things, details on Plaintiff's experts. (Lyon Aff. In Opposition to Plif.'s Mot. to Amend (Nov. 17, 2015), Ex. 1, Def.'s First Set of Interrogatories, Requests for Admission, and Requests for Production to Plif. 4, 6, 9.) The deadline for expert disclosures was also addressed by this Court's Order Governing Proceedings and Setting Jury Trial issued June 18, 2015. Expert disclosures were due September 9, 2015. Plaintiff never disclosed  experts. (Lyon Aff. ¶¶ 3 and 4.)

Where a party fails to provide timely disclosure of expert witnesses, the trial court should exclude any such testimony offered at trial. See *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 53, 995 P.2d 816 (2000) (failure to comply with Rule 26(e) "typically results in the proffered evidence being excluded") citing *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897 (1991); see also *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 217, 846 P.2d 207 (1993) (if a party fails to seasonably supplement his responses as required in Idaho R. Civ. P. 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed as required). A party must timely provide complete disclosures for every expert witness it intends to call at trial even those not retained as experts, such as treating physicians. *Aguilar v. Coonrod*, 151 Idaho 642, 262 P.3d 671 (2011). The information specifically made discoverable by Idaho R. Civ. P. 26(b)(4) is not limited to experts retained in anticipation of litigation. *Clark v. Raty*, 137 Idaho 343, 345, 48 P.3d 672 (Idaho Ct. App. 2002). Accordingly, Plaintiff should be prevented from offering into evidence expert witness testimony because it did not



disclose expert information in accordance with Idaho R. Civ. P. 26(e), 33, 34 and this Court's scheduling order.

This motion is supported by the pleadings and papers on file in this matter.

Oral argument is hereby requested.

DATED this 4<sup>th</sup> day of December, 2015.

CAREY PERKINS LLP

By Aubrey D Lyon  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of December, 2015, I served a true and correct copy of the foregoing DEFENDANT FARM SUPPLY DISTRIBUTORS, INC.'S MOTION TO EXCLUDE EXPERTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
*Attorneys for Plaintiff*

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile (208) 297-2689

Aubrey D Lyon  
Aubrey D. Lyon

DEC 11 2015

CHRISTOPHER D. RICH, Clerk  
By HALEY MYERS  
DEPUTY

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

**Case No. CV OC 1500236**

**FIRST AMENDED COMPLAINT**

COMES NOW the Plaintiff, H2O Environmental, Inc. ("H2O"), by and through its counsel of record, FISHER RAINEY HUDSON, and claims and alleges against the Defendant as follows:

**PARTIES**

1. Plaintiff H2O is, and at all relevant times herein was, a Nevada corporation, registered in Idaho and with its principal place of business in Ada County, Idaho.

2. Defendant Farm Supply Distributors, Inc. ("FSD") is, and at all relevant times herein was, an Oregon corporation, registered in Oregon with its principal place of business in Enterprise, Oregon, but conducting business in the State of Idaho.

### **JURISDICTION AND VENUE**

3. Defendant is a company that transacted business in the State of Idaho for pecuniary benefit during the relevant time period and is, therefore, subject to this Court's jurisdiction under the State's long-arm statute codified in Idaho Code § 5-514(a).

4. The causes of action set forth below arose in Ada County. Therefore, venue is proper in the Fourth Judicial District pursuant to Idaho Code § 5-404.

### **COUNT I BREACH OF CONTRACT**

5. A contract was formed between H2O and the Defendant, whereby H2O would perform environmental remediation services and the Defendant would pay for those services.

6. H2O performed under the contract by providing emergency remediation services in response to a fuel spill at a Maverick country store located in Boise, Idaho.

7. H2O submitted invoice 8393501 and 8393741 ("invoices") to FSD for work performed pursuant to the agreement between the parties.

8. After discussions with FSD, H2O agreed to reduce the total amount due under the invoices to forty-five thousand eight hundred twenty-eight dollars and twenty cents (\$45,828.20).

9. On August 27, 2014, FSD's agent made a payment toward the outstanding balance of thirty-eight thousand four hundred seventy-three dollars and fifty-five cents (\$38,473.55), leaving an unpaid balance of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65) still outstanding.

10. H2O has made various demands for the balance due, including, but not limited to, a demand letter dated December 4, 2014, from H2O's counsel to FSD.

11. FSD has breached the contract between the parties by failing to pay the remainder of the balance owed for services performed.

12. As a result of the Defendant's breach, H2O has sustained damages in the amount of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65).

**COUNT II  
BREACH OF COVENANT OF GOOD FAITH  
AND FAIR DEALING**

13. Plaintiffs reallege and incorporate paragraphs 1-12 as if fully set forth herein.

14. Implied in every contract is a covenant of good faith and fair dealing.

15. FSD's breach of this covenant includes, but is not limited to, its failure to make full payment to H2O for remediation services performed.

16. As a direct result of FSD's breach of the covenant of good faith and fair dealing, H2O has been damaged in the amount of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65).

**COUNT III  
QUANTUM MERUIT**

17. Plaintiff realleges and incorporates paragraphs 1-16 as if fully set forth herein.

18. H2O cleaned up a fuel spill at FSD's request.

19. FSD appreciated the benefit conferred upon it by services provided by H2O at FSD's request.

20. Despite H2O's repeated demand for payment, Defendant refuses to pay H2O the reasonable value of the services performed at FSD's request.

21. FSD has accepted and retained the benefits conferred upon it by H2O's services under such circumstances as to make it inequitable for FSD to retain such benefits without payment of the reasonable value of such services to H2O.

22. As a result, H2O has not been compensated for the reasonable value of services it provided at FSD's request and is entitled to compensation in the amount of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65).

### **COSTS AND ATTORNEY FEES**

23. At the time the debts set forth above were incurred, FSD agreed to be liable for all costs of collection which H2O might incur, including reasonable attorney fees. FSD's unwarranted and unjustified refusal to make payment of the outstanding balance has compelled H2O to retain the services of an attorney in order to prosecute this action. Therefore, pursuant to the agreement between the parties, I.R.C.P 54 and Idaho Code §§ 12-120 and 12-121, H2O is entitled to recover its reasonable attorney fees in the sum of not less than three thousand dollars (\$3,000.00) if judgment is entered by default, and such other amount as the Court may find reasonable if this matter is contested.

24. At the time the debts set forth above were incurred, FSD agreed to pay interest on all past due amounts at the contract rate of 18% per annum. H2O is, therefore, entitled to recover pre-judgment interest at the contract rate.

### **PRAYER FOR RELIEF**

WHEREFORE, H2O prays for judgment as follows:

a. That judgment be entered against FSD in the sum of seven thousand three hundred and fifty-four dollars and sixty-five cents (\$7,354.65), plus interest thereon at the rate of

eighteen percent (18%) per annum through the date of judgment, plus statutory interest on the judgment thereafter until paid;

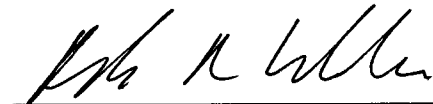
b. For reasonable attorneys' fees incurred in the prosecution of this action in at least the sum of \$3,000.00 if judgment is entered by default, and for such other and further sums as the Court may find reasonable if judgment is entered other than by default;

c. For costs and expenses incurred by the Plaintiff; and

d. For such other and further relief as the Court may deem appropriate under the circumstances.

DATED this 9 day of December, 2015.

FISHER RAINEY HUDSON



---

Nicholas Warden, of the firm  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 9 day of December, 2015, I caused a true and correct copy of the foregoing FIRST AMENDED COMPLAINT to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

  
\_\_\_\_\_  
Nicholas Warden

ORIGINAL

DEC 17 2015

CHRISTOPHER D. RICH, Clerk  
By AUSTIN LOWE  
DEPUTY

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

ANSWER TO FIRST AMENDED  
COMPLAINT

COMES NOW Defendant Farm Supply Distributors Inc., by and through its  
counsel of record, Carey Perkins LLP, and hereby answers Plaintiff's First Amended  
Complaint:

**FIRST DEFENSE**

Plaintiff has failed to state a claim upon which relief can be granted.

A



**SECOND DEFENSE**

**1.**

Defendant denies each and every allegation of Plaintiff's First Amended Complaint not herein expressly and specifically admitted.

**2.**

Defendant admits paragraphs 2 and 18.

**3.**

Defendant is without sufficient knowledge to admit or deny the allegations in paragraph 1, and therefore that paragraph is denied.

**4.**

Paragraphs 3, 4, and 14 are legal conclusions to which no response is required. To the extent a response may be required, those paragraphs are denied.

**5.**

Paragraphs 13 and 17 are admitted or denied to the same extent the paragraphs referenced therein are admitted or denied.

**6.**

Defendant denies that it refused or failed to pay the reasonable value of services provided by Plaintiff as alleged in paragraphs 20–22.

**THIRD DEFENSE**

Plaintiff failed to mitigate its damages, if any.

**FOURTH DEFENSE**

Plaintiff's claims are barred by the doctrine of accord and satisfaction.

**FIFTH DEFENSE**

Plaintiff's claims are barred by the doctrines of waiver and estoppel.

**SIXTH DEFENSE**

In the event a contract is found to have been formed, Plaintiff's recovery is precluded to the extent it breached the agreement alleged and/or failed to comply with material provisions of said agreement.

**SEVENTH DEFENSE**

Plaintiff's claims fail for lack of consideration.

Wherefore, Defendant prays for relief as follows:

1. That Plaintiff take nothing by way of its First Amended Complaint and that its claims against Defendant be dismissed with prejudice;
2. That Defendant be awarded its attorney fees and costs pursuant to all applicable law, including, but not limited to, Idaho Code sections 12-120 and 12-121 and Idaho R. Civ. P. 54.
3. That this Court award Defendant such other and further relief as it deems just and equitable.

DATED this 17<sup>th</sup> day of December, 2015.

CAREY PERKINS LLP

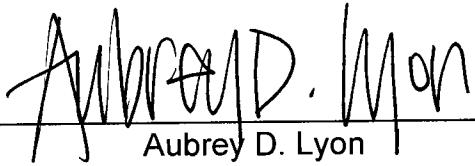
By Aubrey D. Lyon  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of December, 2015, I served a true and correct copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 297-2689

  
\_\_\_\_\_  
Aubrey D. Lyon

12/31/15  
are  
H

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

NO \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 5:00

**DEC 30 2015**

CHRISTOPHER D. RICH, Clerk  
By SANTIAGO BARRIOS  
DEPUTY

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION TO  
EXCLUDE EXPERTS**

COMES NOW the Plaintiff, H2O Environmental, Inc., by and through its counsel of record, FISHER RAINEY HUDSON, and files this response in opposition to Defendant Farm Supply Distributor, Inc.'s Motion to Exclude Experts.

**Facts**

- Plaintiff performed emergency environmental remediation services for Defendant from July 12, 2014 through August 4, 2014. *See Affidavit of Steven King in Support of Response to Motion for Summary Judgment ¶4.*

**ORIGINAL**

MB

- Defendant and its insurance company refused to pay \$7,354.65 of the total invoice for those services because their expert Chris Meceli claimed some of the charges were unreasonable. *See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ¶5.*
- Defendant's insurance company began copying Mr. Meceli on emails and providing him with information as early as July 16, 2014 and he first expressed his opinion that some of the charges were unreasonable shortly thereafter. *See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ¶4, 6 and 7.*
- First Plaintiff, then its attorney, tried to get Mr. Meceli, the insurance company or the Defendant to explain the basis for Mr. Meceli's opinion in October 2014, to no avail. *See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ¶6-9.*
- After Plaintiff filed this lawsuit it tried to get the Defendant to explain its reasoning for contending that some of the charges were unreasonable. In doing so Plaintiff requested a 30b(6) deposition on the topic and informed Defense counsel that since its pleadings were based on Mr. Meceli's opinion and since he was reasonably available to the Defendant (its insurance company's consultant and now Defendant's expert witness) that they should appoint Mr. Meceli to appear at the deposition. *See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ¶10-12.*
- Instead, Defendant appointed two corporate officers who had absolutely no idea why Defendant had taken the position in pleadings that the charges were unreasonable. *See Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ¶13.*

- As a result, on August 25, 2015, Plaintiff filed a motion in limine requesting that Defendant be barred from providing testimony regarding the reasonableness of the charges.
- Then, after the vapid 30b(6) deposition, after the filing of the motion in limine and after requesting the basis for Mr. Meceli's opinion for nearly one year, on September 9, 2015 Defendant finally disclosed Mr. Meceli as an expert witness and finally provided the basis for his opinion regarding the reasonableness of the charges.
- During the subsequent hearing on the motions in limine, in a fit of reasonableness, Plaintiff relented its position that Mr. Meceli should be barred from testifying but asked that, at the least, Plaintiff be permitted to depose him for one hour on the day prior to the trial and that Plaintiff be permitted to respond to his opinions.
- The Court then entered its Order Re: Motions in Limine on December 3, 2015:
  - o permitting Mr. Meceli to present his opinion regarding the unreasonableness of the charges,
  - o permitting Plaintiff to depose Mr. Meceli for one hour the day before the trial,
  - o permitting Plaintiff to offer testimony rebutting Mr. Meceli's opinion, and
  - o permitting Defendant to depose its rebuttal witness<sup>1</sup> for one hour on the day before the trial.
- In response, Defendant filed the instant motion on December 4, 2015.

### **Argument**

First, Defendant purposely withheld Mr. Meceli's testimony for nearly eleven months, failed to appoint him to testify when requested and purposely waited until the last day

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<sup>1</sup> Plaintiff's rebuttal witness is its CEO.

permissible to disclose the basis for his opinion. If anything, he should not have been permitted to testify at all.

Secondly, since Mr. Meceli's expert witness disclosure was filed after the motion in limine, Plaintiff did not know that it would need to rebut his testimony until the Court ruled on December 3, 2015 that Mr. Meceli would be permitted to testify.

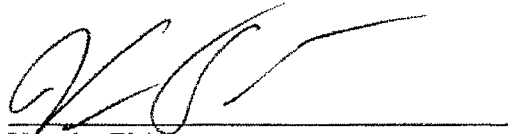
Thirdly, the Court's December 3, 2015 Order Re: Motions in Limine permits both parties the same opportunity to present evidence and conduct a deposition. Neither party should be given an advantage in this matter, particularly the party that refused to disclose the basis for its expert's opinion for nearly a year, despite being asked for that information both prior to and after the initiation of this lawsuit.

Finally, the Court's Order Governing Proceedings and Setting Trial entered on December 9, 2015 sets a deadline for December 31, 2015 for the completion of discovery and Plaintiff will provide the requested disclosure on December 31, 2015 so that defense counsel may have the same information for deposition preparation as was provided to Plaintiff.

For all of the foregoing reasons the Defendant's Motion to Exclude Experts should be denied.

DATED this 30<sup>th</sup> day of December ~~30~~, 2015.

FISHER RAINEY HUDSON




Vaughn Fisher  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31<sup>st</sup> day of December ~~30~~, 2015, I caused a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO DEFENDANT'S FIRST MOTION IN LIMINE to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail  
 Via Facsimile - (208) 345-8660  
 Via Overnight Mail  
 Via Hand Delivery  
 Email

  
\_\_\_\_\_  
Vaughn Fisher



ORIGINAL  
1/4/16

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

JAN 04 2016

CHRISTOPHER D. RICH, Clerk  
By STACEY LAFFERTY  
DEPUTY

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT'S REPLY IN SUPPORT  
OF MOTION TO EXCLUDE  
EXPERTS

I.  
INTRODUCTION

On the eve of trial, Plaintiff introduces opinions in support of its case-in-chief disguised as rebuttal expert opinions. This Court's December 3, 2015 order on the parties' motions in limine limited the evidence Plaintiff can offer at trial: Plaintiff cannot offer evidence which it did not produce during the course of discovery. Plaintiff was allowed to rebut Defendant's expert's opinions, and Plaintiff tries to use this narrow avenue of

AV

evidence to offer a wide range of expert testimony that is not rebuttal testimony. Defendant respectfully requests that this Court grant its Motion.

## II. ARGUMENT

### A. **Plaintiff is attempting to cure its failure to disclose expert evidence in support of its case-in-chief.**

Plaintiff provides expert opinions in support of its claim to recover quantum meruit damages. Quantum meruit “is an objective measure and is proven by evidence demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed.” *Farrell v. Whiteman*, 152 Idaho 190, 195, 268 P.3d 458, 463 (2012).

Therefore, as part of Plaintiff’s prima facie case, Plaintiff must prove the nature of the work performed and the customary rate of pay for such work in the community at the time the work was performed. These are not points first raised by Defendant; they are elements of Plaintiff’s prima facie case for which it has the burden of proof at trial.

Notwithstanding discovery requests served more than six months ago and the expiration of the deadlines three months ago, prior to December 31, 2015, Plaintiff never disclosed expert opinions on these issues or any other. Now, for the first time, Plaintiff offers opinions in support of its prima facie case. (See Plf.’s First Suppl. Responses to Def.’s First Interrogatories enclosed herewith.) Plaintiff’s expert disclosure for John Bradley includes opinions on the costs charged by Plaintiff, rates Plaintiff charged to other customers in the summer of 2014, profits earned through the rates charged, rates of competitors in the area, costs giving rise to the rates, the nature of the work performed,

and Plaintiff's customary rate for work performed. (*Id.*) None of these topics are in rebuttal to Defendant's expert, who will opine regarding why certain rates set by Plaintiff were unreasonable, why certain billed time was unreasonable, why time spent on certain tasks was unreasonable, reasonable rates, and the basis for the reasonable rates. (See Def.'s Expert Witness Disclosure filed September 9, 2015) Because the opinions on which Mr. Bradley is expected to testify are not rebuttal opinions, and because the opinions were not timely disclosed in support of Plaintiff's case-in-chief, Plaintiff's expert testimony should be disallowed.

**B. Mr. Bradley's disclosure is too vague.**

The only information approaching rebuttal opinions from Plaintiff's expert John Bradley is the statement "the lack of relevance of the data points relied upon by Mr. Meceli [Defendant's expert]." (Plf.'s First Suppl. Responses to Def.'s First Interrogatories 3.) This statement is too vague to satisfy the requirement that a party disclose "the facts and opinions to which the witness is expected to testify." Idaho R. Civ. P. 26(b)(4)(A)(1)(ii); *see also Aguilar v. Coonrod*, 151 Idaho 642, 648, 262 P.3d 671, 677 (2011) (expert disclosure must be specific enough to allow opposing party to prepare its case).

**C. Plaintiff provides no information regarding the scope of Mr. Wickenden's alleged expertise or the facts and opinions to which he is expected to testify.**

Plaintiff's other attempt to make an end run around the expert disclosure deadline is with testimony from Joe Wickenden. Mr. Wickenden is an employee of Plaintiff who testified at deposition on August 17, 2015. Plaintiff includes Mr. Wickenden in its expert disclosure and provides no information besides that he will testify consistent with his deposition. (See Plf.'s First Suppl. Responses to Def.'s First Interrogatories 2.) Mr.

Wickenden provided testimony as a corporate designee in a 30(b)(6) deposition of Plaintiff, not as an individual, and certainly not as an expert. (See Lyon Aff. In Support of Def.'s First Motion in Limine, filed Aug. 28, 2015.) If Plaintiff had intended on disclosing Mr. Wickenden, it could have done so by the original September 9, 2015 deadline. At this point, the only type of expert testimony Plaintiff is allowed to disclose is rebuttal testimony, and Plaintiff's disclosure does not explain how Mr. Wickenden's August 17 testimony rebuts Defendant's expert's opinions disclosed two weeks later on September 9.

### III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendant's Motion to Exclude Experts, Defendant respectfully requests that this Court disallow Plaintiff's expert witness evidence.

DATED this 4<sup>th</sup> day of January, 2016.

CAREY PERKINS LLP

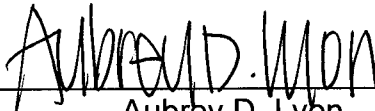
By Aubrey D. Lyon  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of January, 2016, I served a true and correct copy of the foregoing DEFENDANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EXPERTS by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 297-2689

  
\_\_\_\_\_  
Aubrey D. Lyon

Vaughn Fisher, ISB No. 7624  
 Nicholas A. Warden, ISB No. 9179  
 FISHER RAINEY HUDSON  
 950 W. Bannock St., Ste. 630  
 Boise, ID 83702  
 Email: vaughn@frhtriallawyers.com  
 Email: naw@frhtriallawyers.com  
 Telephone: (208) 345-7000  
 Facsimile: (208) 514-1900

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
 Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
 an Oregon corporation

Defendant.

---

**Case No. CV OC 1500236**

**PLAINTIFF'S FIRST SUPPLEMENTAL  
 RESPONSES TO DEFENDANT FARM  
 SUPPLY DISTRIBUTOR'S FIRST  
 INTERROGATORIES**

**INTERROGATORY NO. 2:** Please identify each and every person known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of any of the facts of this action. By this Interrogatory, we seek the identities of all persons who have any knowledge of any fact pertinent to the issues involved in this action. For each such person, describe the nature and substance of such knowledge.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:** In addition to the individuals identified in the initial response to Interrogatory No. 2, Plaintiff identifies:

Joe Wickenden – the substance of his testimony will be consistent with that of his deposition taken on August 17, 2015.

John Bradley – the substance of his testimony will be consistent with the supplemental response to Interrogatory No. 4.

**INTERROGATORY NO. 4:** Please identify each person whom you expect to call as an expert witness at the trial of this case, and for each such person, provide the information listed in I.R.C.P. 26(b)(4)(A)(1)(i)-(ii).

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4:**

**REBUTTAL EXPERT WITNESS DISCLOSURE  
PURSUANT TO RULE 26(b)(4)(A)(1)(ii)**

1. John Bradley  
CEO, H2O Environmental, Inc.  
c/o Fisher Rainey Hudson  
950 W. Main St., Ste. 630  
Boise, ID 83702  
T: (208) 345-7000

Mr. Bradley is disclosed pursuant to Rule 26(b)(4)(A)(1)(ii) as an individual with knowledge of relevant facts who has not been retained or specially employed to provide expert testimony in this case but is expected to present testimony under IRE 702, 703 or 705. Mr. Bradley is the present CEO of H2O Environmental, Inc. and was serving in that position at the time of the services in question in this case. He has more than 25 years' experience providing emergency environmental remedial services. Mr. Bradley's testimony will rebut the opinions of Mr. Meceli regarding the reasonableness of the fees charged by H2O to Defendant in the instant case.

**Summary of facts and opinions**

1. Mr. Bradley will testify that the rates disputed by Defendant (\$235 per hour for use of a GapVax, \$165 per hour for emergency response time for use of a 70 BBL Vacuum

Truck, \$70 per hour for a power, \$75 per hour for crew truck and \$45 per hour for personal protective equipment) were reasonable because (1) the rates were the same rates H2O charged other Idaho customers for emergency response services in July and August of 2014, (2) other H2O customers paid those same rates to H2O in July and August 2014, (3) the profits to be earned by H2O on the disputed rates are consistent with margins earned by H2O on other environmental remediation jobs, (4) the rates were consistent with H2O's competitors in the area where the spill at issue in this case occurred, (5) the high cost of purchasing, storing and maintaining the equipment and training and staffing the personnel necessary to respond to environmental emergencies at any time of the day or night year-round, (6) the lack of relevance of the data points relied upon by Mr. Meceli.

2. Mr. Bradley will testify that the amount invoiced for Project Manager Admin Time was reasonable for the following reasons: (1) the administrative activities described in Steven King's August 14, 2014 email to VERTEX are directly related to environmental remediation work performed by H2O at issue in this case, (2) the rate charged by H2O for Mr. King's time in the invoices submitted to the Defendant in this case represent a 50% reduction of the rate typically charged by H2O for time spent by a Project Manager conducting environmental remediation services, (3) the rate for Project Manager time is the same rate that H2O charged other customers that hired them to provide emergency remediation services in Idaho at the time that this spill occurred and those customers paid that rate (4) the Project Manager activities for which the Defendant was charged in this case are the same activities for which H2O charged other emergency remediation customers in July and August of 2014.

As a basis for any opinions provided, Mr. Bradley may rely upon his extensive experience working in the environmental remediation industry, as well as all documents and testimony provided in this case including all pleadings, deposition testimony, exhibits to depositions, documents produced during discovery, and any information relied upon by Defendant's expert witness in forming his opinion.

This 31<sup>st</sup> day of December, 2015.

Fisher Rainey Hudson



Vaughn Fisher

Attorney for Plaintiff



JAN 27 2016

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
CHRISTOPHER D. RICH, Clerk  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA <sup>By</sup> DEIRDRE PRICE  
DEPUTY

MAGISTRATE DIVISION

H2O ENVIRONMENTAL INC.

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS INC

Defendant.

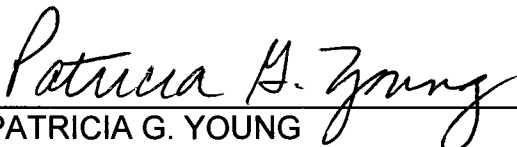
Case No. CV OC 15 00236

ORDER GRANTING DEFENDANT'S  
MOTION TO EXCLUDE PLAINTIFF'S  
EXPERT WITNESSES

After reviewing the record and the recent case **Easterling v. Kendall** No. 42158 (Jan. 25, 2016) this court concludes that witnesses not disclosed by the plaintiff in accordance with Idaho Rules of Civil Procedure 26 (e), 33, 34 and the original Order Governing Proceedings shall be excluded from testifying as experts at the trial in this matter.

IT IS ORDERED that the motion is GRANTED.

Dated this 27<sup>th</sup> day of January 2016

  
PATRICIA G. YOUNG  
Magistrate Judge

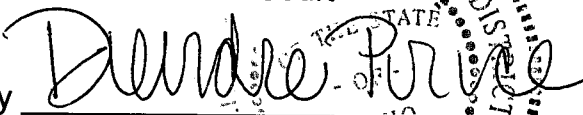


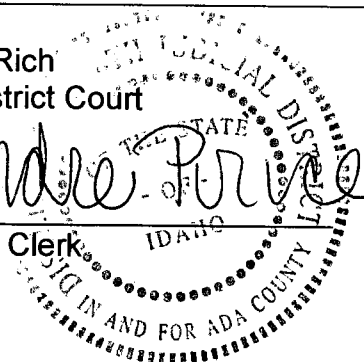
**CERTIFICATE OF MAILING**

I hereby certify that on this 27<sup>th</sup> day of January 2016 I mailed (served) a true and correct copy of the within instrument to:

|                                                                                                        |                                                                                                                                                         |
|--------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| Vaughn Fisher<br>Nicholas Warden<br>Attorney at Law<br>950 W. Bannock St., Ste. 630<br>Boise, ID 83702 | Hans A. Mitchell<br>Aubrey D. Lyons<br>Attorney at Law<br>Capitol Park Plaza<br>300 North 6 <sup>th</sup> St., Ste.200<br>PO Box 519<br>Boise, ID 83701 |
|--------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|

Christopher D Rich  
Clerk of the District Court

By   
Deputy Court Clerk



ORIGINAL

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallywers.com  
Email: naw@frhtriallywers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *JS*

JAN 28 2016

CHRISTOPHER D. RICH, Clerk  
By STACEY LAFFERTY  
DEPUTY

*Attorneys for Plaintiff*

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,

an Oregon corporation  
Defendant.

Case No. CV OC 1500236

**MOTION TO EXCLUDE THE  
TESTIMONY OF CHRISTOPHER  
MICELI OR TO RECONSIDER ORDER  
GRANTING MOTION TO EXCLUDE  
PAINTIFF'S EXPERT WITNESSES**

COMES NOW the Plaintiff, H2O Environmental, Inc. ("H2O"), by and through its counsel of record, FISHER RAINEY HUDSON, and moves this Court to exclude the testimony of Defense expert, Christopher Miceli or, alternatively, reconsider its Order excluding Plaintiff's CEO from opining that the fees charged by H2O Environmental, Inc. are reasonable.

- 1. Defense expert Christopher Miceli should not be permitted to testify because Defendant withheld Miceli's testimony.**

Christopher Miceli is a Vice President of Vertex, a consulting company used by Defendant's insurance company. Two days after H2O began work cleaning up the spill for Farm

Supply Distributors (“FSD”), on July 16, 2014, Vertex notified H2O it had been hired by Defendant’s insurance company (“Zurich”) to investigate the spill and its cleanup.

By July 30, 2014, Zurich was relying upon a spreadsheet made by Mr. Miceli to contest the reasonableness of the fees H2O had charged. The spreadsheet failed to provide any basis for the conclusion that the disputed charges were unreasonable, but for Mr. Miceli’s contention that Vertex “recommend(ed)” a lower charge. *See Affidavit of Vaughn Fisher in Support of Plaintiff’s Motion in Limine, Exhibit F, submitted November 10, 2015.*

When FSD filed its answer to this lawsuit, it asserted its fourth affirmative defense that H2O had already received the reasonable value for its services. This contention, in FSD’s initial pleading, was based entirely on Mr. Miceli’s opinion.<sup>1</sup> *See Answer and Demand for Jury Trial, Fourth Affirmative Defense, filed February 4, 2015.*

In an effort to efficiently assess FSD’s contention regarding the reasonableness of the charges, H2O requested a Rule 30(b)(6) deposition. The attorneys for FSD - the very same ones that filed an answer contesting the reasonableness of H2O’s charges - claimed that FSD knew nothing about the reasonableness of fees. Indeed, FSD went as far as to file a Motion for a Protective Order on April 28, 2015 stating that, “...Farm Supply has no knowledge regarding the reasonableness of the amount charged by Plaintiff H2O Environmental for fuel remediation services. ... This information is not known or reasonably available to Farm Supply.” *See Motion for Protective Order Regarding Plaintiff’s Notice of Deposition Pursuant to Rule 30(b)(6), filed April 28, 2015.* Of course this was untrue since FSD’s attorneys had already made

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<sup>1</sup> There has never been any evidence presented that FSD or Zurich relied upon anything but Mr. Miceli’s opinion in contesting the reasonableness of the charges in this case.

this assertion in a pleading<sup>2</sup> and since the same insurance company that relied upon Mr. Miceli's opinion since July 2014 was the same insurance company that was paying FSD's attorneys.

Plaintiff tried in vain to get to the bottom of Defendant's contention. On May 8, 2015 Plaintiff's counsel wrote to defense counsel as follows:

"Your client has refused to pay the charges based, we believe, upon the insurance company's (or its expert Vertex's) assessment the charges were unreasonable...the information from its insurance company is "reasonably available" to your client as contemplated by the rule. As well, your client may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert as justification for not paying the invoice, then your client has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify."

On May 29, 2015, Plaintiff's counsel again wrote to defense counsel as follows:

"We have explained that under the Rule Farm Supply may appoint other persons who consent to testify on its behalf" including a member of Farm Supply's insurance company, or that company's expert. If someone at the insurance company has knowledge of why H2O's bill is unreasonable, then that information is reasonably available to your client and it should appoint the most appropriate person from the insurance company to testify." The letter went on to say that refusing to pay the bill and refusing to provide evidence as to why is an untenable position and that we "... ask once again that you cooperate with us to complete this short deposition so that we can get this \$9,000 dispute resolved quickly."

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<sup>2</sup> Prior to asserting the affirmative defense contesting the reasonableness of the charges, Rule 11 required that FSD's attorneys make a reasonable inquiry and determine the defense to be "well grounded in fact..."

Although defense counsel asserted in a pleading that the charges were unreasonable, FSD refused to have the insurance company or Mr. Miceli explain why. Instead, they required Plaintiff's counsel to travel to Enterprise, OR and on July 9, 2015 appointed two corporate officers to attend the deposition and testify that they have no knowledge regarding the issue of the reasonableness of the charges.

Having failed to get any evidence from FSD regarding its contention that H2O charged an unreasonable amount for its service, Plaintiff filed a motion in limine on August 25, 2015 seeking to exclude evidence at trial related to the reasonableness of the charges based upon the Defendant's failure to provide testimony on that subject at the 30(b)(6) deposition. Having received no evidence from the Defendant regarding its contentions, Plaintiff chose not to hire an expert.

On September 9, 2015, the very last day permissible for disclosing an expert witness and while Plaintiff's motion was pending, FSD disclosed Mr. Miceli as an expert and provided, for the first time ever, a basis for his opinion. September 9, 2015 was also the last day to conduct discovery so FSD successfully avoided having its expert deposed.

At the hearing on Plaintiff's motion, which sought to exclude any testimony from FSD, Vertex or Mr. Miceli regarding the reasonableness of the charges, Plaintiff suggested a compromise: if the Court permits Mr. Miceli to testify, then Plaintiff should get an opportunity to depose him and Plaintiff should be able to rebut his testimony. The Court took the motion under advisement.

On December 3, 2015, this Court issued its Order Re: Motions in Limine, permitting Mr. Miceli to testify despite Defendant's failure to produce him at the 30(b)(6) deposition and despite Defendant's apparently intentional decision to disclose him after Plaintiff traveled to Enterprise,

after Plaintiff filed a Motion in Limine and after plaintiff was out of time to depose him. As suggested at the hearing, the Court evened the playing field by letting Plaintiff rebut his testimony and depose him prior to trial. That same day, Defendant filed a motion to exclude Plaintiff's rebuttal expert, essentially asking the Court to overturn its own decision and reward Defendant for having produced no testimony at its 30(b)(6) deposition and for having withheld Mr. Miceli's disclosure until September 9, 2015, even though it had been relied upon in denying the claim in August 2014 and in asserting an affirmative defense in the Answer.

On December 9, 2015 the Court issued an Order Governing Proceedings and Setting Trial establishing December 31, 2015 as a deadline for discovery.<sup>3</sup> On December 31, 2015 Plaintiff supplemented its discovery responses and, consistent with the Court's December 3, 2015 Order, disclosed that its CEO, John Bradley, would offer opinions which rebut those of Mr. Miceli.

If this Court will not let H2O rebut Mr. Miceli's opinion, then Mr. Miceli should not be permitted to testify because 1) Mr. Miceli developed his opinion in July 2014, 2) FSD and its insurance company relied on Mr. Miceli's opinion as a reason to not pay the entire invoice, 3) FSD and its attorneys relied on Mr. Miceli when they filed an answer asserting the charges were unreasonable, 4) FSD and its attorneys refused to make him available to be deposed and refused to gather from him the information upon which he based his opinion despite repeated requests for them to do so. Since defendant produced no evidence at its 30(b)(6) deposition regarding the reasonableness of the charges even though Mr. Miceli was available and being relied upon, he should not testify.

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<sup>3</sup> The Court's December 3, 2015 Order required that Mr. Miceli and Plaintiff's expert be deposed the day before trial.

2. **Alternatively, if the Court permits Christopher Miceli to testify, it should reverse its order excluding Plaintiff's opinion testimony because the interest of justice demand it.**

The recent case of Easterling v. Kendall, cited in the Court's order is significantly different than the case at bar. In the Easterling case a new expert was disclosed after the court's deadline. In our case, Plaintiff tried in vain to get Defendant to explain its reason for contesting the reasonableness of its charges and specifically asked that someone from Mr. Miceli's company testify. After defendant refused to provide any information or appoint Mr. Miceli to provide information Plaintiff asked this court to bar defendant from presenting the requested information, including Mr. Miceli's testimony, at trial. The Court issued an order permitting Mr. Miceli to testify, but permitting the Plaintiff to rebut his late-disclosed testimony and provided the Plaintiff with a short window in which to provide its rebuttal disclosure. Plaintiff met that deadline.

Further, the Easterling case was an abuse of discretion case. The Supreme Court found that the trial judge had not abused her discretion in excluding the opinion testimony. The holding in no way stated that the trial judge was required to exclude the testimony. This Court would not be abusing its discretion by letting Plaintiff rebut Mr. Miceli's testimony since defendant relied on his opinion but refused to permit discovery of the basis of his opinion despite repeated requests that it do so. To the contrary, it would be a tremendous miscarriage of justice for Defendant to obtain any reward for having not produced Mr. Miceli during discovery, when requested.

### **Conclusion**

Mr. Miceli should be excluded from testifying and defendant should be prohibited from offering evidence regarding the reasonableness of the Plaintiff's charges because defendant



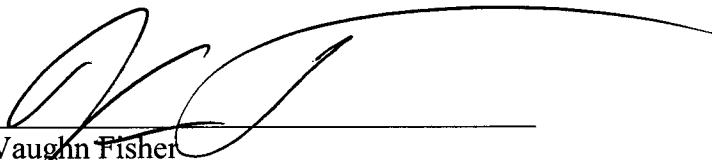
refused to produce any such evidence at its duly noticed Rule 30(b)(6) deposition. Defendant relied on Mr. Miceli's opinion in refusing to pay its bill and in filing its affirmative defense. Mr. Miceli was reasonably available to Defendant at the time of the 30(b)(6) deposition and the basis of his opinion should have been provided then. Since it was not, Mr. Miceli's testimony should be excluded.

Alternatively, if the Court permits Mr. Miceli to testify, it should reverse its decision prohibiting plaintiff's rebuttal opinion. The opinion was disclosed within the time permitted by the court and was suggested as a compromise so that the parties could have a fair trial. It would be prejudicial and unjust to permit Mr. Miceli to testify to matters Defendant could have disclosed at the Rule 30(b)(6) deposition and then prohibit plaintiff from responding.

For all of these reasons Plaintiff requests the Court prohibit Mr. Miceli from testifying or, alternatively, permit Plaintiff to provide its rebuttal opinion.

DATED this 28 day of January, 2016.

FISHER RAINEY HUDSON



Vaughn Fisher  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28 day of January, 2016, I caused a true and correct copy of the foregoing **MOTION TO EXCLUDE THE TESTIMONY OF CHRISTOPHER MICELI OR TO RECONSIDER ORDER GRANTING MOTION TO EXCLUDE PLAINTIFF'S EXPERT WITNESSES** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

  
\_\_\_\_\_  
Nicholas Warden

MAR 16 2016

CHRISTOPHER D. RICH, Clerk  
By STEPHANIE VIDAK  
DEPUTY

Young  
Deviloff  
vs  
3-16-15

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

DEFENDANT'S RESPONSE TO  
PLAINTIFF'S PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF  
LAW

COMES NOW Defendant Farm Supply Distributors, Inc., by and through its  
counsel of record, Carey Perkins LLP, and hereby responds to Plaintiff's Proposed  
Findings of Fact and Conclusions of Law as follows:

**Response to Proposed Findings of Fact**

1. Plaintiff's proposed finding of fact No. 3. This proposed finding of fact  
is vague and unsupported by evidence. Plaintiff uses the term "hire" which is vague and  
conclusory considering one of the issues in this case is whether the parties formed an

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express contract. Additionally, Plaintiff cites to Stipulated Fact #3 as support for the statement that "Farm Supply hired the Plaintiff," but Stipulated Fact #3 does not support the conclusion that a contract was created.

2. Plaintiff's proposed finding of fact No. 6. This proposed finding of fact is unsupported by evidence. The evidence presented in this case was not that Vertex had been hired merely to "review H2O's invoices for this job," rather, Vertex was retained to "conduct an investigation" of the claim, which included reviewing all charges and supporting documentation. (See Stipulated Ex. 2.) Furthermore, Plaintiff's proposed finding of fact No. 6 ignores the undisputed evidence that Vertex objected to Plaintiff's contractor markup rate on the 3501 invoice and that Plaintiff reduced the contractor markup rate in response to that objection. (See Stipulated Ex. 8 and 9.)

3. Plaintiff's proposed finding of fact No. 13, 14, 15, and 17. These proposed findings of fact rely on improper expert evidence from Plaintiff. On January 27, 2016 this Court entered an order granting Defendant's motion to exclude expert evidence from Plaintiff. Plaintiff's proposed findings numbers 13 and 14 rely on expert testimony from Mr. Bradley regarding Plaintiff's competition and their rates and this testimony violates the Court's January 27 order. Mr. Bradley also testified that Plaintiff had no competitors. (Trial Tr. P.36)

4. Plaintiff's proposed finding of fact No. 21 and 24. This proposed finding of fact misstates the evidence presented at trial. [Defendant disputed the amount of time spent on certain activities, the rate of certain equipment, excessive fuel surcharges, the ratio of subcontractor markups, and the appropriateness of billing for administrative tasks. (See Stipulated Ex. 24.)

5. Plaintiff's proposed finding of fact No. 22. This proposed finding of fact misstates the evidence presented at trial. Vertex was hired to "conduct an investigation" of the claim, which included reviewing all charges and supporting documentation. (See Stipulated Ex. 2.)

6. Plaintiff's proposed finding of fact No. 38. This proposed finding of fact misstates the evidence presented at trial. Mr. Miceli explained the process he went through in allocating reasonable time for various project management tasks. When asked how he allocated time, he testified, "Based on my experience from having to do that myself and also from seeing multiple projects." (Trial Tr. 162:5-8.) He also testified that the total project management time was a factor he considered. (Trial Tr. 162:9-11.)

#### **Response to Proposed Conclusion of Law**

1. Plaintiff's proposed conclusion of law No. 1. Plaintiff's proposed conclusion of law No. 1 contradicts Idaho law in that an agreement lacking a material term does not create an express contract. The Idaho Supreme Court has held that price is an essential, material term to a contract and without it there can be no enforceable contract. *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 64, 305 P.3d 499, 508 (2013); *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 547, 314 P.3d 593, 602 (2013). An agreement lacking a material term does not create an enforceable contract. *Maroun v. Wyreless Sys.*, 141 Idaho 604, 614, 111 P.3d 974, 984 (2005).

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affirmed  
affirmed

Plaintiff contends that an express contract need not contain a price term and relies on a U.S. District Court decision for its only authority. See *Jones v. Chapungu Safaris*, No. 1:11-cv-00027-BLW, 2013 U.S. Dist. LEXIS 157233 (D. Idaho Oct. 31, 2013). The *Jones* decision is inapposite to the case before this Court. As discussed in

Defendant's Proposed Findings of Fact and Conclusions of Law, shortly after the *Jones* decision, the Idaho Supreme Court issued its controlling *Syringa* decision, finding price to be a material elemental

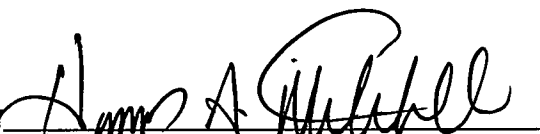
2. Plaintiff's proposed conclusion of law No. 3. Plaintiff's proposed conclusion of law No. 3 incorporates Plaintiff's incorrect statement of Idaho law regarding whether price is an essential term, and therefore Defendant objects to this conclusion of law. Plaintiff is not entitled to recover under an express oral contract theory.

Defendant further objects to Plaintiff's proposed conclusion of law No. 3 because it relies on improper opinion evidence from Plaintiff's witness John Bradley. Plaintiff seeks recovery under a quantum meruit theory and Plaintiff concedes that it has the burden to prove "the customary rate of pay for such work in the community at the time the work was performed" (citing *Baker v. Boren*, 129 Idaho 885, 894, 934 P.2d 951, 960 (Ct. App. 1997)). (Plf.'s Proposed Findings at 13.) However, this Court excluded Plaintiff's expert testimony in its January 27, 2016 order, and therefore, Plaintiff is unable to carry its burden to prove the customary rate of pay in the community. The only admissible evidence Plaintiff provided regarding its rates were the factors it considered in setting its rates. It could not offer any expert testimony on the subject and it offered us evidence of what *other* entities received for the services. *Peavey v. Pellandini*, 97 Idaho 655, 660, 551 P. 26 610 (1976). Accordingly, Plaintiff failed to prove the customary rate in the community.

not  
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DATED this 16<sup>th</sup> day of March, 2016.

CAREY PERKINS LLP

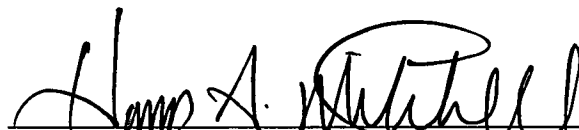
By   
Hans A. Mitchell, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of March, 2016, I served a true and correct copy of the foregoing DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 297-2689

  
Hans A. Mitchell

**MAR 30 2016**

CHRISTOPHER D. RICH, Clerk  
By DEBORAH PRICE  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF IDAHO**

**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**MAGISTRATE DIVISION**

H2O ENVIRONMENTAL, INC., an Idaho Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC., an Oregon corporation

Defendant.

Case No. CV OC 1500236

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

Appearances:

For Plaintiff ("H2O"):

Vaughn Fisher, Esq.

For Defendant ("Farm Supply"):

Hans Mitchell, Esq.

This a case about an oil spill by Farm Supply, the successful clean-up of the spill by H2O, and a dispute about the contract between the parties and the reasonable cost of the work completed by H2O.

On February 3, 2016 at 9:00 a.m. this matter came before the Court for trial on H2O's First Amended Complaint. Plaintiff's counsel stipulated that Plaintiff was trying the case on the First Count (Breach of Contract) and the Third Count (Quantum Meruit) of the First Amended Complaint only. The parties stipulated to certain facts, the Court heard testimony of witnesses and received certain exhibits into evidence. By agreement the parties submitted written Final Arguments/Proposed Findings of Fact and Conclusions of Law by March 9, 2016. Having fully considered the evidence presented at trial, and the arguments of counsel, the court makes the following findings of fact and conclusions of law pursuant to Rule 52(a).



## I. FINDINGS OF FACT

### The Fuel Spill

1. On Saturday, July 12, 2014, at approximately 2:00 p.m., transported fuel spilled from a truck owned by Defendant Farm Supply Distributors (“Farm Supply”) at a Maverick gas station in Boise, Idaho. *Stipulated Fact 1*. Shortly thereafter, Craig Willis, President and CEO of Farm Supply, received calls from local authorities in Boise informing him of the spill and advising him of his responsibility to dispatch a HAZMAT team to clean it up. *Stipulated Fact 2*.

2. The Ada County Fire Department provided Mr. Willis the phone numbers for two different emergency response companies. He received no response when he dialed the first phone number. The second number that he called was H2O and the dispatcher that answered said that she would get a team dispatched. *Trial 88:4-25; 90:1 -12*

3. Farm Supply hired the Plaintiff to clean up the spill. *Stipulated Fact 3*. Mr. Willis testified that he requested H2O to come out and clean up the spill. *Trial 90: 13-16*.

4. H2O responded immediately and began conducting emergency remediation of the spill that same day. *Stipulated Fact 4*. They performed the requested cleanup and Mr. Willis thought that they did a “tremendous job”. *Trial 90: 17-21*. H2O completed the initial response from July 12 through July 15, 2014. *Exhibit 3*. H2O completed the remaining work from July 16 through August 4, 2014. *Stipulated Fact 14 and Exhibit 10*.

### **Vertex disputes some of the rates charged on the two H2O invoices**

5. On July 18, 2014, H2O emailed invoice number x3501 (“First Invoice”) and supporting documentation to Farm Supply. *Stipulated Fact 7.* The invoice contained charges for environmental remediation services performed by H2O from July 12 through July 15. *Id.*

6. On July 30, 2014, a representative of Vertex, the company hired by Zurich (Farm Supply’s insurer) to review H2O’s invoices and supporting documents for this job, emailed H2O a spreadsheet objecting to certain charges contained in the First Invoice based on rates “recommended” by Vertex for such services. *Stipulated Fact 12 and Exhibit 8.*

7. On August 11, 2014, H2O emailed invoice number x3741 (“Second Invoice”) and supporting documentation to Farm Supply. *Stipulated Fact 14.* Invoice x3741 contained all remaining charges for environmental remediation services performed by H2O prior to completing the cleanup from July 16 through August 4, 2014.

8. On or about August 27, 2014, Zurich sent a check to H2O on behalf of Farm Supply in the amount of \$38,473.55. H2O received and cashed the check. *Stipulated Fact 19.*

9. On October 23, 2014, Vertex provided a spreadsheet to H2O’s counsel which was similar to the one provided on July 30, 2014, but now included “recommended” lower charges for the Second Invoice as well. *Exhibit 17.*

10. The sum of the First Invoice (\$30,987.24) and the Second Invoice (\$14,480.96) is \$45,828.19. Subtracting the payment (\$38,473.55) leaves a remaining amount of \$7,354.64 which was disputed as unreasonable. These amounts are summarized on the first page of the attachment to Mr. Miceli’s October 23, 2014 email to H2O’s counsel. *Exhibit 17.*

### **Plaintiff's evidence regarding the rates it charged**

11. Mr. Bradley, the founder and CEO of H2O, testified that he began the company in 1996 with a single vacuum truck and that it is now a nonhazardous, hazardous waste management business that performs emergency response, and transportation of hazardous and non-hazardous waste. *Trial 29:7-20*. Mr. Bradley explained that H2O has five bases of operation, located in Boise, Reno, Las Vegas, Salt Lake City and Chandler, Arizona and that their area of operation is a six hour circle from each base which forms a single geographic area. *Trial 30: 5-18*. The Boise base has been in existence for more than ten years. *Trial 31: 4-8*.

12. He also explained the difference between scheduled work, for which H2O could plan their crews to staff it and perform in the future (*Trial 32: 12-19*) and emergency response, for which H2O must respond quickly to an accident or mishap (*Trial 32: 20-25; 33: 1-9*). H2O has differing rates for scheduled work and emergency response. *Trial 33: 10-13*.

13. Mr. Bradley testified that he has been setting rates for H2O since 1996. *Trial 34: 8-10*. He also testified that H2O has real competitors and that in setting rates he looks at the industry with the understanding that if H2O's rates are overpriced H2O won't get work and if their rates are underpriced H2O will not be able to stay in business. *Trial 34:13-25; 35:1-5*.

14. He further testified that he goes over the rates with his vice president and the office managers at each of the H2O bases and that they collectively establish the rates. In setting H2O's rates, they rely on their knowledge of the competition. *Trial 37: 15-25; 38 1-8*.

15. In setting H2O's rates for 2014 they relied on rates from H2O's competitors. *Trial 38: 15-23*. Mr. Bradley identified Clean Harbors, NRC, Petri Environmental, Steri Cycle and Pac West as non-Boise companies that offer competitive services in Boise and upon whose rates he

relies in setting the rates for H2O. *Trial 51: 4-25; 52: 1-2*. No evidence was presented regarding rates of other companies who provide competitive services to H2O in the Boise market.

16. Mr. Bradley also testified that many factors go into setting H2O's rates, including the fact that some of the equipment costs as much as \$400,000. *Trial 40: 8-22*. Some of the equipment that H2O stages in Boise for emergency response includes roll-off equipment, vac and truck equipment, a DOT-approved truck for pumping of flammable liquids, lift-gated trucks that can pick up drums, a boat that runs in four inches of water and could be used on the Snake River, an endless supply of drums and metal, and pallets upon pallets of Solid-a-Sorb to absorb spills. The staging of this equipment is necessary to reduce the response time, risk and cost. *Trial 41: 23-25; 42: 1-25; 43: 1-6*.

17. Finally, Mr. Bradley testified that he set the rates for H2O for 2014 based on what his customers had customarily paid in the Boise market. *Trial 56: 16-19*. He also testified that the rates charged to Farm Supply were the same rates charged to emergency response clients without preexisting contracts with H2O. *Trial 56: 20-25; 57 1-2*. He also testified that in 2014 other customers in the Boise market paid the rates charged to Farm Supply. *Trial 57: 18-20*.

18. H2O normally charges for project management from the field and project management from the office. The administrative time may include coordinating and communicating with stakeholders and regulatory agencies. *Trial 217: 15-25; 218: 1*.

19. He testified that the rates are set low enough to be competitive, but high enough to ensure his business remains profitable. *Id.* at 34: 16-25; 35: 1-5; 52: 9-16.

**Defense evidence regarding its objection to Plaintiff's rates**

20. Defendant does not dispute the scope of work or the quality of the work that was performed by H2O. *Stipulated Fact 14; Exhibit 10; Trial 90; 17-21*.

21. Defendant only disputes the rates for some of the services that were performed. *Exhibit 17*. The only evidence Defendant presented at trial that H2O's invoiced rates were too high was its consultant, Christopher Miceli. *Trial 92: 9-14*.

22. Vertex and Mr. Miceli were first hired by the Defendant's insurance company, Zurich Insurance, in July 2014 to provide opinions regarding the reasonableness of the charges from H2O Environmental. *Trial 170: 25; 171: 1-6*.

23. Mr. Miceli's colleague, Katie Johnsen, received the First Invoice on July 18, 2014 along with supporting documentation which allowed Vertex to verify that H2O performed the services for which it was billing. *Trial 173: 18-25; 174: 1-16*. Mr. Miceli testified that H2O was always forthcoming in providing Vertex with requested documents and that he did not find any occasion where H2O failed to perform any of the work they claimed in their invoices. *Trial 174: 17-23*.

24. On July 30, 2014, Vertex sent an email to H2O indicating that Vertex disputed the reasonableness of some rates H2O charged Farm Supply for its services. *Trial 175: 14-20*. Vertex provided H2O with a spreadsheet which specified the disputed rates. *Trial 175: 20-25; 176: 1 and Exhibit 8*.

25. Mr. Miceli testified that in July 2014, when the spreadsheet was created, he does not know whether its author, Katie Johnsen, looked at any rate sheets for the Boise area. *Trial 179: 2-6*. He further testified that when the spreadsheet was first presented to H2O on July 30, 2014, Vertex did not provide any information to H2O to explain why they recommended a lower rate than that being used by H2O. *Trial 179: 14-21*.

26. Mr. Miceli testified that he was hired to be a testifying expert in this case around August of 2015. *Trial 176: 18-22*. After he was hired in August of 2015 he created a second

spreadsheet which was first disclosed to H2O on September 9, 2015. The only difference between the July 30, 2014 spreadsheet and the September 9, 2015 spreadsheet was the addition of a column titled "Explanation". *Trial 176: 4-13*. Mr. Miceli testified that in creating his explanation column he relied entirely on documents and information that he procured in August 2015. *Trial 176: 14-22*.

27. Mr. Miceli testified that he understood that environmental remediation companies charge different rates for emergency response remediation versus scheduled work. *Trial 179: 24-25; 180 1-3*.

28. Mr. Miceli contested the rates of six different equipment charges found in the two H2O invoices: the Guzzler Vac Truck, 70 barrel vac tanker, power washer, crew truck, 120 barrel vac tanker and PPE (personal protective equipment). *Trial 138: 24-25; 139: 1-9*.

29. Mr. Miceli contended that 28 and one-half of the hours H2O billed for project administration time were not reasonable. *Trial 165: 2-5*.

#### **The information Mr. Miceli relied on**

30. Mr. Miceli testified that he did not find many available rate sheets for Boise, Idaho other than those of H2O. *Trial 128: 6-10*

31. In contesting the reasonableness of H2O's invoiced rates, Mr. Miceli relied upon a rate sheet from Maxum Offshore Services in New Iberia, Louisiana. *Trial 180: 4-8*. He also testified that he does not know if the Maxum rate sheet he relied upon was applicable to 2014 (*Trial 182: 6-8*) and that he does not believe that Maxum provides its services in the Boise market (*Trial 183: 1-7*).

32. Mr. Miceli also based some of his contentions on a rate sheet from a company called NWFF Environmental with offices in Philomath, Oregon and Grants Pass, Oregon. *Trial*

184: 21-25; 185: 1-2; 186:3-6. He also testified that he did not know where either city was or what distance they were from Boise. *Trial 186: 19-25; 187: 1-11.*

33. Mr. Miceli also based his contentions regarding the reasonableness of H2O's rate for PPE and crew truck on a rate sheet for a company called Olympus Technical Services in Boise, Idaho. *Trial 188: 5-13.* He did not know whether the Olympus rate for the crew truck was for a crew truck with a lift gate but admitted the lift gate could affect the price. *Trial 188: 14-20.* He also testified the Olympus rate sheet was not for the year 2014 and was not for emergency remedial services. *Trial 189: 3-15.*

34. Mr. Miceli based some of his contentions on a rate sheet for a company called BB&A located in Wilsonville, Oregon. *Trial 191: 22-25.* He testified that he did not know where Wilsonville, Oregon was, did not know what year the rate sheet was from and did not know whether it was for emergency response services. *Trial 192: 1-3, 23-25; 193: 1-10.* He went on to testify that he did not know what side of the Cascades Wilsonville is on. *Trial 133: 3-7.* He also testified that he did not have any evidence that BB&A offered emergency response fuel remediation services in Boise in July 2014. *Trial 193: 11-15.*

35. Mr. Miceli also relied upon the rates for past bids that H2O submitted for a job in Henderson, Nevada. *Trial 193: 16-25; 194: 1.* He testified that these rates were from 2012 and 2013 and they were bids for regularly scheduled work, not emergency response work. *Trial 195: 3-13.*

36. Mr. Miceli testified that there were 39 and one-half hours of project administrative time on the two H2O invoices. He took the position that some of the activities, such as organizing sub-contractor payments, managing vendor receipts, reviewing previous invoicing, reviewing employee time sheets and compiling data for the final invoicing were not remediation work.

*Trial 159: 16-25; 160 1-9.* Mr. Bradley testified that the project administration time was billed at \$50 per hour, as opposed to \$80 for project management in the field. *Trial 208: 11-18.*

37. Mr. Miceli agreed that many of those hours were justified for such activities as corresponding with the highway district, Department of Environmental Quality, the sewer department and finalizing the scheduling coordinating tasks. *Trial 160: 10-24.* He also accepted that it was justifiable to charge for authoring a spill report and coordinating with the various governmental agencies, but he concluded that only four hours should have been spent doing so. *Trial 161: 20-25; 162 1-8.* After allocating four hours to the writing of the spill report, Mr. Miceli looked to total response technician time and relied on 15% of that number as a reasonable amount of time for the project manager to bill for project management time. *Trial 163: 22-25; 164: 1-14.*

38. Mr. Miceli provided no reason for his formula. He said that he relied on his experience in forming these conclusions. *Trial 162: 5-8.* He did not testify that he had experience in the Boise market or that his calculations were based upon what was customarily charged in the Boise market in 2014.

#### **The information Mr. Miceli did not rely on**

39. Mr. Miceli testified that he investigates hundreds of claims per year and that includes receiving invoices, proposals and rate sheets. *Trial 196: 9-22.* As a result he had access to rates from hundreds of projects in the United States in the year 2014. *Trial 196: 23-25; 107: 1.* He also testified that Vertex has project files for all of its active files and that he could have run a search by state. *Trial 214: 23-25; 215 1-9.* Instead of using the information available to him, he conducted an internet search. *Trial 197: 2-5.*



40. He was aware that H2O had bases in five locations, but he did not check to see if he had rate sheets from any other places that H2O had bases, such as Salt Lake City. *Trial 197: 18-25.*

41. Mr. Miceli testified that he was aware that a company called Clean Harbors performs emergency response cleanup throughout the whole country but that he did not endeavor to find out how much Clean Harbors charged in Boise for emergency response in the summer of 2014. *Trial 190: 25; 191: 1-10.* He also testified that he did not know why he did not rely on their rates. *Trial 191: 11-21.*

42. Mr. Miceli testified that he had limited familiarity with Boise. *Trial 124: 9-11.* He relied upon Katie Pierce, a Vertex senior project manager, to help him formulate his contentions. *Trial 126: 12-20.* Ms. Pierce told Mr. Miceli that she had limited information because she did not have active projects in Boise, Idaho. *Trial 127: 12-17.* They did not discuss the inactive projects that she had worked on previously. *Trial 127: 18-20.*

43. Mr. Miceli testified that, based on his review of “many” projects, most environmental companies do not charge for administrative project management time. However, he brought none of those projects to court to prove his contention and admitted that none of them were in the Boise area. *Trail 204: 4-15; 208 2-10.*

## **CONCLUSIONS OF LAW**

### **1. Count One Breach of Contract**

Plaintiff has alleged that an express oral contract was formed and that, pursuant thereto, it is entitled to judgement for \$7,354.64. “The inquiry by the trier of fact into an alleged oral agreement is three-fold: first, determining whether an agreement exists; second, interpreting the terms of the agreement; and third, construing the agreement for its intended legal effect.”

*Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 828, 748 P.2d 410, 412 (1987). “The question of whether there was a sufficient meeting of the minds to form an express agreement is to be determined by the trier of fact.” *Id.* (citing *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984)).

In this case it is undisputed that on July 12, 2014, Craig Willis, President and CEO of Farm Supply, called H2O and hired it to clean up the spill. It is undisputed that H2O provided the services Farm Supply requested and cleaned up the spill. The Court therefore holds that an express oral agreement existed between the parties for environmental remediation services, and that the parties intended that agreement to be binding as to both of them. However, the Court also finds that the parties failed to supply a price term at the time they entered into the express oral contract.

However, an express oral agreement need not contain a price term in order to be enforceable. “Generally, if a party partly performs an otherwise unenforceable contract, that performance ‘may remove the uncertainty and establish that a contract is enforceable as a bargain has been formed.’” *Von Jones v. Chapungu Safaris*, No. 1:11-CV-00027-BLW, 2013 WL 5876280, at \*4 (D. Idaho Oct. 31, 2013) (citing Restatement (Second) Contracts § 34(2) (1981)). “That one of [the parties], with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consummated and intend to be bound thereby . . . In this way, the indefiniteness may be cured, or at least reduced. The fair and just solution may then be the enforcement of promises rather than a decision that no contract exists . . . When one party has fully performed, the argument that the contract is too indefinite usually will not be sustained.” *Id.* (citing Corbin on Contracts, § 4.1 at p. 542).

Here, H2O fully performed the agreed upon services and they did so with Farm Supply's full knowledge and approval. There was no evidence that Farm Supply requested H2O to cease working on the cleanup when the amounts of some of the charges were questioned. In cases such as this, Idaho courts will "supply the omitted price term, as permitted under Restatement (Second) of Contracts § 204 (1981)" *Von Jones v. Chapungu Safaris*, No. 1:11-CV-00027-BLW, 2013 WL 5876280, at \*4 (D. Idaho Oct. 31, 2013) (distinguishing cases involving full performance by one party to an agreement from other Idaho case law requiring agreement to a price term for an express agreement to be enforceable). Section 204 of the Restatement states "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the Court." Restatement (Second) Contracts § 204. Because the Court finds by a preponderance of the evidence that an express oral contract was created and performed, this Court will supply a reasonable price term as set forth below.

## **2. Count Three Quantum Meruit**

"The remedy of quantum meruit is based upon the principle that 'one who provides services should receive the compensation he or she deserves.'" *Baker v. Boren*, 129 Idaho 885, 894, 934 P.2d 951, 960 (1997) (citing *Shacocass, Inc. v. Arrington Const. Co.*, 116 Idaho 460, 464, 776 P.2d 469, 473 (Ct.App.1989). "It is used to compensate a person who has performed services at the request of another, and recovery is based on an implied-in-fact contract." *Id.* (citing *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 829, 748 P.2d 410, 413 (Ct.App.1987). "The measure for recovery required for a claim of quantum meruit is the reasonable value of services rendered . . ." *Id.* (citing *Peavey v. Pellandini*, 97 Idaho 655, 660, 551 P.2d 610, 615 (1976). "This is an objective measure and is proven by evidence

demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed.” *Id.*

Thus, “a plaintiff, to make a prima facie case, is required to prove performance and reasonable value, and that defenses available against such an action include showing that the services were not in fact furnished, and were not of value claimed – and that the measure of recovery is the actual value of services rendered.” *Peavey v. Pellandini*, 97 Idaho 655, 661, 551 P.2d 610, 616 (1976) (citing 66 Am.Jur.2d. Restitution and Implied Contracts, s. 89 at 1031). The Court finds that, by a preponderance of the evidence, Plaintiff has proven that it performed services for Defendant and the reasonable value thereof.

### **3. The Reasonable Value of the Services**

Having determined the parties entered into an express oral contract for which this Court will provide a price term and that H2O is entitled to Quantum Meruit, the Court now turns to the reasonable value of the services provided, which is expressly found to be a reasonable price term. If the reasonable value of the services provided by H2O exceeds the amount it was paid, then it should be entitled to recover under both theories.

H2O has provided evidence of the reasonableness of the rates it utilized in Boise in 2014, including the process by which they were created. H2O presented evidence of what factors went into the rates (cost of equipment, overhead, training and insurance). H2O also provided evidence that its rates in Boise in 2014 were the same as its other bases in Arizona, Nevada and Utah, were based on H2O’s past billing experience and were set while considering the rates of at least five companies that, while not based in Boise, provided competing services in Boise.

H2O’s CEO testified that the rates it charged Farm Supply in 2014 were the same rates that it charged other emergency response customers in the Boise market in 2014 and that its other

customers paid those rates. H2O has provided evidence of the reasonable rate customarily charged for emergency response services in the Boise market in 2014 and that evidence is consistent with the rates it charged Farm Supply.

In response, Farm Supply produced only the testimony of Mr. Miceli to refute H2O's claims regarding the reasonableness of the rates H2O charged in Boise in 2014. However, Mr. Miceli demonstrated absolutely no knowledge of the 2014 Boise market. He attempted to rely on rate sheets from companies based in locations with no proximity to Boise. For several companies, he did not know the location of the city from which they operated. He also used rate sheets from years other than 2014 and was uncertain in some cases whether he was using rates that were emergency response or scheduled work.

Further, Mr. Miceli admitted that he was aware of at least one company that provided emergency response services in Boise in 2014, Clean Harbors, but that he had no reason for not trying to get their rate sheet. He also failed to get rate sheets for the other cities where H2O had bases and failed to search the hundreds of files available to him from other Vertex jobs to try to locate rate sheets for Idaho or any of the other states where H2O has bases.

Mr. Miceli's testimony was not probative and was not credible.

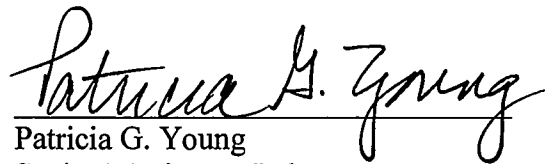
### **Conclusion**

The Court finds for Plaintiff on Count One of its First Amended Complaint for breach of an express oral contract. In so doing, the Court finds that H2O has demonstrated by a preponderance of the evidence that the rates in its two invoices were reasonable rates for the Boise market for 2014. Farm Supply's failure to pay the total amount invoiced is a breach of the express oral contract.

The Court find for Plaintiff on Count Three of its First Amended Complaint for quantum meruit. In so doing, the Court finds that H2O has demonstrated by a preponderance of the evidence that the rates in its two invoices demonstrate the customary rate of pay for such work in the community at the time the work was performed.

Plaintiff is therefore entitled to Judgment in the amount of \$7,354.64. Counsel for Plaintiff is directed to prepare a Judgment consistent with these Findings of Fact and Conclusions of Law.

Dated March 30, 2016

  
Patricia G. Young  
Senior Magistrate Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30 day of March 2016, I caused a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

*Counsel for Defendant*

Nicholas Warden  
Fisher Rainey Hudson  
950 W. Bannock Street, Ste. 630  
Boise, ID 83702  
F: 208-514-1900  
naw@frhtriallawyers.com

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

*Counsel for Plaintiff*

  
Clerk of the Court  


APR 19 2016

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE PRICE  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

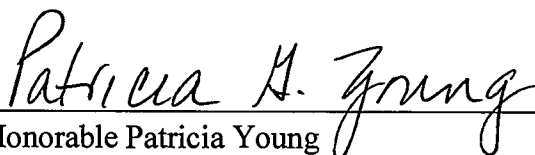
Case No. CV OC 1500236

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff is hereby awarded judgment against Defendant Farm Supply Distributors, Inc. in the principal sum of \$7,354.64, plus pre-judgment interest at the rate of 5.125% per annum in the amount of \$597.32, for a total judgment of \$7,952.56 together with interest at the statutory rate from the date of entry of this Judgment to the date this Judgment is paid in full.

DATED this 19 day of April, 2016.

  
Honorable Patricia Young



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19 day of April, 2016, I caused to be served a true copy of the foregoing **JUDGMENT** by the method indicated below, and addressed to each of the following:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701  
hamitchell@careyperkins.com

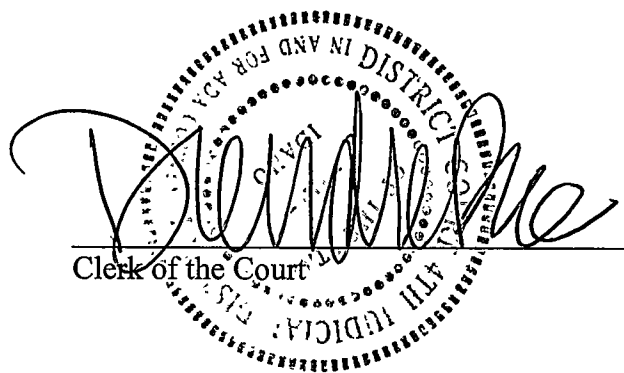
- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

*Counsel for Defendant*

Nicholas Warden  
Fisher Rainey Hudson  
950 W. Bannock Street, Ste. 630  
Boise, ID 83702  
F: 208-514-1900  
naw@frhtriallawyers.com

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile

*Counsel for Plaintiff*

  
Clerk of the Court

The image shows a circular stamp from the District Court of the Fourth Judicial District, Idaho. The text around the perimeter of the stamp reads "DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, IDAHO". In the center of the stamp, the words "CLERK OF THE COURT" are visible. A handwritten signature is written across the stamp.

NO \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 448

**MAY - 2 2016**

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

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallywers.com  
Email: naw@frhtriallywers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,  
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation  
Defendant.


Case No. CV OC 1500236

**MOTION FOR COSTS AND ATTORNEY'S  
FEES**

COMES NOW, Plaintiff H2O Environmental, Inc. ("H2O"), pursuant to I.R.C.P. 54(d)(5), 54(e)(1) and 54(e)(3) and Idaho Code §§ 12-120(3) and 12-121 and hereby submits this motion for costs and fees. This motion is supported by a Memorandum in Support of Motion for Costs and Attorney's Fees and the Affidavit of Vaughn Fisher in Support of Motion for Costs and Attorney's Fees filed concurrently herewith.

Dated this 2 day of May, 2016.

FISHER RAINEY HUDSON



Vaughn Fisher – of the firm  
Attorneys for Plaintiffs


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of May 2016, I caused a true and correct copy of the foregoing **MOTION FOR COSTS AND ATTORNEY'S FEES** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Via Hand Delivery  
 Email

*Counsel for Defendant*



Vaughn Fisher

MAY - 2 2016

CHRISTOPHER D. RICH, Clerk  
By SANTIAGO BARRIOS  
DEPUTY

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
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Email: vaughn@frhtriallawyers.com  
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Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,  
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation  
Defendant.

Case No. CV OC 1500236

**AFFIDAVIT OF VAUGHN FISHER IN  
SUPPORT OF MOTION FOR COSTS AND  
ATTORNEY'S FEES**

STATE OF IDAHO )  
                                          ) ss  
County of Ada    )

Vaughn Fisher, being first duly sworn deposes and says the following:

1. I am one of the attorneys of record in this matter and I make this affidavit based upon my own personal knowledge and upon the business records of Fisher Rainey Hudson, which business records are made at or near the time of the events contained therein by (or from information transmitted by) a person with knowledge of such events, which records are kept in the

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course of regularly conducted activity of Fisher Rainey Hudson, and which records are made by the regularly conducted activity and regular practice of Fisher Rainey Hudson.

2. I am an attorney licensed to practice in Idaho and have been an active member of the Idaho State Bar since April 3, 2007. I am also a member of the bar of Idaho's United State District and Bankruptcy Courts since September 29, 2011. Additionally, I am an active member of Idaho's Trial Lawyers Association and a recent recipient (2015) of the Idaho Business Review's Leaders in Law award and a past recipient (2009) of the Denise O'Donnell Day Pro Bono Award.

3. I am also licensed to practice law in Georgia and have been a member of the Georgia Bar in good standing since May 31, 1995 (currently inactive). I am admitted to practice in the Georgia trial and appellate courts and the Federal Courts for the Northern District of Georgia.

4. I received my undergraduate degree from Kent State University in 1991 and my J.D. from Thomas M. Cooley Law School in 1995.

5. At our firm, I have an interstate litigation practice with a focus on commercial litigation and complex federal litigation, including civil rights cases. As the senior member of Fisher Rainey Hudson, I also help make decisions about the deployment of resources and case strategy.

6. My current rate for litigation matters, similar to this matter, is between \$235 and \$350 per hour. For long-term clients such as H2O I use my historic hourly rate of \$235 per hour, which is my rate in this case. When I first began practicing in Idaho, I assisted Howard Belodoff in the matter of *Community House Inc. v. City of Boise*, Case No. CV 05-283-S-CWD (D. Idaho 2005). In that case the Honorable Candy W. Dale, United States Magistrate Judge found my then rate of \$325 per hour to be reasonable as of March 25, 2014. *Community House Inc.* (Dkt. 447).

7. I also participate in setting the rates for other service providers in my firm. Based on prevailing market rates, the following rates are reasonable:

- a. Rebecca Rainey is a partner at Fisher Rainey Hudson and she received her JD from Baylor University. She has been practicing civil litigation in state and federal court since 2006. In this case she made a very small time contribution by helping to develop case strategy and her rate of \$225 is reasonable and is the rate that is normally charged by her to H2O.
- b. Nicholas Warden is an associate attorney at Fisher Rainey Hudson and received his JD from University of California Davis. He has been practicing civil litigation in state and federal court since 2013. In this case he conducted most of the discovery and brief writing. He also helped prepare the case for trial. His rate of \$150 per hour is reasonable and is a rate below what is now charged to H2O for his time.
- c. Jennifer Hanway is a paralegal at Fisher Rainey Hudson and has five years of experience. While working full time for Fisher Rainey Hudson and Rainey Law Office she also attended law school in the evenings at Concordia University School of Law and graduated *magna cum laude* in December 2015. She sat for and passed the Idaho, February 2016 Bar Exam. Her rate of \$120 per hour is reasonable and is below the rate the client would now be charged for her services.
- d. The \$120 rate for experienced paralegal Renea Lund, and \$90.00 per hour for two-year paralegal Steffanie Coy are also reasonable rates and are consistent with those rates actually charged to H2O.

8. On January 8, 2015, a Complaint was filed before this Court seeking affirmative relief against Defendant Farm Supply Distributors for breach of contract. Plaintiff's first amended

complaint was filed on December 11, 2015 adding a claim for quantum meruit in addition to the original two claims.

9. Trial was held before the Court on February 3, 2016, on the breach of contract and quantum meruit claims. The parties submitted written Final Arguments/Proposed Findings of fact and Conclusions of Law on March 9, 2016.

10. This Court entered its Findings of Facts and Conclusions of Law in favor of Plaintiff H2O Environmental on both of its claims on March 30, 2016.

11. The Plaintiff has incurred costs and attorney’s fees in the continued prosecution of the case against Farm Supply Distributors.

12. A breakdown of the costs and fees incurred by the Plaintiff in prosecuting the case against Farm Supply Distributors is attached as Exhibit A and are summarized as follows:

|                                                  |                     |
|--------------------------------------------------|---------------------|
| <b>Attorney Fees</b>                             |                     |
| Vaughn W. Fisher                                 | \$ 27,683.00        |
| Rebecca A. Rainey                                | \$ 720.00           |
| Nicholas A. Warden                               | \$ 18,660.00        |
| <b>Total</b>                                     | <b>\$ 47,063.00</b> |
| <b>Paralegal Fees</b>                            |                     |
| Jennifer Hanway                                  | \$ 3,228.00         |
| Renea Lund                                       | \$ 1,920.00         |
| Steffanie Coy                                    | \$ 1,192.50         |
| <b>Total</b>                                     | <b>\$ 6,340.50</b>  |
| <b>Costs as a Matter of Right</b>                |                     |
| Filing Fee – Complaint                           | \$ 166.00           |
| Service Fee – Complaint                          | \$ 36.00            |
| Costs of Reporting & Transcribing Depositions:   |                     |
| Carol Ward and Craig Willis                      | \$ 638.15           |
| Steven King’s 30(b)(6) Deposition                | \$ 216.51           |
| Joe Wickenden’s 30(b)(6) Deposition              | \$ 111.57           |
| Chris Miceli                                     | \$ 357.30           |
| <b>Total</b>                                     | <b>\$ 1,525.53</b>  |
| <b>Discretionary Costs</b>                       |                     |
| Attorney Mileage to and from 30(b)(6) Deposition | \$ 266.05           |
| Conference Room Rental for 30(b)(6) Deposition   | \$ 150.00           |
| Trial Transcript                                 | \$ 579.38           |
| <b>Total</b>                                     | <b>\$ 995.43</b>    |


Total Costs & Fees

\$ 55,924.46

13. Attached hereto as **Exhibit B** are true and correct copies of invoices reflecting the costs and fees in this case. Charges which were deemed to be duplicate or administrative in function have been redacted from these invoices.

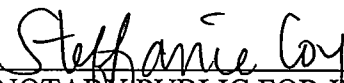
14. Further your affiant sayeth naught.

Dated this 2 day of May, 2016.

  
\_\_\_\_\_  
Vaughn Fisher

SUBSCRIBED AND SWORN to before me this 2 day of May, 2016.



  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at: Boise  
My commission expires: March 28, 2020

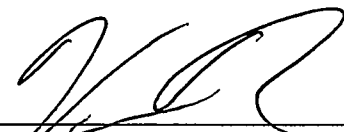
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of May 2016, I caused a true and correct copy of the foregoing **AFFIDAVIT OF VAUGHN FISHER IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY'S FEES** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

*Counsel for Defendant*

  
\_\_\_\_\_  
Vaughn Fisher



# EXHIBIT A

| <b>Attorney's Fees</b> |                              |                               |                                     |
|------------------------|------------------------------|-------------------------------|-------------------------------------|
| <b>Invoice Date</b>    | <b>Total Amount Incurred</b> | <b>Total Amount Requested</b> | <b>Notes</b>                        |
| 11/10/2014             | \$ 282.00                    | \$ 282.00                     |                                     |
| 1/20/2015              | \$ 630.00                    | \$ 630.00                     |                                     |
| 2/10/2015              | \$ 261.00                    | \$ 234.00                     | SRC Administrative Time Removed     |
| 3/18/2015              | \$ 99.00                     | \$ 81.00                      | SRC Administrative Time Removed     |
| 4/14/2015              | \$ 285.00                    | \$ 285.00                     |                                     |
| 5/13/2015              | \$ 1,022.50                  | \$ 1,022.50                   |                                     |
| 6/10/2015              | \$ 649.00                    | \$ 649.00                     |                                     |
| 7/8/2015               | \$ 1,870.00                  | \$ 1,870.00                   |                                     |
| 8/6/2015               | \$ 4,184.00                  | \$ 4,184.00                   |                                     |
| 9/17/2015              | \$ 3,390.50                  | \$ 3,390.50                   |                                     |
| 10/15/2015             | \$ 1,473.50                  | \$ 1,473.50                   |                                     |
| 11/16/2015             | \$ 3,014.00                  | \$ 2,489.00                   | NAW Duplicate Attorney Time Removed |
| 12/18/2015             | \$ 3,762.00                  | \$ 3,720.00                   | SRC Administrative Time Removed     |
| 1/11/2016              | \$ 2,081.50                  | \$ 2,072.50                   | SRC Administrative Time Removed     |
| 2/12/2016              | \$ 14,453.00                 | \$ 13,808.00                  | NAW Duplicate Attorney Time Removed |
| 3/9/2016               | \$ 9,017.50                  | \$ 8,777.50                   | NAW Duplicate Attorney Time Removed |
| 4/11/2016              | \$ 4,927.00                  | \$ 4,909.00                   | SRC Administrative Time Removed     |
| 5/2/2016               | \$ 3,526.00                  | \$ 3,526.00                   |                                     |
| <b>Total Fees</b>      | <b>\$ 54,927.50</b>          | <b>\$ 53,403.50</b>           |                                     |

### Costs

| Invoice Date | Type of Cost Incurred | Amount Incurred | Total |
|--------------|-----------------------|-----------------|-------|
|--------------|-----------------------|-----------------|-------|

|                  |                                   |           |                  |
|------------------|-----------------------------------|-----------|------------------|
| <b>1/20/2015</b> | <b>Costs as a Matter of Right</b> |           | <b>\$ 202.00</b> |
|                  | Filing Fee                        | \$ 166.00 |                  |
|                  | Service Fee                       | \$ 36.00  |                  |
|                  | <b>Total</b>                      |           | <b>\$ 202.00</b> |

|                 |                                                |           |                    |
|-----------------|------------------------------------------------|-----------|--------------------|
| <b>8/6/2015</b> | <b>Costs as a Matter of Right</b>              |           | <b>\$ 638.15</b>   |
|                 | Carol Ward and Craig Willis Deposition Costs   | \$ 638.15 |                    |
|                 | <b>Discretionary Costs</b>                     |           | <b>\$ 416.05</b>   |
|                 | Mileage to and from 30(b)(6) Deposition        | \$ 266.05 |                    |
|                 | Conference Room Rental for 30(b)(6) Deposition | \$ 150.00 |                    |
|                 | <b>Total</b>                                   |           | <b>\$ 1,054.20</b> |

|                  |                                   |           |                  |
|------------------|-----------------------------------|-----------|------------------|
| <b>9/17/2015</b> | <b>Costs as a Matter of Right</b> |           | <b>\$ 328.08</b> |
|                  | Steve King Deposition Costs       | \$ 216.51 |                  |
|                  | Joe Wickenden Deposition Costs    | \$ 111.57 |                  |
|                  | <b>Total</b>                      |           | <b>\$ 328.08</b> |

|                  |                                   |           |                  |
|------------------|-----------------------------------|-----------|------------------|
| <b>2/12/2016</b> | <b>Costs as a Matter of Right</b> |           | <b>\$ 357.30</b> |
|                  | Chris Miceli Deposition Costs     | \$ 357.30 |                  |
|                  | <b>Discretionary Costs</b>        |           | <b>\$ 579.38</b> |
|                  | Trial Transcript                  | \$ 579.38 |                  |
|                  | <b>Total</b>                      |           | <b>\$ 936.68</b> |

|                                             |                    |
|---------------------------------------------|--------------------|
| <b>Costs As A Matter of Right Requested</b> | <b>\$ 1,525.53</b> |
| <b>Discretionary Costs Requested</b>        | <b>\$ 995.43</b>   |
| <b>Total Costs Requested</b>                | <b>\$ 2,520.96</b> |

# EXHIBIT B

FISHER | RAINEY | HUDSON  
910 W. Main St., Ste. 254  
Boise, Idaho 83702  
(208) 345-7000  
EIN: 45-4020090

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

H2O (Farm Supply Distributors)  
FRH0043-VF

November 10, 2014

Invoice # 10947

Payment Terms: Net 30

Professional Services

|                                           |                                                                                                                    | <u>Hrs/Rate</u>   | <u>Amount</u>   |
|-------------------------------------------|--------------------------------------------------------------------------------------------------------------------|-------------------|-----------------|
| 10/21/2014                                | VWF Review emails and invoices; Review Savre correspondence; Phone with ES about status of discussions with Zurich | 235.00/hr         | NO CHARGE       |
| 10/23/2014                                | VWF Email correspondence with Zurich insurance company; Email correspondence with client; Phone with E Savre       | 0.40<br>235.00/hr | 94.00           |
| 10/24/2014                                | VWF Review email from insurer consultant Vertex and attached spreadsheet; email correspondence with Vertex         | 0.40<br>235.00/hr | 94.00           |
| 10/27/2014                                | VWF Phone with insurance adjuster                                                                                  | 0.20<br>235.00/hr | 47.00           |
| 10/28/2014                                | VWF Phone with client; Email correspondence with Zurich insurance company                                          | 0.20<br>235.00/hr | 47.00           |
| <b>For professional services rendered</b> |                                                                                                                    | <b>1.20</b>       | <b>\$282.00</b> |

FISHER | RAINEY | HUDSON  
910 W. Main St., Ste. 254  
Boise, Idaho 83702  
(208) 345-7000  
EIN: 45-4020090

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

H2O (Farm Supply Distributors)  
FRH0043-VF

January 20, 2015

Invoice # 11014

Payment Terms: Net 30

Professional Services

|                                                                          | <u>Hrs/Rate</u>   | <u>Amount</u>   |
|--------------------------------------------------------------------------|-------------------|-----------------|
| 12/3/2014 NAW Drafted and revised demand letter.                         | 0.80<br>150.00/hr | 120.00          |
| 12/4/2014 VWF Edit and finalize demand                                   | 0.10<br>235.00/hr | NO CHARGE       |
| 12/11/2014 VWF Phone call from Zurich insurance                          | 0.10<br>235.00/hr | NO CHARGE       |
| 12/29/2014 NAW Reviewed case file; drafted Complaint; revised Complaint. | 3.10<br>150.00/hr | 465.00          |
| 12/30/2014 NAW Researched venue; revised Complaint.                      | 0.30<br>150.00/hr | 45.00           |
| <b>For professional services rendered</b>                                | <b>4.40</b>       | <b>\$630.00</b> |

Additional Charges :

|                                                                                      | <u>Qty/Price</u> |                 |
|--------------------------------------------------------------------------------------|------------------|-----------------|
| 1/8/2015 CMT Filing Fee                                                              | 1<br>166.00      | 166.00          |
|  |                  |                 |
| 1/12/2015 CMT Service Fee                                                            | 1<br>36.00       | 36.00           |
| <b>Total additional charges</b>                                                      |                  | <b>\$207.00</b> |



FISHER | RAINEY | HUDSON  
910 W. Main St., Ste. 254  
Boise, Idaho 83702  
(208) 345-7000  
EIN: 45-4020090

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716


H2O (Farm Supply Distributors)  
FRH0043-VF

February 10, 2015

Invoice # 11061

Payment Terms: Net 30

Professional Services

|                                                                                      | <u>Hrs/Rate</u>   | <u>Amount</u>   |
|--------------------------------------------------------------------------------------|-------------------|-----------------|
| 1/5/2015 VWF Status report to client                                                 | 0.10<br>235.00/hr | NO CHARGE       |
| 1/6/2015 NAW Revised complaint (VF edits).                                           | 0.50<br>150.00/hr | 75.00           |
| 1/7/2015 JJH Finalize Complaint & draft summons                                      | 0.70<br>120.00/hr | 84.00           |
| NAW Reviewed Complaint.                                                              | 0.10<br>150.00/hr | NO CHARGE       |
|  |                   |                 |
| 1/27/2015 NAW Tele. w/ opposing counsel.                                             | 0.50<br>150.00/hr | 75.00           |
| <b>For professional services rendered</b>                                            | <b>2.20</b>       | <b>\$261.00</b> |





Isher | Rainey | Hudson  
950 W. Bannock St., Ste. 630  
Boise, Idaho 83702  
(208) 345-7000  
EIN: 45-4020090

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716


H2O (Farm Supply Distributors)  
FRH0043-VF

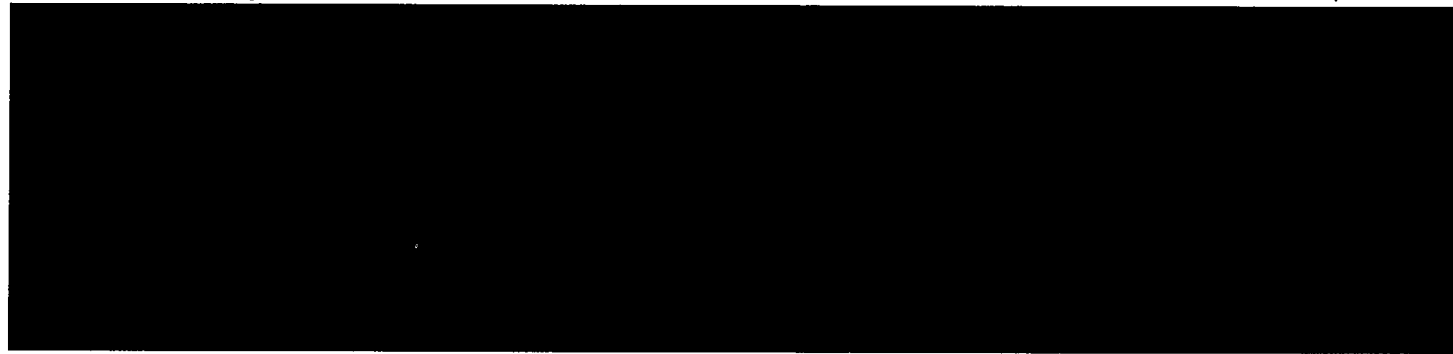
March 18, 2015

Invoice # 11100

Payment Terms: Net 30

Professional Services

|                                                                                    | <u>Hrs/Rate</u>   | <u>Amount</u>  |
|------------------------------------------------------------------------------------|-------------------|----------------|
| 2/3/2015 SRC Create Affidavit of Service for Wallowa County Sheriff                | 0.30<br>90.00/hr  | 27.00          |
|  |                   |                |
| 2/5/2015 SRC Update pleadings file                                                 | 0.10<br>90.00/hr  | 9.00           |
| 2/5/2015 VWF Review answer filed by Farm Supply                                    | 0.10              | NO CHARGE      |
| 2/5/2015 NAW Reviewed FSD Answer; mtng w/ VF to discuss defenses.                  | 0.30<br>150.00/hr | 45.00          |
| <b>For professional services rendered</b>                                          | <b>1.00</b>       | <b>\$99.00</b> |

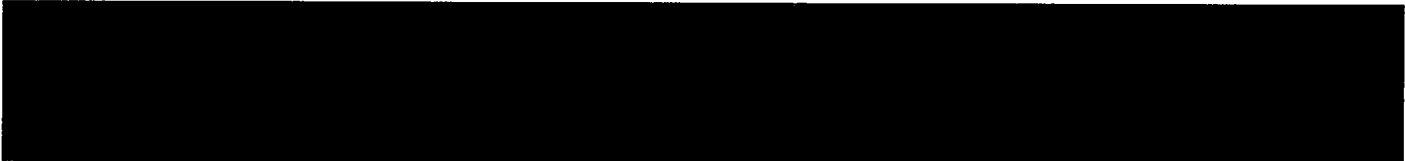


H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716  
April 14, 2015  
Invoice # 11134  
Payment Terms: Net 30

Professional Services

|                                                                                                                        | <u>Hrs/Rate</u>   | <u>Amount</u>   |
|------------------------------------------------------------------------------------------------------------------------|-------------------|-----------------|
| 3/5/2015 NAW Review of File                                                                                            | 0.40<br>150.00/hr | NO CHARGE       |
| 3/5/2015 NAW Began drafting Memo ISO MSJ                                                                               | 1.20<br>150.00/hr | 180.00          |
| 3/10/2015 NAW Email to Ed Savre seeking additional information re: contract formation.                                 | 0.20<br>150.00/hr | 30.00           |
| 3/11/2015 NAW Email correspondence w/ Ed Savre re: formation of agreement w/ FSD;<br>Reviewed write-up of Steven King. | 0.30<br>150.00/hr | 45.00           |
| 3/11/2015 NAW Reviewed red-lined invoice from Zurich received from Savre via email.                                    | 0.20<br>150.00/hr | 30.00           |
| 3/18/2015 VWF Confer with NAW about [REDACTED] strategy & facts of the case                                            | 0.10<br>235.00/hr | NO CHARGE       |
| <b>For professional services rendered</b>                                                                              | <b>2.40</b>       | <b>\$285.00</b> |



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

May 13, 2015  
Invoice # 11211

Payment Terms: Net 30

Professional Services

|           |                                                                                                      | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 4/7/2015  | RAR conference with Vaughn re. strategy [REDACTED]                                                   | 0.10<br>225.00/hr | 22.50         |
| 4/7/2015  | NAW Mtng w/ VF to discuss scheduling conference.                                                     | 0.20<br>150.00/hr | 30.00         |
| 4/7/2015  | VWF Confer with NAW about scheduling conference and possibility of filing summary judgment motion;   | 0.20<br>235.00/hr | NO CHARGE     |
| 4/8/2015  | NAW Attended Scheduling Conference                                                                   | 0.50<br>150.00/hr | 75.00         |
| 4/8/2015  | NAW Reviewed offer of judgment; reviewed IRCP 58; mtng w/ VF to discuss results of research.         | 0.30<br>150.00/hr | 45.00         |
| 4/8/2015  | VWF Confer with NAW about scheduling conference & 30b6 deposition; Receive and review offer judgment | 0.20<br>235.00/hr | 47.00         |
| 4/13/2015 | NAW Drafted and revised 30(b)(6) Notice of Depo.                                                     | 1.00<br>150.00/hr | 150.00        |
| 4/14/2015 | VWF Review and edit 30b6 notice; confer with NAW about edits and objectives                          | 0.30<br>235.00/hr | 70.50         |
| 4/15/2015 | SRC Finalize and send correspondence to opposing council                                             | 0.10<br>90.00/hr  | 9.00          |
| 4/15/2015 | NAW Revised Notice of 30(b)(6) depo.                                                                 | 0.30<br>150.00/hr | 45.00         |

|                                                                                            | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|--------------------------------------------------------------------------------------------|-------------------|-------------------|
| 4/15/2015 NAW Letter to opposing counsel re: 30(b)(6) notice of deposition                 | 0.20<br>150.00/hr | 30.00             |
| 4/16/2015 VWF Review offer of judgment and rules; Phone with client                        | 0.20<br>235.00/hr | 47.00             |
| 4/21/2015 NAW Tele. w/ opposing counsel regarding 30(b)(6) deposition.                     | 0.40<br>150.00/hr | 60.00             |
| 4/23/2015 RAR conference with Vaughn regarding [REDACTED] bad faith;                       | 0.20<br>225.00/hr | 45.00             |
| 4/23/2015 NAW Email corr. w/ opposing counsel.                                             | 0.30<br>150.00/hr | 45.00             |
| 4/23/2015 NAW Legal Research re: permissible scope of 30(b)(6) notice.                     | 0.50<br>150.00/hr | 75.00             |
| 4/23/2015 VWF Draft emails to other side about deposition; Confer with NAW and RR          | 0.30<br>235.00/hr | 70.50             |
| 4/24/2015 VWF Status memo to client                                                        | 0.20<br>235.00/hr | NO CHARGE         |
| 4/25/2015 NAW Drafted and revised RFP.                                                     | 0.50<br>150.00/hr | 75.00             |
| 4/27/2015 JJH Edit, finalize and file discovery requests; draft and file notice of service | 0.30<br>120.00/hr | 36.00             |
| 4/28/2015 NAW Reviewed motion for protective order and attachments.                        | 0.30<br>150.00/hr | 45.00             |
| <b>For professional services rendered</b>                                                  | <u>6.60</u>       | <u>\$1,022.50</u> |



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

June 10, 2015  
Invoice # 11224

Payment Terms: Net 30

Professional Services

|                                                                                         | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------------------------------------------------------------------------------------|-------------------|---------------|
| 5/8/2015 JJH Edit and send letter to Pollock                                            | 0.20<br>120.00/hr | 24.00         |
| 5/8/2015 NAW Mtng w/ VF to discuss response to Mot for Protective Order.                | 0.30<br>150.00/hr | 45.00         |
| 5/8/2015 NAW Drafted ltr in response to mot for protective order.                       | 0.50<br>150.00/hr | 75.00         |
| 5/8/2015 VWF Confer with NAW about 30b6 and motion for protective order                 | 0.30<br>235.00/hr | 70.50         |
| 5/11/2015 SRC Update discovery file                                                     | 0.25<br>90.00/hr  | 22.50         |
| 5/11/2015 VWF Review new discovery                                                      | 1.00<br>235.00/hr | 235.00        |
| 5/28/2015 NAW Ltr to Pollack re: 30(b)(6) depo.                                         | 0.70<br>150.00/hr | 105.00        |
| 5/28/2015 VWF Confer with NAW about moving case forward                                 | 0.10<br>235.00/hr | NO CHARGE     |
| 5/29/2015 SRC Finalize Notice of Deposition and Letter to Opposing Counsel; file Notice | 0.60<br>90.00/hr  | 54.00         |
| 5/29/2015 VWF Review letter to opposing counsel; Confer with NAW                        | 0.10<br>235.00/hr | NO CHARGE     |
| 6/1/2015 SRC Research to find court reporter in Enterprise, OR                          | 0.20<br>90.00/hr  | 18.00         |

000304

|                                           | <u>Hours</u> | <u>Amount</u>   |
|-------------------------------------------|--------------|-----------------|
| <b>For professional services rendered</b> | <b>4.25</b>  | <b>\$649.00</b> |



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716  
July 8, 2015  
Invoice # 11301

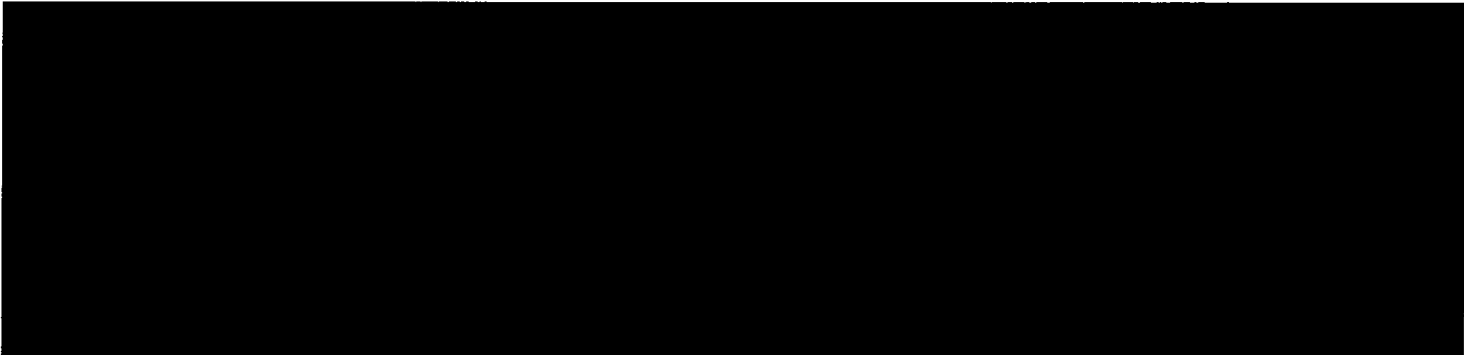
Payment Terms: Net 30

Professional Services

|           |                                                                                                   | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|---------------------------------------------------------------------------------------------------|-------------------|---------------|
| 6/10/2015 | SRC Research conference rooms in Enterprise, OR for deposition of FSD                             | 0.30<br>90.00/hr  | NO CHARGE     |
| 6/12/2015 | NAW Email correspondence w/ opposing counsel.                                                     | 0.30<br>150.00/hr | 45.00         |
| 6/15/2015 | SRC Reserve conference room for deposition; Amend Notice of Deposition;<br>Contact Court Reporter | 0.70<br>90.00/hr  | NO CHARGE     |
| 6/17/2015 | JJH Prepare responses to RFAs, finalize, and file                                                 | 1.20<br>120.00/hr | 144.00        |
| 6/17/2015 | NAW Scheduling Conference                                                                         | 0.90<br>150.00/hr | 135.00        |
| 6/17/2015 | NAW Drafted response to Dfdt's 1st set of discovery.                                              | 1.50<br>150.00/hr | 225.00        |
| 6/17/2015 | NAW Email to client; [REDACTED]                                                                   | 0.70<br>150.00/hr | 105.00        |
| 6/17/2015 | NAW Revised responses to RFAs (VF and client edits).                                              | 1.00<br>150.00/hr | 150.00        |
| 6/17/2015 | VWF Confer with NAW; Review draft discovery; Email to client regarding trial<br>date              | 0.40<br>235.00/hr | 94.00         |
| 6/22/2015 | SRC Calendar Order Setting Jury Trial                                                             | 0.17<br>90.00/hr  | NO CHARGE     |
| 6/23/2015 | SRC Amend Notice of Deposition; Contact court reporter                                            | 0.20<br>90.00/hr  | NO CHARGE     |

000306

|                                           |                                                                                             | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|---------------------------------------------------------------------------------------------|-------------------|-------------------|
| 6/26/2015                                 | SRC Prepare draft for discovery responses                                                   | 0.30<br>90.00/hr  | 27.00             |
| 6/26/2015                                 | JJH Review discovery requests and begin drafting responses; provide draft to NAW for review | 2.60<br>120.00/hr | 312.00            |
| 6/27/2015                                 | NAW Reviewed and revised discovery responses.                                               | 1.50<br>150.00/hr | 225.00            |
| 6/27/2015                                 | NAW Tele. w/ Steven King                                                                    | 0.80<br>150.00/hr | 120.00            |
| 6/29/2015                                 | JJH Edits to discovery responses                                                            | 0.70<br>120.00/hr | 84.00             |
| 6/30/2015                                 | JJH Finalize discovery responses and file.                                                  | 1.20<br>120.00/hr | 144.00            |
| 6/30/2015                                 | NAW Finalized discovery responses                                                           | 0.40<br>150.00/hr | 60.00             |
| <b>For professional services rendered</b> |                                                                                             | <b>14.87</b>      | <b>\$1,870.00</b> |





H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

August 6, 2015  
Invoice # 11330

Payment Terms: Net 30

Professional Services

|                                                                                                                  | <u>Hrs/Rate</u>   | <u>Amount</u> |
|------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 7/7/2015 NAW Mtng w/ VF to Preparation and assembly of for 30(b)(6) depo.                                        | 0.70<br>150.00/hr | 105.00        |
| 7/7/2015 NAW Prepped for 30(b)(6) depo.                                                                          | 1.20<br>150.00/hr | 180.00        |
| 7/7/2015 VWF Confer with NAW about deposition preparation                                                        | 0.60<br>235.00/hr | 141.00        |
| 7/8/2015 NAW Travel to and from 30(b)(6) depo.                                                                   | 8.00<br>150.00/hr | 1,200.00      |
| 7/8/2015 NAW Conducted 30(b)(6) depo.                                                                            | 2.70<br>150.00/hr | 405.00        |
| 7/9/2015 VWF Status                                                                                              | 0.10<br>235.00/hr | 23.50         |
| 7/20/2015 NAW Tele. w/ Steve King                                                                                | 0.30<br>150.00/hr | 45.00         |
| 7/27/2015 SRC Finalize Plaintiffs response to Defendant's MSJ                                                    | 1.00<br>90.00/hr  | 90.00         |
| 7/27/2015 RAR conference with Nick & Vaughn re. response to motion for summary judgment and strategy [REDACTED]; | 0.30<br>225.00/hr | 67.50         |
| 7/27/2015 NAW Legal Research re: ratification of contract terms.                                                 | 1.10<br>150.00/hr | 165.00        |
| 7/27/2015 NAW Drafted Memo IOT MSJ                                                                               | 3.00<br>150.00/hr | 450.00        |

000308

|                                                                                                                                                                                             | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 7/27/2015 NAW Drafted Affs of Bradley and King.                                                                                                                                             | 0.90<br>150.00/hr | 135.00            |
| 7/27/2015 NAW Revised Memo IOT MSJ (VF edits).                                                                                                                                              | 0.90<br>150.00/hr | 135.00            |
| 7/27/2015 VWF Confer w/ RR                                                                                                                                                                  | 0.30<br>235.00/hr | 70.50             |
| 7/28/2015 SRC Finalize affidavits and pleadings                                                                                                                                             | 1.90<br>90.00/hr  | 171.00            |
| 7/28/2015 VWF Review and edit memo in opposition to summary judgment; Review and edit memo in support of amending complaint; Confer with NAW: Finalize all pleadings and prepare for filing | 1.30<br>235.00/hr | 305.50            |
| 7/28/2015 NAW Drafted Motion to Amend.                                                                                                                                                      | 0.30<br>150.00/hr | 45.00             |
| 7/28/2015 NAW Drafted proposed amended complaint.                                                                                                                                           | 0.50<br>150.00/hr | 75.00             |
| 7/28/2015 NAW Drafted Memo ISO mot to amend.                                                                                                                                                | 1.20<br>150.00/hr | 180.00            |
| 7/28/2015 NAW Revised pleadings.                                                                                                                                                            | 0.30<br>150.00/hr | 45.00             |
| 7/30/2015 SRC Update discovery file                                                                                                                                                         | 0.10<br>90.00/hr  | 9.00              |
| 7/30/2015 VWF Review deposition email from opposing counsel; Review 30b6 topics; Confer with NAW; Research [REDACTED]                                                                       | 0.60<br>235.00/hr | 141.00            |
| <b>For professional services rendered</b>                                                                                                                                                   | <b>27.30</b>      | <b>\$4,184.00</b> |

Additional Charges :

|                                                                                                                 | <u>Qty/Price</u> |        |
|-----------------------------------------------------------------------------------------------------------------|------------------|--------|
| 7/8/2015 CMT Mileage to and from 30(b)(6) deposition (462.7 miles at IRS standard mileage rate of \$0.575/mile) | 1<br>266.05      | 266.05 |
| 7/10/2015 CMT Cost to rent conference room for 30(b)(6) deposition                                              | 1<br>150.00      | 150.00 |
| 7/24/2015 CMT Deposition Costs for Carol Ward, Craig Willis                                                     | 1<br>638.15      | 638.15 |

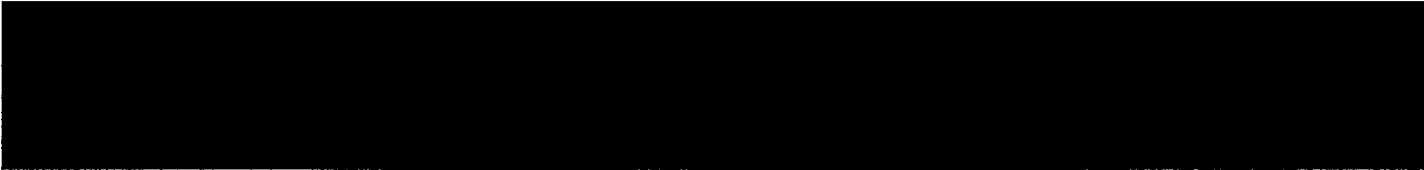
|                                                                                    | <u>Qty/Price</u> | <u>Amount</u> |
|------------------------------------------------------------------------------------|------------------|---------------|
|  |                  |               |

**Total additional charges**

**\$1,078.20**

**Total amount of this bill**

**\$5,262.20**



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

September 17, 2015  
Invoice # 11415

Payment Terms: Net 30

Professional Services

|                                                                                                         | <u>Hrs/Rate</u>   | <u>Amount</u> |
|---------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 8/5/2015 NAW Drafted and revised supplemental responses to Interrogatories 5 and 6.                     | 1.00<br>150.00/hr | 150.00        |
| 8/6/2015 SRC Finalize supplemental responses                                                            | 0.50<br>90.00/hr  | 45.00         |
| 8/6/2015 VWF Email correspondence regarding client depositions                                          | 0.10<br>235.00/hr | NO CHARGE     |
| 8/7/2015 SRC Prepare documents for attorney's hearing                                                   | 0.30<br>90.00/hr  | 27.00         |
| 8/7/2015 NAW Call to Steven King                                                                        | 0.20<br>150.00/hr | 30.00         |
| 8/7/2015 NAW Tele. w/ Steven King.                                                                      | 0.70<br>150.00/hr | 105.00        |
| 8/7/2015 NAW Email to opposing counsel re: 30(b)(6) designees.                                          | 0.20<br>150.00/hr | 30.00         |
| 8/10/2015 NAW Tele. w/ Joe Wickenden.                                                                   | 0.30<br>150.00/hr | 45.00         |
| 8/10/2015 NAW Hearing on Motion for Summary Judgment.                                                   | 0.60<br>150.00/hr | NO CHARGE     |
| 8/10/2015 NAW Drafted proposed order denying Dfdt's MSJ.                                                | 0.20<br>150.00/hr | 30.00         |
| 8/10/2015 VWF Phone with client about 30b6 deposition; Prepare for and attend summary judgment argument | 3.00<br>235.00/hr | 705.00        |

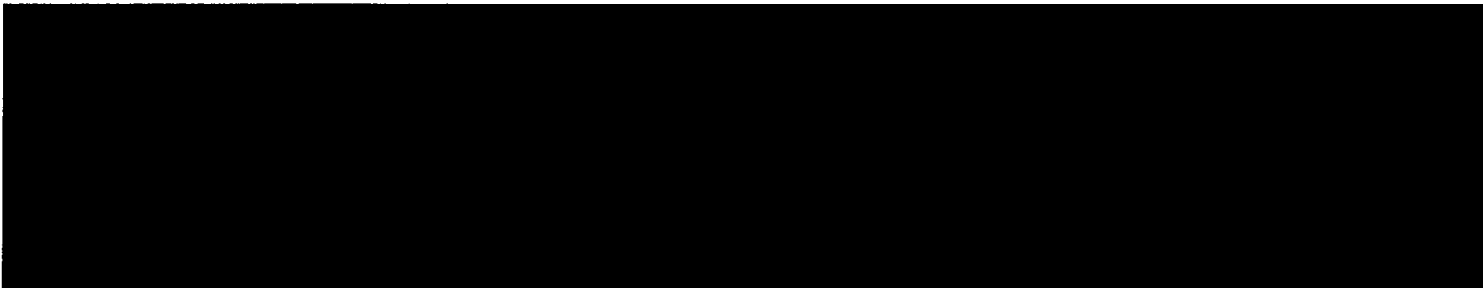
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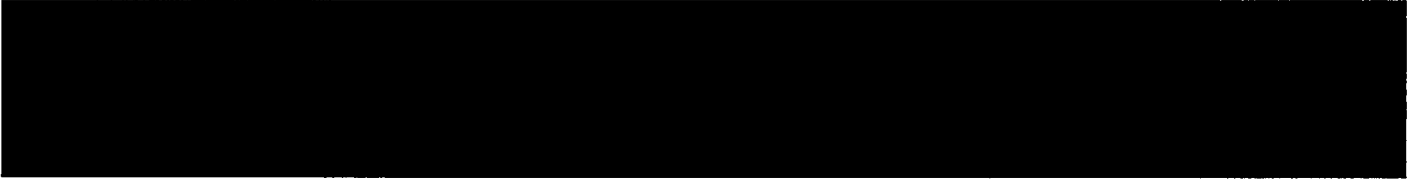
|           |                                                                                                                           | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|---------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 8/14/2015 | VWF Email correspondence regarding mediation                                                                              | 0.20<br>235.00/hr | 47.00         |
| 8/17/2015 | NAW Reviewed case file; prepared packet for Steven King.                                                                  | 0.50<br>150.00/hr | 75.00         |
| 8/17/2015 | NAW Prepared Steven King for deposition.                                                                                  | 0.80<br>150.00/hr | 120.00        |
| 8/17/2015 | NAW Prepared Joe Wickenden for deposition.                                                                                | 0.40<br>150.00/hr | 60.00         |
| 8/17/2015 | NAW Defended 30(b)(6) deposition of Joe Wickenden and Steven King.                                                        | 4.20<br>150.00/hr | 630.00        |
| 8/17/2015 | VWF Confer with opposing counsel (AL); Confer with NAW about mediation and possibility for resolution                     | 0.30<br>235.00/hr | NO CHARGE     |
| 8/18/2015 | SRC Finalize proposed Order Denying Defendant's MSJ                                                                       | 0.20<br>90.00/hr  | 18.00         |
| 8/18/2015 | VWF Final edits to order denying summary judgment                                                                         | 0.10<br>235.00/hr | NO CHARGE     |
| 8/19/2015 | VWF Phone with JB                                                                                                         | 0.10<br>235.00/hr | NO CHARGE     |
| 8/19/2015 | VWF Phone with ED; Confer with NAW regarding trial preparation                                                            | 0.40<br>235.00/hr | NO CHARGE     |
| 8/20/2015 | NAW Research for motion in limine.                                                                                        | 1.20<br>150.00/hr | 180.00        |
| 8/20/2015 | VWF Two phone calls with KD about his client FSD, the history of the bad faith claim and possible ways to settle the case | 0.50<br>235.00/hr | 117.50        |
| 8/24/2015 | NAW Researched doctrine of quasi-estoppel.                                                                                | 1.00<br>150.00/hr | 150.00        |
| 8/24/2015 | NAW Drafted and revised Motion in Limine.                                                                                 | 1.80<br>150.00/hr | 270.00        |
| 8/24/2015 | VWF Phone with opposing counsel re: settlement offer; Confer with NAW re: same                                            | 0.20<br>235.00/hr | NO CHARGE     |
| 8/24/2015 | VWF Review and edit motion in limine; Confer with NAW re: case status and resolution possibility                          | 0.20<br>235.00/hr | 47.00         |
| 8/25/2015 | SRC Finalize Motion in Limine; draft and finalize Affidavit of NAW                                                        | 1.60<br>90.00/hr  | 144.00        |

|                                           |                                                                                                                                                             | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 8/25/2015                                 | JJH Assist SC with edits to motion in limine; review and edit motion and affidavit                                                                          | 0.60<br>120.00/hr | 72.00             |
| 8/27/2015                                 | SRC Call to clerk regarding hearing date                                                                                                                    | 0.10<br>90.00/hr  | NO CHARGE         |
| 8/28/2015                                 | RAR conf. with Vaughn and Nick re. [REDACTED]; [REDACTED]                                                                                                   | 0.20<br>225.00/hr | 45.00             |
| 8/28/2015                                 | VWF Confer w/ RR                                                                                                                                            | 0.20<br>235.00/hr | 47.00             |
| 8/31/2015                                 | JJH Edits to notice of hearing and motion to shorten time and proposed order; finalize and file all; phone call with clerk regarding motion to shorten time | 0.80<br>120.00/hr | 96.00             |
| 8/31/2015                                 | NAW Drafted motions to shorten time; drafted proposed order; drafted notices of hearing; revised all.                                                       | 0.70<br>150.00/hr | 105.00            |
| <b>For professional services rendered</b> |                                                                                                                                                             | <b>23.40</b>      | <b>\$3,390.50</b> |

Additional Charges :

|                                  |                                                       | <u>Qty/Price</u> |                   |
|----------------------------------|-------------------------------------------------------|------------------|-------------------|
| [REDACTED]                       |                                                       |                  |                   |
| 8/21/2015                        | CMT Transcript of Steven King's 30(b)(6) deposition   | 1<br>216.51      | 216.51            |
|                                  | CMT Transcript of Joe Wickenden's 30(b)(6) deposition | 1<br>111.57      | 111.57            |
| [REDACTED]                       |                                                       |                  |                   |
| <b>Total additional charges</b>  |                                                       |                  | <b>\$352.08</b>   |
| <b>Total amount of this bill</b> |                                                       |                  | <b>\$3,742.58</b> |





H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

October 15, 2015  
Invoice # 11445

Payment Terms: Net 30

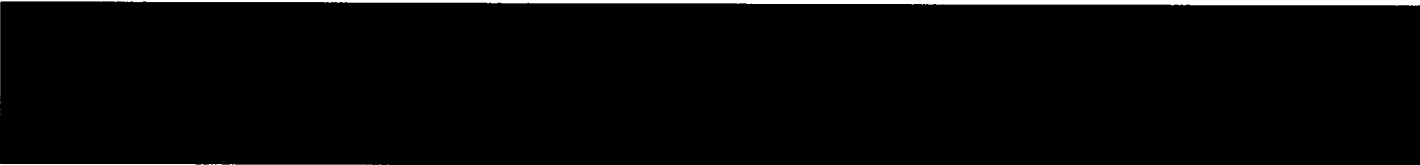
Professional Services

|          |                                                                                                                                                                                     | <u>Hrs/Rate</u>   | <u>Amount</u> |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 9/1/2015 | VWF Confer with ES; Direct staff regarding scheduling of mediation and response to Court                                                                                            | 0.10<br>235.00/hr | 23.50         |
| 9/2/2015 | NAW Tele. w/ Aubrey Lyon re: mediation.                                                                                                                                             | 0.20<br>150.00/hr | 30.00         |
| 9/2/2015 | NAW Mtng w/ VF to discuss mediation.                                                                                                                                                | 0.10<br>150.00/hr | NO CHARGE     |
| 9/4/2015 | VWF Confer with NAW about mediation format, schedule and mediator                                                                                                                   | 0.20<br>235.00/hr | NO CHARGE     |
| 9/8/2015 | VWF Emails with court; Confer with NAW; Phone with client; Emails with opposing counsel; Phone with JB re: case status; Email with the court                                        | 0.70<br>235.00/hr | 164.50        |
| 9/8/2015 | VWF Email to court re: mediation                                                                                                                                                    | 0.20<br>235.00/hr | NO CHARGE     |
| 9/8/2015 | VWF Phone with attorney for FSD (KD); Email from court regarding hearing on the case; Email to opposing counsel about which mediator to use; Settlement email with opposing counsel | 1.00<br>235.00/hr | 235.00        |
| 9/9/2015 | VWF Email to and from opposing counsel about settlement issues; Email regarding mediation schedule                                                                                  | 0.80<br>235.00/hr | 188.00        |
| 9/9/2015 | VWF Email from opposing counsel regarding potential resolution                                                                                                                      | 0.20<br>235.00/hr | 47.00         |
| 9/9/2015 | VWF Review expert witness disclosure; Confer with NAW                                                                                                                               | 0.40<br>235.00/hr | 94.00         |

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|                                           |                                                                                                                                               | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 9/9/2015                                  | NAW Reviewed expert disclosure.                                                                                                               | 0.40<br>150.00/hr | 60.00             |
| 9/15/2015                                 | VWF Emails re: mediation schedule                                                                                                             | 0.10<br>235.00/hr | NO CHARGE         |
| 9/23/2015                                 | VWF Detailed status memo to client regarding case status and settlement discussions                                                           | 1.80<br>235.00/hr | 423.00            |
| 9/29/2015                                 | RAR conference with VF regarding [REDACTED]                                                                                                   | 0.30<br>225.00/hr | 67.50             |
| 9/29/2015                                 | VWF Email correspondence with client regarding next move and mediation schedule; Respond to questions about settlement posture; confer w/ RAR | 0.60<br>235.00/hr | 141.00            |
| <b>For professional services rendered</b> |                                                                                                                                               | <u>7.10</u>       | <u>\$1,473.50</u> |



H2O (Farm Supply Distributors)  
FRH0043-VF

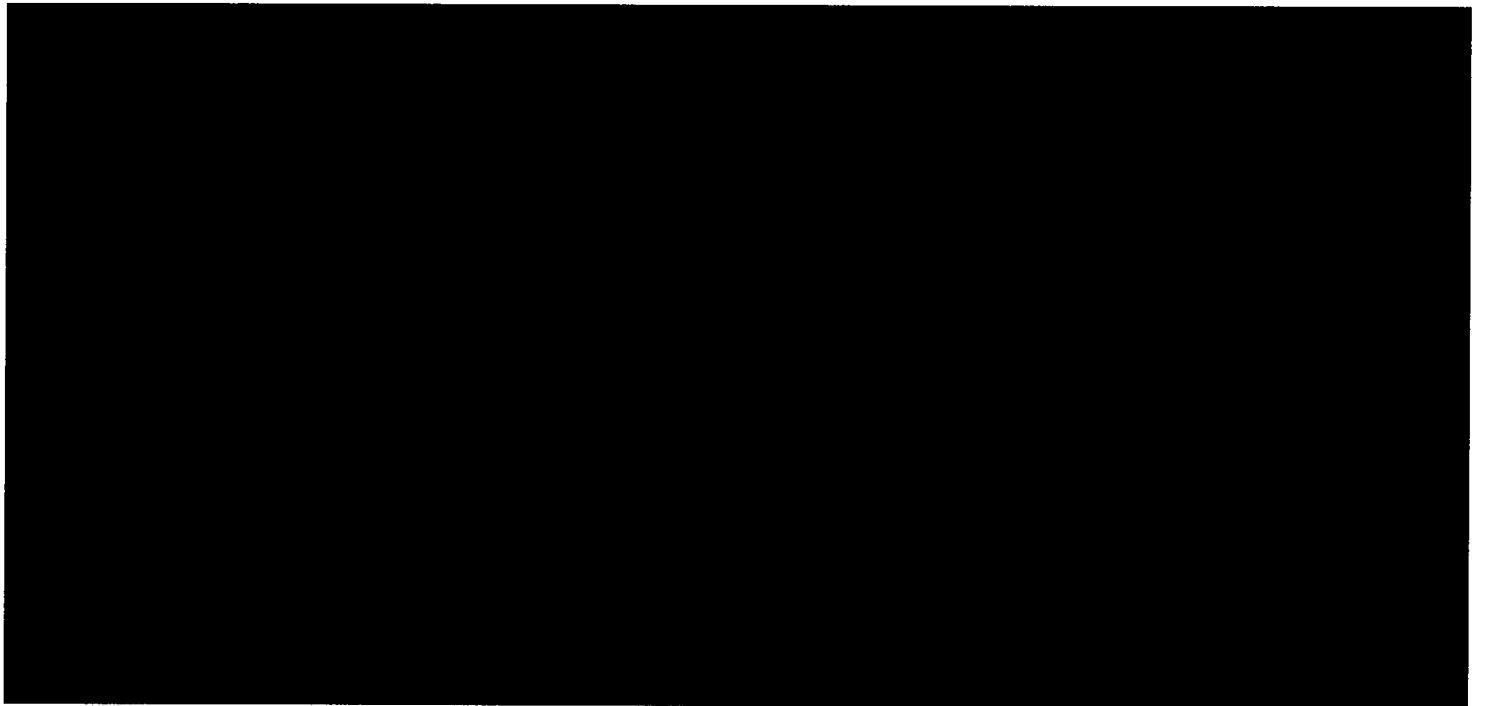
Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

November 16, 2015  
Invoice # 11497

Payment Terms: Net 30

Professional Services

|                                           |                                                                                                | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 10/6/2015                                 | VWF Emails re: mediation schedule                                                              | 0.20<br>235.00/hr | 47.00             |
| 10/16/2015                                | SRC Prepare mediation binders                                                                  | 0.80<br>90.00/hr  | 72.00             |
| 10/16/2015                                | VWF Review file; Review letter from mediator; Prepare mediation package focused on [REDACTED]  | 3.20<br>235.00/hr | 752.00            |
| 10/20/2015                                | VWF Voice message for mediator; Confer with NAW about mediation preparation; Email with client | 0.30<br>235.00/hr | 70.50             |
| 10/21/2015                                | VWF Prepare for and attend mediation                                                           | 6.00<br>235.00/hr | 1,410.00          |
| 10/21/2015                                | NAW Mediation                                                                                  | 3.50<br>150.00/hr | [REDACTED]        |
| 10/26/2015                                | NAW Scheduled status conference.                                                               | 0.30<br>150.00/hr | 45.00             |
| 10/28/2015                                | VWF Correspond with NAW re: status conference and hearing                                      | 0.10<br>235.00/hr | 23.50             |
| 10/28/2015                                | NAW Tele. w/ Judge's clerk; email to VF re: preparation for hearing.                           | 0.30<br>150.00/hr | 45.00             |
| 10/29/2015                                | JJH Draft and file notice of hearing                                                           | 0.20<br>120.00/hr | 24.00             |
| <b>For professional services rendered</b> |                                                                                                | <b>14.90</b>      | <b>\$3,014.00</b> |



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

December 18, 2015  
Invoice # 11542

Payment Terms: Net 30

Professional Services

|                |                                                                                                                                                    | <u>Hrs/Rate</u>   | <u>Amount</u> |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 11/10/2015 JJH | Call court re: hearing; draft notice of hearing; finalize and file affidavit, motion and notice                                                    | 0.70<br>120.00/hr | 84.00         |
| 11/10/2015 SRC | Send out correspondence                                                                                                                            | 0.10<br>90.00/hr  | NO CHARGE     |
| 11/10/2015 VWF | Motion to file supplemental affidavit; Draft supplemental affidavit with exhibits; Offer of judgment research; Letter to opposing counsel re: same | 2.30<br>235.00/hr | 540.50        |
| 11/16/2015 NAW | Legal Research re: [REDACTED]                                                                                                                      | 1.20<br>150.00/hr | 180.00        |
| 11/16/2015 NAW | Legal Research re: [REDACTED]                                                                                                                      | 1.40<br>150.00/hr | 210.00        |
| 11/16/2015 NAW | Review of File for Motion in Limine Response                                                                                                       | 1.00<br>150.00/hr | 150.00        |
| 11/16/2015 NAW | Began drafting Response to Mot in Lim                                                                                                              | 1.70<br>150.00/hr | 255.00        |
| 11/16/2015 VWF | Confer with NAW about response to motion in limine                                                                                                 | 0.20<br>235.00/hr | 47.00         |
| 11/17/2015 SRC | Finalize response in opposition to motion in limine                                                                                                | 0.90<br>90.00/hr  | 81.00         |
| 11/17/2015 NAW | Drafted opposition to 1st Mot in Lim                                                                                                               | 2.70<br>150.00/hr | 405.00        |

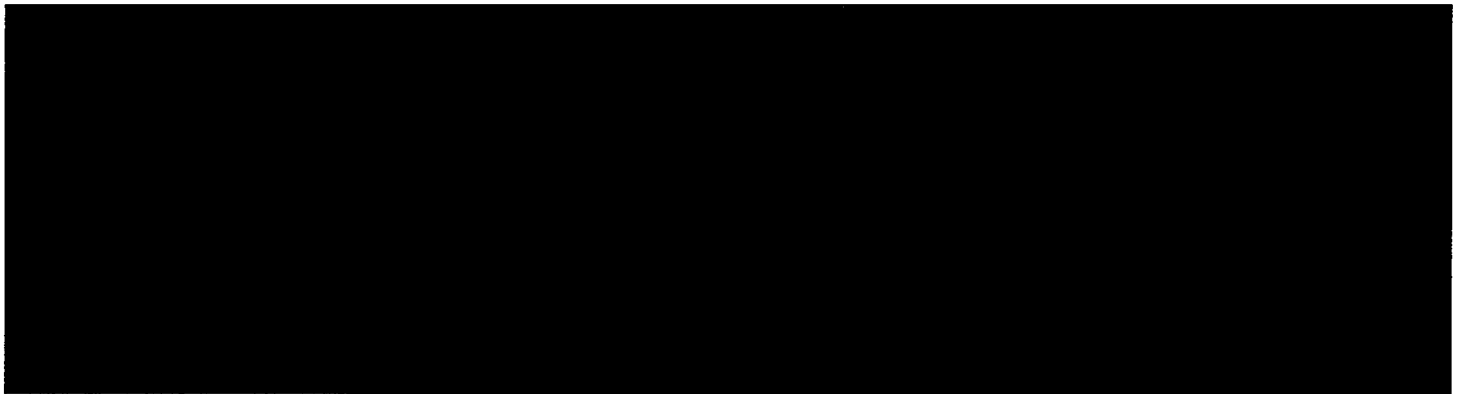
|            |                                                                                                                                                                                                | <u>Hrs/Rate</u>   | <u>Amount</u> |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 11/17/2015 | NAW Revised Opposition to 1st Mot in Lim                                                                                                                                                       | 1.00<br>150.00/hr | 150.00        |
| 11/17/2015 | NAW Drafted and revised Aff of NAW IOT 1st Mot in Lim; prepared Exhibits                                                                                                                       | 0.50<br>150.00/hr | 75.00         |
| 11/17/2015 | VWF Review opposing motion in limine & our response; Confer with NAW and edit response                                                                                                         | 0.80<br>235.00/hr | 188.00        |
| 11/18/2015 | SRC Update pleadings file                                                                                                                                                                      | 0.20<br>90.00/hr  | 18.00         |
|            |                                                                                                                                                                                                |                   |               |
| 11/20/2015 | VWF Reply brief regarding our motion in limine                                                                                                                                                 | 1.30<br>235.00/hr | 305.50        |
| 11/24/2015 | NAW Drafted Order granting leave to amend                                                                                                                                                      | 0.20<br>150.00/hr | 30.00         |
| 11/24/2015 | VWF Prepare for and attend hearing on motions in limine and motion to amend complaint to add claim;                                                                                            | 2.50<br>235.00/hr | 587.50        |
| 11/30/2015 | RAL Drafted EM to Judge Young's clerk attaching two proposed Orders and prepared same for hand delivery to Court.                                                                              | 0.30<br>120.00/hr | 36.00         |
| 11/30/2015 | VWF Review opposing counsel's draft orders; Edit draft order granting leave to amend complaint; Draft our proposed orders on motions in limine; Confer with staff re: delivery of draft orders | 1.30<br>235.00/hr | 305.50        |
| 12/4/2015  | SRC Draft stipulation                                                                                                                                                                          | 0.80<br>90.00/hr  | 72.00         |

**For professional services rendered**

**21.50      \$3,762.00**

Additional Charges :

Qty/Price



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

January 11, 2016  
Invoice # 11572

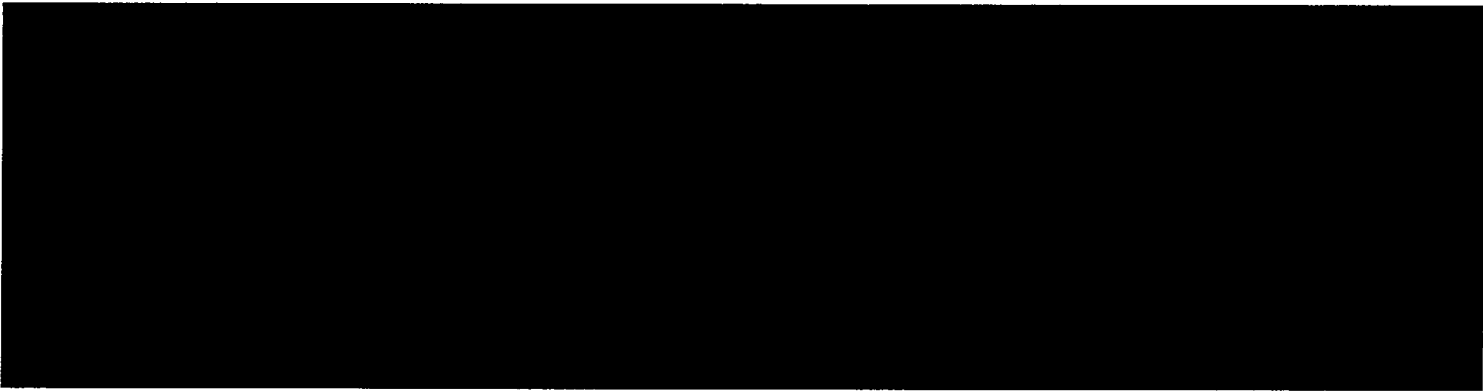
Payment Terms: Net 30

Professional Services

|                                                                                                                     | <u>Hrs/Rate</u>   | <u>Amount</u> |
|---------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 12/9/2015 NAW Revised 1st amended complaint.                                                                        | 0.30<br>150.00/hr | 45.00         |
| 12/9/2015 NAW Reviewed Motion to Exclude Expert Disclosure                                                          | 0.30<br>150.00/hr | 45.00         |
| 12/9/2015 VWF Receive and review orders; Receive and review motion to prevent expert testimony                      | 0.30<br>235.00/hr | 70.50         |
| 12/15/2015 VWF Email with client about trial and rebuttal testimony                                                 | 0.20<br>235.00/hr | 47.00         |
| 12/16/2015 NAW Drafted and revised rule 26 rebuttal disclosure for John Bradley.                                    | 1.20<br>150.00/hr | 180.00        |
| 12/16/2015 NAW Reviewed Micelli opinion; reviewed depo testimony of Joe Wickenden.                                  | 0.60<br>150.00/hr | 90.00         |
| 12/17/2015 VWF Email correspondence with client about [REDACTED]                                                    | 0.20<br>235.00/hr | 47.00         |
| 12/18/2015 VWF Review draft disclosure for Bradley testimony; Review Meceli disclosure; Confer with NAW about edits | 0.50<br>235.00/hr | 117.50        |
| 12/21/2015 NAW Tele. w/ John Bradley re: expert disclosure.                                                         | 0.50<br>150.00/hr | 75.00         |
| 12/21/2015 VWF Phone with John Bradley                                                                              | 0.40<br>235.00/hr | 94.00         |
| 12/29/2015 NAW Revised Bradley Rebuttal disclosure (VF edits)                                                       | 1.60<br>150.00/hr | 240.00        |

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|                                                                                                                                            | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|--------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 12/29/2015 NAW Mtng w/ VF to discuss [REDACTED]                                                                                            | 0.70<br>150.00/hr | 105.00            |
| 12/29/2015 VWF Review expert witness disclosure of rebuttal to FSD opinions; Confer with NAW several times re: [REDACTED]                  | 1.00<br>235.00/hr | 235.00            |
| <b>[REDACTED]</b>                                                                                                                          |                   |                   |
| 12/30/2015 VWF Respond to motion to exclude experts                                                                                        | 1.60<br>235.00/hr | 376.00            |
| 12/31/2015 VWF Review draft disclosures; Email to JB; Final edits to disclosures; Research Rule 26; Draft supplemental discovery responses | 1.30<br>235.00/hr | 305.50            |
| <b>For professional services rendered</b>                                                                                                  | <b>10.80</b>      | <b>\$2,081.50</b> |





H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

February 12, 2016  
Invoice # 11618

Payment Terms: Net 30

Professional Services

|                                                                                                                                    | <u>Hrs/Rate</u>   | <u>Amount</u> |
|------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 1/4/2016 VWF Review client comments on defendant expert disclosure                                                                 | 0.30<br>235.00/hr | 70.50         |
| 1/6/2016 VWF Prepare for and attend hearing on motion to reconsider decision re:<br>expert testimony                               | 1.50<br>235.00/hr | 352.50        |
| 1/6/2016 VWF Confer with NAW about trial strategy                                                                                  | 0.30<br>235.00/hr | 70.50         |
| 1/6/2016 NAW Confer w/ VF                                                                                                          | 0.30<br>150.00/hr | 45.00         |
| 1/8/2016 VWF Confer with NAW about exhibits and witnesses (trial prep)                                                             | 0.30<br>235.00/hr | 70.50         |
| 1/8/2016 NAW Confer w/ VF                                                                                                          | 0.30<br>150.00/hr | 45.00         |
| 1/11/2016 NAW Prepped witness list.                                                                                                | 0.60<br>150.00/hr | 90.00         |
| 1/11/2016 NAW Compiled trial exhibits.                                                                                             | 2.00<br>150.00/hr | 300.00        |
| 1/11/2016 NAW Mtng w/ RL re: exhibit list.                                                                                         | 0.30<br>150.00/hr | 45.00         |
| 1/12/2016 RAL Pulled and identified exhibits for trial exhibit notebook.                                                           | 2.10<br>120.00/hr | 252.00        |
| 1/13/2016 RAL Additional work on Trial Exhibit List - locating Bates numbered<br>documents to reference against exhibit documents. | 0.90<br>120.00/hr | 108.00        |

|           |                                                                                                                                                                                                                       | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 1/15/2016 | RAL Strategy meeting with attorneys regarding exhibit and witness list for trial                                                                                                                                      | 0.80<br>120.00/hr | 96.00         |
| 1/15/2016 | RAL Pulled documents for VF trial prep and labeled exhibits.                                                                                                                                                          | 0.50<br>120.00/hr | 60.00         |
| 1/15/2016 | SRC Create exhibit trial binder                                                                                                                                                                                       | 0.80<br>90.00/hr  | 72.00         |
| 1/15/2016 | RAL Finalized exhibit selection, assembled and labeled exhibits, scanned documents into system for trial Preparation and assembly of and assembled trial notebooks. Also revised Exhibit List pleading.               | 2.30<br>120.00/hr | 276.00        |
| 1/15/2016 | NAW Mtng w/ VF and RL to prep for trial.                                                                                                                                                                              | 0.80<br>150.00/hr | 120.00        |
| 1/15/2016 | VWF Meeting with RL and NAW re: trial prep, documents, binders, witness, etc.                                                                                                                                         | 0.80<br>235.00/hr | 188.00        |
| 1/18/2016 | NAW Tele. w/ potential witness Steve King                                                                                                                                                                             | 0.20<br>150.00/hr | 30.00         |
| 1/18/2016 | NAW Tele. w/ potential witness Joe Wickenden.                                                                                                                                                                         | 0.20<br>150.00/hr | 30.00         |
| 1/18/2016 | NAW Mtng w/ VF to discuss trial witnesses.                                                                                                                                                                            | 0.30<br>150.00/hr | 45.00         |
| 1/18/2016 | NAW Email to VF and RL re: Steven King subpoena.                                                                                                                                                                      | 0.20<br>150.00/hr | 30.00         |
| 1/18/2016 | VWF Confer with NAW; Trial prep [REDACTED]                                                                                                                                                                            | 0.30<br>235.00/hr | 70.50         |
| 1/18/2016 | VWF Review deposition of Steve King (former employee and project manager); Continue trial prep (including direct of King if used); make notes about whether to use King and strengths and weaknesses of his testimony | 1.00<br>235.00/hr | 235.00        |
| 1/19/2016 | RAL Worked on and revised Trial Exhibit List                                                                                                                                                                          | 0.30<br>120.00/hr | 36.00         |
| 1/19/2016 | RAR conf. w/ Vaughn re. [REDACTED]                                                                                                                                                                                    | 0.20<br>225.00/hr | 45.00         |
| 1/19/2016 | NAW Mtng w/ VF to discuss [REDACTED].                                                                                                                                                                                 | 0.60<br>150.00/hr | 90.00         |
| 1/19/2016 | NAW Preparation of trial exhibits                                                                                                                                                                                     | 0.50<br>150.00/hr | 75.00         |

|           |                                                                                                                    | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|--------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 1/19/2016 | NAW Identified discrepancies btw Miceli table and Miceli disclosure                                                | 0.50<br>150.00/hr | 75.00         |
| 1/19/2016 | NAW Revised witness list and exhibit list.                                                                         | 0.40<br>150.00/hr | 60.00         |
| 1/19/2016 | VWF Review 30b6 depositions of defendant (Ward and Willis); Make notes regarding each; Continue trial preparationn | 1.00<br>235.00/hr | 235.00        |
| 1/19/2016 | VWF Confer with NAW about depositions and ongoing trial prep (including [REDACTED])                                | 0.40<br>235.00/hr | 94.00         |
| 1/19/2016 | VWF Phone with client                                                                                              | 0.20<br>235.00/hr | 47.00         |
| 1/19/2016 | VWF Confer w/ RAR                                                                                                  | 0.20<br>235.00/hr | 47.00         |
| 1/20/2016 | RAL Telephone call to court reporter. Revised exhibit stickers per court instruction.                              | 0.50<br>120.00/hr | 60.00         |
| 1/20/2016 | RAL Finalized exhibit binders and corresponding pleading, Emailed exhibits to Clerk, Scanned exhibits.             | 1.10<br>120.00/hr | 132.00        |
| 1/20/2016 | SRC Edits to exhibit binders                                                                                       | 0.70<br>90.00/hr  | 63.00         |
| 1/20/2016 | NAW Prepped for pre-trial conference.                                                                              | 2.00<br>150.00/hr | [REDACTED]    |
| 1/20/2016 | NAW Travel to and from pre-trial conference.                                                                       | 0.80<br>150.00/hr | [REDACTED]    |
| 1/20/2016 | NAW Pre-trial conference.                                                                                          | 1.50<br>150.00/hr | [REDACTED]    |
| 1/20/2016 | VWF Confer with NAW about pretrial, exhibits and witnesses; Continue trial preparation                             | 0.50<br>235.00/hr | 117.50        |
| 1/20/2016 | VWF Prepare for and attend pretrial and settlement conference                                                      | 4.50<br>235.00/hr | 1,057.50      |
| 1/21/2016 | NAW Call to Aubrey Lyon                                                                                            | 0.10<br>150.00/hr | NO CHARGE     |
| 1/21/2016 | NAW Call to Steve King                                                                                             | 0.10<br>150.00/hr | NO CHARGE     |
| 1/21/2016 | NAW Email corr. w/ Lyon re: trial exhibit list.                                                                    | 0.30<br>150.00/hr | 45.00         |

|           |     | <u>Hrs/Rate</u>                                                                                                                                                                                                             | <u>Amount</u>     |           |
|-----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-----------|
| 1/21/2016 | VWF | Email correspondence with John; Receive opposing counsel's subpoena of Steve King                                                                                                                                           | 0.20<br>235.00/hr | NO CHARGE |
| 1/22/2016 | NAW | Reviewed trial exhibits from defense counsel for stip to authenticity and admissibility.                                                                                                                                    | 2.00<br>150.00/hr | 300.00    |
| 1/22/2016 | NAW | updated trial exhibit list to include defense exhibits                                                                                                                                                                      | 0.60<br>150.00/hr | 90.00     |
| 1/22/2016 | NAW | Mtng w/ VF to review proposed stipulated facts                                                                                                                                                                              | 0.80<br>150.00/hr | 120.00    |
| 1/22/2016 | VWF | Review new documents from opposing counsel; Emails from NAW and opposing counsel about exhibits & stipulated facts; Confer with NAW about exhibits and stipulation; Call to opposing counsel                                | 1.50<br>235.00/hr | 352.50    |
| 1/25/2016 | NAW | Mtng w/ VF to discuss Stipulated Facts                                                                                                                                                                                      | 0.40<br>150.00/hr | 60.00     |
| 1/25/2016 | NAW | Revised Stipulated Facts                                                                                                                                                                                                    | 0.70<br>150.00/hr | 105.00    |
| 1/25/2016 | NAW | Email to Lyon re: Stipulated Facts                                                                                                                                                                                          | 0.10<br>150.00/hr | NO CHARGE |
| 1/25/2016 | VWF | Email with opposing counsel re: stipulated facts & trial process; Meet with NAW about exhibits, witnesses, trial prep and stipulated facts                                                                                  | 1.00<br>235.00/hr | 235.00    |
| 1/26/2016 | NAW | Prepped trial exhibits and amended exhibit lists                                                                                                                                                                            | 1.20<br>150.00/hr | 180.00    |
| 1/26/2016 | NAW | Email to opp counsel w/ trial exhibit list                                                                                                                                                                                  | 0.10<br>150.00/hr | 15.00     |
| 1/26/2016 | NAW | Email to Hans Mitchell                                                                                                                                                                                                      | 0.10<br>150.00/hr | NO CHARGE |
| 1/26/2016 | NAW | Drafted Stipulated Exhibit List                                                                                                                                                                                             | 0.50<br>150.00/hr | 75.00     |
| 1/26/2016 | NAW | Reorganized trial exhibits consistent with stipulated list                                                                                                                                                                  | 0.50<br>150.00/hr | 75.00     |
| 1/26/2016 | VWF | Confer with NAW; Review email correspondence with opposing counsel re: stipulated facts and decision on exhibits; Draft explanation of our exception to their stipulated facts; Confer with NAW; Continue trial preparation | 1.70<br>235.00/hr | 399.50    |
| 1/27/2016 | RAR | conf. with NAW re. [REDACTED]                                                                                                                                                                                               | 0.60<br>225.00/hr | 135.00    |

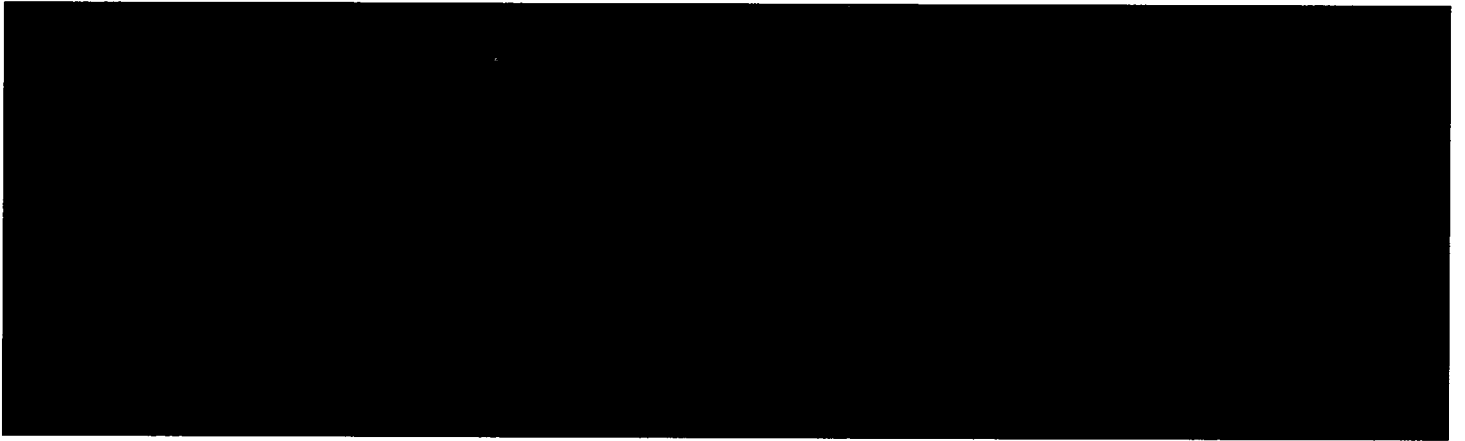
|           |                                                                                                                                                                              | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 1/27/2016 | NAW Email corr w/ Lyon re: exhibit list                                                                                                                                      | 0.40<br>150.00/hr | 60.00         |
| 1/27/2016 | VWF Confer with NAW about trial preparation, exhibit list and stipulated facts; Discuss correspondence with opposing counsel                                                 | 0.30<br>235.00/hr | 70.50         |
| 1/27/2016 | VWF Receive and review order from judge; Phone with client; Review Wickenden deposition for trial preparation                                                                | 1.30<br>235.00/hr | 305.50        |
| 1/27/2016 | NAW Confer w/ RAR                                                                                                                                                            | 0.60<br>150.00/hr | 90.00         |
| 1/28/2016 | RAL Drafted Motion to Shorten Time and letter to court's clerk.                                                                                                              | 0.30<br>120.00/hr | 36.00         |
| 1/28/2016 | RAL Assembled notebook for attorney with price sheets provided by opposing counsel. Coordinated court reporter. Contacted Oregon Court Reporter to obtain sealed deposition. | 0.40<br>120.00/hr | 48.00         |
| 1/28/2016 | RAR conferences with Vaughn re. trial strategy and motion strategy;                                                                                                          | 0.30<br>225.00/hr | 67.50         |
| 1/28/2016 | RAL Revised Notice of Hearing, Motion to Shorten Time. Prepped for distribution. Distributed to parties and judge's clerk. Delivered to Court.                               | 0.90<br>120.00/hr | 108.00        |
| 1/28/2016 | NAW Tele. w/ Craig Simmons                                                                                                                                                   | 0.30<br>150.00/hr | 45.00         |
| 1/28/2016 | NAW Revised Motion for Reconsideration                                                                                                                                       | 0.40<br>150.00/hr | 60.00         |
| 1/28/2016 | NAW Drafted Motion in Limine                                                                                                                                                 | 1.40<br>150.00/hr | 210.00        |
| 1/28/2016 | NAW Legal Research re: rule of completeness                                                                                                                                  | 0.60<br>150.00/hr | 90.00         |
| 1/28/2016 | NAW Revised Mot in Lim                                                                                                                                                       | 0.20<br>150.00/hr | 30.00         |
| 1/28/2016 | NAW Drafted Motion to Shorten Time                                                                                                                                           | 0.30<br>150.00/hr | 45.00         |
| 1/28/2016 | NAW Drafted Aff of Warden ISO Mot for Reconsideration                                                                                                                        | 0.30<br>150.00/hr | 45.00         |
| 1/28/2016 | NAW Drafted ltr to Judge Young                                                                                                                                               | 0.20<br>150.00/hr | 30.00         |

|           |                                                                                                                                                                                                                                        | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 1/28/2016 | NAW Trial prep mtng w/ VF.                                                                                                                                                                                                             | 0.80<br>150.00/hr | 120.00        |
| 1/28/2016 | NAW Prepped Simmons direct                                                                                                                                                                                                             | 0.60<br>150.00/hr | 90.00         |
| 1/28/2016 | VWF Trial preparation; Review Miceli disclosure and supporting docs; Gather information on Miceli from Linkedn and about his "comparisons" from internet available information; Begin draft of Miceli cross examination; confer w/ RAR | 2.00<br>235.00/hr | 470.00        |
| 1/28/2016 | VWF Phone with attorney for Defendant regarding witness attendance at trial                                                                                                                                                            | 0.40<br>235.00/hr | 94.00         |
| 1/28/2016 | VWF Draft motion for reconsideration of Judge's decision to prohibit J Bradley from providing opinion testimony; Motion in Limine regarding the redacted portions of Miceli's supporting documents                                     | 3.80<br>235.00/hr | 893.00        |
| 1/30/2016 | NAW Review of case file docs concerning project admin time.                                                                                                                                                                            | 1.50<br>150.00/hr | 225.00        |
| 1/30/2016 | NAW Analyzed Miceli calculation of reasonable value of project admin time                                                                                                                                                              | 1.00<br>150.00/hr | 150.00        |
| 1/30/2016 | NAW Prepped Miceli cross on project admin time                                                                                                                                                                                         | 2.20<br>150.00/hr | 330.00        |
| 1/30/2016 | VWF Trial preparation; Review depositions; Confer with NAW status of stipulated documents and facts; Draft witness examinations                                                                                                        | 1.30<br>235.00/hr | 305.50        |
| 1/31/2016 | NAW Prepped Miceli cross re: project admin time                                                                                                                                                                                        | 3.80<br>150.00/hr | 570.00        |
| 1/31/2016 | VWF In office trial preparation; Continue to draft cross examination of C Miceli and direct examination of J Bradley                                                                                                                   | 4.00<br>235.00/hr | 940.00        |
| 1/31/2016 | VWF Respond to proposed stipulated fact and draft response to issues regarding the authenticity and admissibility of the exhibits                                                                                                      | 1.30<br>235.00/hr | 305.50        |
| 2/1/2016  | RAL Telephone call to judge's clerk. Drafted Order.                                                                                                                                                                                    | 0.40<br>120.00/hr | 48.00         |
| 2/1/2016  | RAL Revised trial exhibit notebooks and assembled for trial.                                                                                                                                                                           | 2.70<br>120.00/hr | 324.00        |
| 2/1/2016  | RAL Telephone call to judge's clerk regarding equipment for trial.                                                                                                                                                                     | 0.10<br>120.00/hr | 12.00         |
| 2/1/2016  | RAL Second telephone call to judge's clerk regarding equipment for trial.                                                                                                                                                              | 0.10<br>120.00/hr | 12.00         |

|                                           |                                                                                             | <u>Hrs/Rate</u>   | <u>Amount</u>      |
|-------------------------------------------|---------------------------------------------------------------------------------------------|-------------------|--------------------|
| 2/1/2016                                  | RAR conf. with VF re. trial strategy; provide Vaughn case law regarding [REDACTED]          | 0.30<br>225.00/hr | 67.50              |
| 2/2/2016                                  | RAL Pulled documents needed for deposition.                                                 | 0.40<br>120.00/hr | 48.00              |
| 2/2/2016                                  | RAL Finalized trial exhibit list, scanned final set and emailed to judge's clerk.           | 1.40<br>120.00/hr | 168.00             |
| 2/2/2016                                  | RAR conferences with VF re. trial strategies and issues;                                    | 0.30<br>225.00/hr | 67.50              |
| 2/4/2016                                  | RAR conf. w/ VF re. [REDACTED]                                                              | 0.20<br>225.00/hr | 45.00              |
| 2/8/2016                                  | RAL Telephone call to court requesting transcript of trial.                                 | 0.10<br>120.00/hr | 12.00              |
| 2/10/2016                                 | RAL Telephone call to/from court regarding potential transcript order.                      | 0.10<br>120.00/hr | 12.00              |
| 2/10/2016                                 | RAL Telephone call to court finalizing trial transcript request and email requesting check. | 0.10<br>120.00/hr | 12.00              |
| 2/10/2016                                 | RAL Letter to Court Trial Administrator formalizing request for trial transcript.           | 0.20<br>120.00/hr | 24.00              |
| <b>For professional services rendered</b> |                                                                                             | <b>82.80</b>      | <b>\$14,453.00</b> |

Additional Charges :

|                                  |                                       | <u>Qty/Price</u> |                    |
|----------------------------------|---------------------------------------|------------------|--------------------|
| [REDACTED]                       |                                       |                  |                    |
| 2/2/2016                         | CMT Deposition Costs for Chris Miceli | 1<br>357.30      | 357.30             |
| 2/12/2016                        | CMT Transcript Cost                   | 1<br>579.38      | 579.38             |
| <b>Total additional charges</b>  |                                       |                  | <b>\$951.68</b>    |
| <b>Total amount of this bill</b> |                                       |                  | <b>\$15,404.68</b> |
| [REDACTED]                       |                                       |                  |                    |





H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

March 9, 2016  
Invoice # 11662

Payment Terms: Net 30

Professional Services

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <u>Hrs/Rate</u>   | <u>Amount</u> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------|
| 2/1/2016 NAW Prepped Micelli cross on project admin time                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 3.80<br>150.00/hr | 570.00        |
| 2/1/2016 NAW Trial prep including exhibits, exhibit list, depo review and meetings w/<br>VF to discuss trial prep.                                                                                                                                                                                                                                                                                                                                                                                              | 2.10<br>150.00/hr | 315.00        |
| 2/1/2016 NAW Tele. w/ Craig Simmons                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 0.20<br>150.00/hr | 30.00         |
| 2/1/2016 NAW Finalized exhibit list and exhibit binders                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1.00<br>150.00/hr | 150.00        |
| 2/1/2016 VWF Confer with staff about exhibit and trial preparation; Email to client re:<br>itinerary for depositions and trial; Outline direct examination of J<br>Bradley; Review trial documents; Review the deposition of Willis; Draft<br>outline for closing argument; Prepare for pretrial hearing; Review briefs<br>regarding motions in limine & motion to reconsider order on expert<br>opinions; Prepare for Miceli deposition & cross examination for trial'<br>Continue to work on J Bradley direct | 7.30<br>235.00/hr | 1,715.50      |
| 2/2/2016 NAW Travel to and from courthouse                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 0.60<br>150.00/hr | ████████      |
| 2/2/2016 NAW Pre-trial hearing                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 0.50<br>150.00/hr | ████████      |
| 2/2/2016 NAW Drafted pre-trial memo                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 4.70<br>150.00/hr | 705.00        |
| 2/2/2016 NAW Legal research for pre-trial memo.                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 1.30<br>150.00/hr | 195.00        |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <u>Hrs/Rate</u>    | <u>Amount</u>     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|-------------------|
| 2/2/2016 NAW Revised pre-trial memo.                                                                                                                                                                                                                                                                                                                                                                                                             | 0.40<br>150.00/hr  | 60.00             |
| 2/2/2016 NAW Highlighted portions of Willis depo in preparation for direct.                                                                                                                                                                                                                                                                                                                                                                      | 0.40<br>150.00/hr  | 60.00             |
| 2/2/2016 VWF Continue trial preparation; Attend pretrial conference with the court; Prepare J Bradley for his testimony and continue to outline; Make list of anticipated objections; Prepare for and take deposition of Chris Miceli; Confer with NAW about pretrial brief and legal research to be done; Outline and prepare Miceli cross examination for trial and review Miceli deposition transcript; Draft opening statement for the trial | 12.50<br>235.00/hr | 2,937.50          |
| 2/3/2016 NAW Trial prep                                                                                                                                                                                                                                                                                                                                                                                                                          | 0.50<br>150.00/hr  | 75.00             |
| 2/3/2016 NAW Travel to and from courthouse                                                                                                                                                                                                                                                                                                                                                                                                       | 0.50<br>150.00/hr  | [REDACTED]        |
| 2/3/2016 NAW Trial                                                                                                                                                                                                                                                                                                                                                                                                                               | 7.50<br>150.00/hr  | NO CHARGE         |
| 2/3/2016 VWF Trial on the matter                                                                                                                                                                                                                                                                                                                                                                                                                 | 7.50<br>235.00/hr  | 1,762.50          |
| 2/23/2016 SRC Call to Ada County Courthouse re: trial transcripts                                                                                                                                                                                                                                                                                                                                                                                | 0.10<br>90.00/hr   | 9.00              |
| 2/23/2016 VWF Phone with CFO E Savre                                                                                                                                                                                                                                                                                                                                                                                                             | 0.10<br>235.00/hr  | NO CHARGE         |
| 2/23/2016 VWF Status memo to file re: [REDACTED]                                                                                                                                                                                                                                                                                                                                                                                                 | 0.10<br>235.00/hr  | NO CHARGE         |
| 2/25/2016 SRC Draft and File Stipulation to move deadline for Findings of Fact & Proposed Order                                                                                                                                                                                                                                                                                                                                                  | 1.10<br>90.00/hr   | 99.00             |
| 2/25/2016 VWF Phone w opposing counsel; Letter to opposing counsel; Begin review of trial transcript                                                                                                                                                                                                                                                                                                                                             | 0.40<br>235.00/hr  | 94.00             |
| <b>For professional services rendered</b>                                                                                                                                                                                                                                                                                                                                                                                                        | <b>52.60</b>       | <b>\$9,017.50</b> |

Additional Charges :

Qty/Price

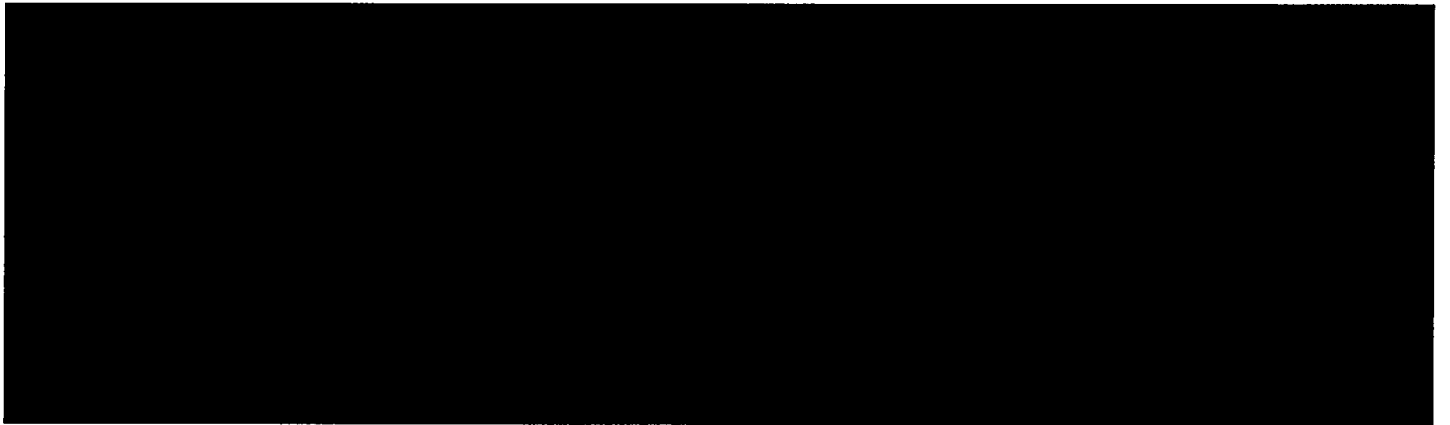


Qty/Price      Amount



**Total amount of this bill**

**\$9,044.50**



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

April 11, 2016  
Invoice # 11677

Payment Terms: Net 30

Professional Services

|          |                                                                                                | <u>Hrs/Rate</u>   | <u>Amount</u> |
|----------|------------------------------------------------------------------------------------------------|-------------------|---------------|
| 3/4/2016 | VWF Review trial transcript to prep closing                                                    | 1.50<br>235.00/hr | 352.50        |
| 3/7/2016 | RAR conf. with VF re. strategy on proposed findings of fact and conclusions of law;            | 0.20<br>225.00/hr | 45.00         |
| 3/7/2016 | VWF Confer with RR re: findings of fact and conclusions of law; confer w/ NAW                  | 0.50<br>235.00/hr | 117.50        |
| 3/7/2016 | NAW Drafted proposed findings of fact                                                          | 1.00<br>150.00/hr | 150.00        |
| 3/8/2016 | VWF Work on drafting findings of fact and conclusions of law                                   | 7.00<br>235.00/hr | 1,645.00      |
| 3/8/2016 | NAW Drafted summary of Bradley testimony for proposed findings of fact and conclusions of law. | 2.40<br>150.00/hr | 360.00        |
| 3/9/2016 | SRC Format draft of Findings of Fact and Conclusion of Law                                     | 0.20<br>90.00/hr  | 18.00         |
| 3/9/2016 | SRC Finalize Findings of Fact and Conclusion of Law and file                                   | 0.20<br>90.00/hr  | 18.00         |
| 3/9/2016 | VWF Continue to work on proposed findings of fact and conclusions of law                       | 4.70<br>235.00/hr | 1,104.50      |
| 3/9/2016 | VWF Final review, edits and approval of findings of fact and conclusions of law                | 0.60<br>235.00/hr | 141.00        |

000335

|                                           |                                                                                                                                             | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 3/9/2016                                  | NAW Review of Bradley and Simmons testimony; review of trial exhibits; supplemented proposed findings of fact and conclusions of law.       | 1.10<br>150.00/hr | 165.00            |
| 3/9/2016                                  | NAW Revised proposed findings of fact and conclusions of law.                                                                               | 0.70<br>150.00/hr | 105.00            |
| 3/9/2016                                  | NAW reviewed Micelli direct/cross and Bradley direct in re: project admin time.                                                             | 2.00<br>150.00/hr | 300.00            |
| 3/9/2016                                  | NAW Supplemented Proposed Findings of Fact and Conclusions of Law w/ testimony from Bradley and Micelli.                                    | 1.20<br>150.00/hr | 180.00            |
| 3/16/2016                                 | NAW Reviewed unsanctioned response to plaintiff's proposed findings of fact and conclusions of law; ,mtng w/ VF to discuss.                 | 0.60<br>150.00/hr | 90.00             |
| 3/22/2016                                 | VWF Review their response to our proposed findings of fact and conclusions of law; Review emails; Call to Judge re: need to further respond | 0.50<br>235.00/hr | 117.50            |
| <b>For professional services rendered</b> |                                                                                                                                             | <b>24.60</b>      | <b>\$4,927.00</b> |

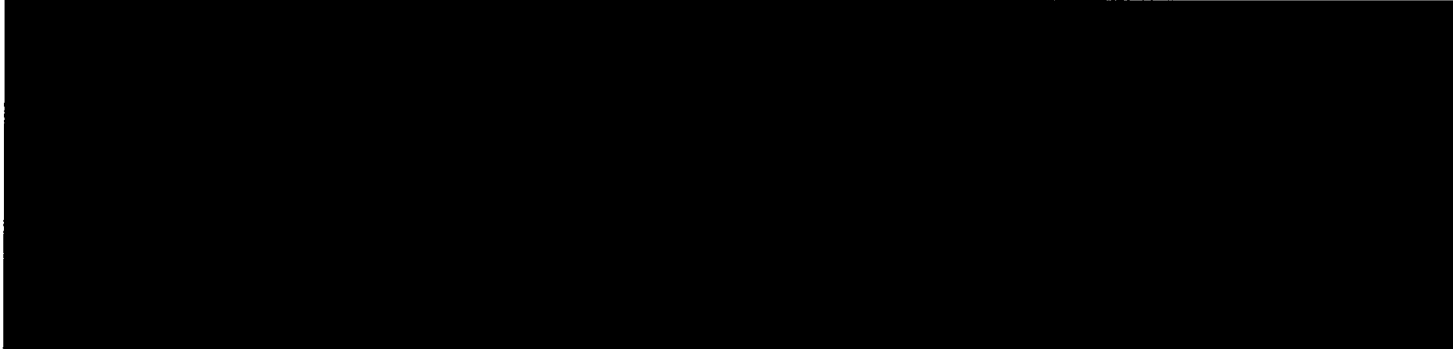
Additional Charges :

Qty/Price



**Total amount of this bill**

**\$4,936.00**



H2O (Farm Supply Distributors)  
FRH0043-VF

Invoice submitted to:  
H2O Environmental  
c/o John Bradley  
6679 S. Supply Way  
Boise, ID 83716

May 2, 2016  
Invoice # 11713

Payment Terms: Net 30

Professional Services

|           |     | <u>Hrs/Rate</u>                                                                                                                                                                                                                                                                                                                                                                                                                                           | <u>Amount</u>     |        |
|-----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------|
| 4/4/2016  | NAW | Reviewed Findings of Fact and Conclusions of Law; researched statutory pre-judgment interest rate; calculated pre-judgment interest based on date of breach; drafted judgment consistent with the above; confer w/ VF; research Rule 54.                                                                                                                                                                                                                  | 1.00<br>150.00/hr | 150.00 |
| 4/4/2016  | VWF | Review Court's findings of facts and conclusions of law; Confer with NAW about strategy; Email correspondence with client regarding: [REDACTED]                                                                                                                                                                                                                                                                                                           | 0.50<br>235.00/hr | 117.50 |
| 4/5/2016  | JJH | Review invoices to separate the time billed by each attorney and paralegal for the affidavit of costs and fees and begin drafting affidavit of costs and memo (2.2); review rule regarding costs and the billed costs to determine costs as a matter of right and discretionary costs (.6); review court's findings of fact and conclusions of law (.4); review order by Judge Copsy regarding costs and attorney's fees as guideline for our brief (.8). | 4.00<br>120.00/hr | 480.00 |
| 4/7/2016  | JJH | Edits to affidavit of costs and begin drafting memo of costs                                                                                                                                                                                                                                                                                                                                                                                              | 0.80<br>120.00/hr | 96.00  |
| 4/7/2016  | NAW | Revised judgment                                                                                                                                                                                                                                                                                                                                                                                                                                          | 0.20<br>150.00/hr | 30.00  |
| 4/7/2016  | VWF | Review and edit proposed judgment; Confer with NAW re: same; Draft letter to the Court                                                                                                                                                                                                                                                                                                                                                                    | 0.30<br>235.00/hr | 70.50  |
| 4/12/2016 | JJH | Research regarding award of fees under 54(e)(1); begin drafting section on 12-120(3) and frivolous defense                                                                                                                                                                                                                                                                                                                                                | 1.10<br>120.00/hr | 132.00 |
| 4/13/2016 | JJH | Additional research regarding frivolous defense                                                                                                                                                                                                                                                                                                                                                                                                           | 0.70<br>120.00/hr | 84.00  |

000337

|                                           |                                                                                                                                                                                                                                          | <u>Hrs/Rate</u>   | <u>Amount</u>     |
|-------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------|
| 4/21/2016                                 | JJH Continue working on memorandum for costs; draft motion for costs; review invoices and mark proposed redactions for VF                                                                                                                | 2.80<br>120.00/hr | 336.00            |
| 4/22/2016                                 | VWF Receive and review judgment; Email correspondence with client; Email correspondence with opposing counsel re: payment of judgment and W-9; Ongoing discussions about resolution                                                      | 0.40<br>235.00/hr | 94.00             |
| 4/25/2016                                 | JJH Discuss proposed cost redactions with VF; review VF affidavit for facts regarding frivolous conduct; begin redacting invoices                                                                                                        | 0.90<br>120.00/hr | 108.00            |
| 4/25/2016                                 | VWF Review invoices and make preparations for the Rule 54 petition (include and edit items to be redacted and removal of certain charges (including NAW's trial time))                                                                   | 1.20<br>235.00/hr | 282.00            |
| 4/25/2016                                 | VWF Confer with JJH re: briefing on attorney fees motion and strategy for submitting all required documents and information; Review proposed VF affidavit, judgment and findings of fact; Confer with staff about update to fees request | 0.70<br>235.00/hr | 164.50            |
| 4/25/2016                                 | VWF Email correspondence with opposing counsel (HM) regarding the possibility of resolution                                                                                                                                              | 0.30<br>235.00/hr | 70.50             |
| 4/26/2016                                 | JJH Finish redactions of invoices; create a spreadsheet of invoice amounts and costs; draft facts section and argument of memo                                                                                                           | 4.60<br>120.00/hr | 552.00            |
| 4/27/2016                                 | JJH Finalize first draft of memorandum and affidavit and provide to VF for review.                                                                                                                                                       | 2.80<br>120.00/hr | 336.00            |
| 4/29/2016                                 | VWF Review and edit documents associated with attorney fees request                                                                                                                                                                      | 0.30<br>235.00/hr | 70.50             |
| 5/2/2016                                  | VWF Review and edit memo in support of attorney fees request; Edit other documents; Finalize all documents and research and prepare for filing with the court                                                                            | 1.50<br>235.00/hr | 352.50            |
| <b>For professional services rendered</b> |                                                                                                                                                                                                                                          | <b>24.10</b>      | <b>\$3,526.00</b> |

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,  
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation  
Defendant.

Case No. CV OC 1500236

**MEMORANDUM IN SUPPORT OF  
MOTION FOR COSTS AND ATTORNEY'S  
FEES**

COMES NOW, Plaintiff H2O Environmental, Inc. ("H2O"), and hereby files this  
Memorandum in Support of Motion for Costs and Attorney's Fees.

**FACTUAL AND PROCEDURAL BACKGROUND**

1. On January 8, 2015, a Complaint was filed before this Court seeking affirmative relief against Defendant Farm Supply Distributors for breach of contract and breach of the covenant of good faith and fair dealing. Plaintiff's first amended complaint was filed on December 11, 2015 adding a claim for quantum meruit.

**MEMORANDUM IN SUPPORT OF MOTION FOR COSTS AND  
ATTORNEY'S FEES - 1**

NO \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4/48

**MAY - 2 2016**

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

**ORIGINAL**



2. Trial was held before the Court on February 3, 2016, on the breach of contract and quantum meruit claims. The parties submitted written Final Arguments/Proposed Findings of Fact and Conclusions of Law on March 9, 2016.

3. This Court entered its Findings of Facts and Conclusions of Law in favor of Plaintiff H2O Environmental on both of its claims on March 30, 2016.

4. Judgment was entered by this Court on April 19, 2016.

5. Throughout the course of this litigation Farm Supply Distributors engaged in frivolous and dilatory tactics that resulted in a significant increase in the costs and fees incurred by H2O in the recovery of its money. Such tactics included:

a. At no point during the course of the litigation did Farm Supply dispute the scope of work or the quality of the work that was performed by H2O. Findings of Fact and Conclusions of Law (“Findings of Fact”) ¶ 20, filed March 30, 2016. Instead, their attempted defense relied upon an arbitrary and unsupported opinion by Vertex, the company hired by Farm Supply’s insurance company, that the rates charged by H2O “appear[ed] excessive.” *See* Affidavit of Vaughn Fisher in Support of Plaintiff’s Motion in Limine (“Fisher Aff. Re Motion in Limine”), Ex. F, filed November 10, 2015.

b. In its original Answer and Demand for Jury Trial Farm Supply asserted as its 4<sup>th</sup> Affirmative Defense that H2O has already been compensated the reasonable value of the services it provided. However, five months later, on July 8, 2015, Farm Supply failed to appoint a person for the 30(b)(6) deposition noticed by H2O who actually had knowledge of why Farm Supply had set forth that contention in its answer, specifically someone who could testify regarding the claimed unreasonableness of the charges. Fisher Aff. Re Motion in Limine, ¶ 13, and Ex. K (Notice of Deposition Pursuant to 30(b)(6)). This occurred even after multiple discussions between

the parties' counsel regarding who would be an appropriate person<sup>1</sup> and the narrowing of the issues for the deposition. *Id.* at ¶¶ 10-12, and Exs. J & K. At the defendant's request the deposition was held in Enterprise, OR, resulting in significantly increased costs and fees. *See* Fisher Aff. Re Motion in Limine, ¶ 13 and Exs. J & K.

c. Farm Supply's refusal to provide any basis for the "recommended" rates by Vertex prior to and throughout the course of the litigation. *See* Fisher Aff. Re Motion in Limine, Ex. H, and Findings of Fact, ¶¶ 6, 9 and 10. However, one year after such information was initially requested informally, Farm Supply "disclosed" its expert witness Chris Miceli, the same person who had recommended the lowered charges but had been unable to provide any evidence regarding why H2O's charges were unreasonable. Fisher Aff. Re Motion in Limine, ¶ 14.

d. Even after Mr. Miceli was formally announced as a testifying expert for this case, no evidence was produced nor testimony elicited that indicated why Mr. Miceli considered H2O's rates to be unreasonable. *See* Findings of Fact ¶ 30-32, 34-35, 39-41. Rather, the only evidence produced by Farm Supply was Mr. Miceli's arbitrary opinion that the rates set by H2O were too high. *See id.* ¶ 21. Mr. Miceli's testimony during the trial was not persuasive and, remarkably, was based entirely on information he had gathered in August 2015, just before he was disclosed as an expert in this case. *Id.* at p. 14. At no point has Mr. Miceli, Farm Supply or its insurance company produced any evidence that it relied upon in August 2014, when it first recommended a lower rate.

6. Primarily, Plaintiff notes that it tried to get the bottom of Farm Supply's insurance company's "unreasonableness" claim prior to filing a lawsuit and Farm Supply, its insurer and

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<sup>1</sup> To this point the only person Plaintiff knew of who had expressed such an opinion was Chris Miceli and Plaintiff's counsel repeatedly pointed out to Defendant's counsel that, if appropriate, Farm Supply could appoint its insurance company's consultant, Mr. Miceli, to testify at the deposition. Instead Defendants would wait until September 9, 2015, the very last day of discovery to "disclose" Mr. Miceli as an expert witness.

consultant refused to provide any basis. *See* Fisher Aff. Re Motion in Limine, ¶¶ 5-9. Next, Plaintiff tried to get to the bottom of the “unreasonableness” claim during discovery by requesting a Rule 30b6 deponent to explain why Farm Supply claimed the charges to be unreasonable. However, Farm Supply, its insurer and consultant refused to appoint a person with knowledge to testify at the deposition that they required be held in Enterprise, OR. *See id.* ¶¶ 10-13. Instead Farm Supply and its insurance company waited until the very last day of discovery, September 9, 2015, to “disclose” Mr. Miceli as a testifying expert despite having necessarily and admittedly relied upon his opinion since the inception of this dispute more than a year earlier. *See id.* ¶¶ 14. Finally, when Mr. Miceli did disclose the basis for his contentions regarding the unreasonableness of the charges, his testimony was neither credible nor probative. *See* Findings of Fact ¶¶ 20-43.

7. As a result of Farm Supply’s frivolous tactics prior to and throughout the course of this litigation H2O has incurred increased costs and attorney’s fees in prosecuting this case. This includes \$53,403.50 in attorney’s and paralegal’s fees, \$1,525.53 in costs as a matter of right, and \$995.43 in discretionary costs for total costs and fees of \$55,924.46. Affidavit of Vaughn Fisher in Support of Motion for Costs and Fees, ¶ 12 and Exhibits A and B.

#### **APPLICABLE LEGAL STANDARDS**

Rule 54(d)(1), Idaho Rules of Civil Procedure, provides that prevailing parties are entitled to costs as a matter of right. Idaho Code 12-120(3) provides that in any civil action to recover on a “contract relating to the purchase or sale of . . . services” and in any commercial transaction, “the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.”

In addition to a prevailing party recovering costs and fees in a commercial transaction, Rule 54(e)(1) provides that the Court may award reasonable attorney’s fees to the prevailing party when

provided for by statute or by contract. Rule 54(e)(1) also provides that attorney's fees may be awarded pursuant to Idaho Code § 12-121 when the court finds that the case was "brought, pursued or defended frivolously, unreasonably or without foundation." If a court grants attorney fees to a party in a civil action pursuant to 54(e)(1) there are a variety of factors that must be considered in determining the amount of the award as laid out in Rule 54(e)(3) and discussed in depth below.

### ARGUMENT

**1. Pursuant to Idaho Code § 12-120(3) H2O was the prevailing party in an action on commercial services.**

Idaho Code § 12-120(3) allows for reasonable attorney's fees to the prevailing party of a contract or commercial transaction. H2O Environmental is clearly the prevailing party in this case, having received a Judgment for the entire amount it claimed was still due from the services it provided, and therefore is entitled to costs and attorney's fees pursuant to §12-120(3). Since H2O is the prevailing party and this was an action on a commercial transaction, H2O is entitled to its reasonable costs and attorney's fees in prosecuting this action.

**2. Farm Supply engaged in frivolous defense tactics throughout the course of the litigation.**

Additionally, in assessing the reasonableness of the amount of attorney fees requested as costs, this Court should consider the frivolous manner in which Farm Supply defended the case. When considering whether a case was defended frivolously, "[t]he frivolity and unreasonableness of a defense is not to be examined only in the context of trial proceedings. The entire course of the litigation will be taken into account." *Magic Valley Radiology Associates, P.A. v. Prof. Bus. Services, Inc.*, 808 P.2d 1303, 1308 (Idaho 1991) (citing *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989)). The applicable legal standard is whether "all claims brought or all defenses asserted are frivolous and without foundation." *Rockefeller v. Grabow*, 39 P.3d 577, 585 (Idaho 2001) (Citing *Chapple v. Madison County Officials*, 132 Idaho 76, 81, 967 P.2d 278, 283 (1998)).

In the instant case, Farm Supply did not dispute the scope or quality of the services. Instead, its sole defense was that the charges were unreasonable. And, its sole basis for that contention was its insurance company's consultant, Mr. Miceli. However, no one would reveal Mr. Miceli's rationale despite numerous requests prior to filing the lawsuit and during the discovery process. Instead, Mr. Miceli's basis was first disclosed on the last day of discovery—September 9, 2015. At trial, Mr. Miceli's rationale was found substantially lacking in foundation, methodology or credibility and was completely rejected by the finder of fact. For these reasons, the case was defended frivolously and the higher than expected attorney fees were necessitated by Defendant's behavior.

Accordingly, H2O should be awarded the entire amount of the fees that it incurred in the prosecution of this case.

### **3. Rule 54(e)(3) Factors**

When an award of fees is granted pursuant to I.C. § 12-121 and 54(e)(1), Rule 54(e)(3) provides a list of factors that are "to be considered in fixing the amount of the award." *Bank of Idaho v. Colley*, 103 Idaho 320, 326, 647 P.2d 776, 782 (Ct. App. 1982). However, nowhere in this rule does it indicate that the amount of an attorney fees award must be proportionate to the size of the damages award so long as the work record submitted supports the determination of the attorney fee award. *Meldco, Inc. v. Hollytex Carpet Mills, Inc.*, 118 Idaho 265, 272, 796 P.2d 142, 148 (Ct. App. 1990).

#### **a. Time and Labor Required**

Plaintiff's attorneys spent more than 300 attorney and paralegal hours on this case in successfully prosecuting it through trial. More than half of these hours were spent from January 2016 through March 2016, i.e. the months leading up to and immediately following the trial of this

case. Since this case was litigated clear through trial the time and labor that was required for Plaintiff to succeed in its claim was significant.

**b. Novelty and difficulty of the questions**

This case was not particularly novel and represents the type of dispute that is routinely resolved prior to litigation or in the early phases thereof. What was novel was Farm Supply's insurance company's failure to reveal its reasons for contesting the reasonableness of the charges, both prior to and during the course of the litigation, despite numerous formal and informal requests therefore. Finally, when it did reveal the basis for its contentions, the Defendant's reasons were not grounded on any compelling admissible evidence whatsoever. Instead, it appeared to be a process of Mr. Miceli trying to find some way to justify the arbitrary rates he had suggested more than a year earlier when he first initiated this dispute.

**c. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law**

Vaughn Fisher is a partner at Fisher Rainey Hudson who has been licensed in Georgia (currently inactive) since 1995 and in Idaho since 2007. Fisher Aff. ¶¶ 2-3. Mr. Fisher's practice focuses on commercial litigation and complex federal litigation, including civil rights cases. Fisher Aff. ¶ 5. As the senior member of Fisher Rainey Hudson, Mr. Fisher helps make decisions about the deployment of resources and case strategy. Fisher Aff. ¶ 5. In this case Mr. Fisher managed much of the case strategy and trial preparation, and he conducted the trial.

Nicholas Warden is an associate at Fisher Rainey Hudson who has been licensed in Idaho since 2013. Fisher Aff. ¶ 7b. In an attempt to minimize the costs to the client, Mr. Warden provided a majority of the initial services in this case including conducting discovery and drafting motions. Mr. Warden has experience in a number of other similar cases, including work for this client collecting similar amounts in various areas throughout the Mountain West.

Rebecca Rainey is a partner at Fisher Rainey Hudson who has been licensed in Idaho since 2006 and an adjunct professor at Concordia University School of Law. Fisher Aff. ¶ 7a. Ms. Rainey's primary involvement in this case included case strategy discussions.

Jennifer Hanway has worked for Fisher Rainey Hudson and Rainey Law Office for five years as a paralegal and legal assistant. Fisher Aff. ¶ 7c. While working full time for Fisher Rainey Hudson and Rainey Law Office she also attended law school in the evenings at Concordia University School of Law and graduated *magna cum laude* in December 2015. Fisher Aff. ¶ 7c. She sat for and passed the Idaho, February 2016 Bar Exam. Fisher Aff. ¶ 7c.

**d. Prevailing charges for like work**

The rates charged by Fisher Rainey Hudson are reasonable in light of the prevailing charges by other attorneys and paralegals of similar experience practicing in this area of the law. Mr. Fisher's new commercial litigation clients are charged \$300 per hour. H2O is afforded a discounted historical rate of \$235 per hour because of the long standing relationship between law firm and client.

**e. Whether the fee is fixed or contingent**

The fees in this case were based upon an hourly billing.

**f. The time limitations imposed by the client or the circumstances of the case**

There were no time limitations created by either side in this case.

**g. The amount involved and the results obtained**

Although in this case the amount of attorney's fees ended up being higher than the amount involved, the Idaho Supreme Court has noted that when considering the 54(e)(3) factors in determining the amount of attorney fees "courts are not required to give the amount involved in the case 'more weight or emphasis than should be given to the other applicable factors.'" *Elec.*

*Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 827, 41 P.3d 242, 255 (2001) (internal citation omitted). In this case the amount involved was fairly small, however, H2O was never given a reason that its rates were being disputed until September 2015. H2O ultimately prevailed on the entirety of its claim.

**h. The undesirability of the case**

This case was fairly undesirable due to it being a small collections case which ran the risk of costing more to prosecute than what would ultimately be recovered. However, H2O can not sustain itself on a business model where its clients and their insurance carriers arbitrarily write-down the cost of H2O's services after receiving them, without H2O's consent and without revealing the reasons therefor.

**i. The nature and length of the professional relationship with the client**

H2O has been a client of Fisher Rainey Hudson for more than three years. Fisher Rainey Hudson performs a wide variety of work for H2O throughout the Intermountain West, including cases similar to the one presented in this case.

**j. Awards in similar cases**

In *Campbell v. Parkway Surgery Center, LLC*, an award of fees of nearly \$49,000 (for the amount incurred in magistrate court, additional fees were granted for the appeal to the district court and supreme court) was upheld in a breach of contract case with \$6,800.00 in dispute. 158 Idaho 957, 970, 354 P.3d 1172, 1185 (2015) (W. Jones and Horton Concurrence and J. Jones special concurrence). *Campbell* was a case that also started in Magistrate Court and the amount in dispute and amount of attorney's fees are very similar to those in this case.



**k. The reasonable cost of automated legal research if the court finds it was reasonably necessary in preparing the party's case**

Fisher Rainey Hudson does not charge its clients the cost of automated legal research and does not seek to recover it from the Defendant in this case.

**l. Any other factor the court deems appropriate in the particular case**

The Plaintiff in this matter provides a very valuable service to our community by not only providing its services, but by staging equipment in the Greater Boise Area. In this particular case the Plaintiff was able to respond quickly and effectively to contain a burgeoning environmental disaster. Even the Defendant thought that H2O did a tremendous job responding. Mr. Miceli's baseless attack on H2O's rates was without foundation and completely ignored the practical realities and needs of our community. In the case of an emergency, people in Boise cannot wait to be served by a company in New Iberia, LA, or Grant Pass, OR for that matter.

**4. H2O is entitled to recover its costs pursuant to I.R.C.P. 54(d)(1)**

**a. Costs as a Matter of Right**

As the prevailing party, as discussed above, H2O is entitled to recover its costs pursuant to I.R.C.P. 54(d)(1). H2O incurred \$1525.53 in costs as a matter of right as described by I.R.C.P. 54(d)(1)(C). Fisher Aff. Ex. A. These costs include filing and service fees and the costs of reporting and transcribing depositions.

**b. Discretionary Costs**

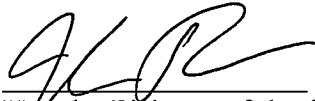
Pursuant to I.R.C.P. 54(d)(1)(D) H2O is requesting \$995.43 in discretionary costs. Fisher Aff. Ex. A. The discretionary costs requested include the travel and room reservation costs for the 30(b)(6) deposition held in Enterprise, Oregon since Farm Supply failed to provide an appropriate person for such deposition. H2O is also requesting the cost of the trial transcript which was necessary in order to draft the Findings of Fact and Conclusions of Law requested by the Court.

**CONCLUSION**

For the foregoing reasons, H2O respectfully requests that this Court grant its Motion for Costs and Attorney's fees in the amount of \$55,924.46.

Dated this 2 day of May, 2016.

FISHER RAINEY HUDSON



Vaughn Fisher – of the firm  
Attorneys for Plaintiffs


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of May 2016, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY'S FEES** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- ( ) Via U.S. Mail
- (~~o~~) Via Facsimile
- ( ) Via Overnight Mail
- yes (x) Via Hand Delivery
- ( ) Email

*Counsel for Defendant*

  
\_\_\_\_\_  
Vaughn Fisher

ORIGINAL

MAY 16 2016

CHRISTOPHER D. RICH, Clerk  
By SARAH TAYLOR  
REPUTA

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR COSTS  
AND FEES

I.  
INTRODUCTION

This matter is before the Court on Plaintiff's motion for costs and attorney fees. Although Plaintiff was ultimately awarded the amount it sought in this matter, that award was made on a basis far different from that which Plaintiff originally pled, and only after multiple theories were either defeated or abandoned following Plaintiff's protracted gamesmanship and ill-advised tactics. Considering all of the circumstances in this case, there is no prevailing party.

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Even if Plaintiff is the prevailing party, Defendant opposes Plaintiff's motion for costs and fees. Plaintiff's attorney fee and cost bill, over \$55,000 expended for the recovery of less than \$8,000, is patently unreasonable. Plaintiff pursued a misguided, unreasonable approach to its prosecution of this case, admittedly engaged in gamesmanship and staked out all-or-nothing positions. Hundreds of hours of attorney time and costs were incurred by both parties solely due to the unreasonable manner in which Plaintiff elected to conduct this litigation. For those reasons, Defendant asks that this Court find that the reasonable fees and costs in this matter equal no more than the amount originally in dispute: \$7,354.65.

## II. LEGAL STANDARD

"The determination of whether a litigant is the prevailing party is committed to the discretion of the trial court." *Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct. App. 2000). Additionally, "the calculation of a reasonable attorney fee is within the trial court's discretion." *In re Estates of Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012); Idaho R. Civ. P. 54(e)(3).

## III. ARGUMENT

### A. *There is no prevailing party in this case*

The determination of a prevailing party is based upon all of the facts and circumstances of each individual case. *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003). "[U]nder I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or

issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues." **Sanders**, 134 Idaho at 325, 1 P.3d at 826 (Emphasis added.)

Establishing a right to recovery does not, as a matter of law, make the recovering party the prevailing party. **Poole v. Davis**, 153 Idaho 604, 608, 288 P.3d 821, 825 (2012). The Idaho Supreme Court has held where "there are claims, counterclaims and cross-claims, the mere fact that a party is successful in asserting or defeating a single claim does not mandate an award of fees to the prevailing party on that claim." **Israel**, 139 Idaho at 27, 72 P.3d at 867 (quoting **Chenery v. Agri-Lines Corp.**, 106 Idaho 687, 691, 682 P.2d 640, 644 (Ct.App.1984)). In numerous cases the Idaho Supreme Court has upheld determinations that there was no prevailing party even when one party establishes a right to recovery. See, e.g., **Caldwell v. Cometto**, 151 Idaho 34, 40-41, 253 P.3d 708, 714-15 (2011); **Jorgensen v. Coppedge**, 148 Idaho 536, 538-39, 224 P.3d 1125, 1127-28 (2010)(No prevailing party even though money judgment entered against defendant, where defendant successfully defended a portion of plaintiff's theories). When both parties are partially successful, however, it is within the court's discretion to decline an award of attorney fees to either side. **Israel**, 139 Idaho at 27, 72 P.3d at 867. In **Israel**, the plaintiffs prevailed on their claim under the Idaho Consumer Protection Act, but not on their claims for breach of contract, statutory violations, and fraud. **Id.** at 25-26. The Idaho Supreme Court affirmed the district court's decision to award no attorney fees because it determined that both parties prevailed in part. **Id.** at 28. The Court should do likewise in this case.

Although Plaintiff ultimately recovered, it did so on very different theories from those originally brought and only after Defendant successfully defended both of Plaintiff's

original theories of liabilities - breach of written contract and breach of the covenant of good faith and fair dealing. Initially, Plaintiff sought recovery for breach of express written contract (even though it was never able to produce a contract signed by Defendant) and for breach of the implied covenant of good faith and fair dealing. (See Plf.'s Response to Mot. Summ. J.) (arguing that Defendant ratified a written contract.)

Only after nearly a year of litigation, and after Defendant's Motion for Summary judgment and discovery had eviscerated Plaintiff's express written contract theories, did Plaintiff amend its complaint to include a claim to recover under quantum meruit-the claim for which it finally established a right to relief. Furthermore, consistent with its preferred litigation mode of gamesmanship, Plaintiff first introduced the theory of recovery under an express oral contract with no price term in its pre-trial brief. Finally, although Plaintiff abandoned its claim for breach of the covenant of good faith and fair dealing, it only did so at trial.

Although Plaintiff ultimately recovered, it only did so upon theories introduced at the last minute and only after the vast majority of fees and expenses in this matter were incurred defending and prosecuting theories that were defeated. For those reasons, there is no prevailing party in this matter and neither side should be awarded its costs or attorney fees.

**B. Defendant's defense of this matter was not frivolous**

"A defense is not frivolous or groundless merely because the respondent loses." **Lowery v. Bd. of Cty. Comm'rs**, 115 Idaho 64, 69, 764 P.2d 431, 436 (Ct. App. 1988). In order for an award under Idaho Code section 12-121, the entire defense case must be frivolous. **Thomas v. Madsen**, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006).

"If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under this statute even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *Id.*

In this case, Defendant asserted numerous meritorious defenses, even though it did not prevail at trial. It successfully opposed Plaintiff's position that an express written contract had been created by virtue of acceptance of a Fee Schedule. It successfully opposed Plaintiff's breach of the implied covenant of good faith and fair dealing. Even though Defendant did not, in the end, prevail based on Mr. Miceli's testimony and opinions on the reasonable value of the services at issue, Defendant made a good-faith argument that Plaintiff had charged 14 percent too much for its services.

Plaintiff has failed to prove its claim for attorney fees under Idaho Code section 12-121 because it has not shown that Defendant's defenses were all completely without merit. Accordingly, attorney fees under Idaho Code section 12-121 are not appropriate.

**C. *Even if Plaintiff is the prevailing party under Idaho Code section 12-120(3), Plaintiff is entitled only to its reasonable fees pursuant to that statute.***

The overriding consideration in determining an amount of attorney fees to award, is that of reasonableness. The statute under which Plaintiff seeks to recover, Idaho Code 12-120(3), as well as the Idaho Rule of Civil Procedure governing such an award, I.R.C.P. 54, provide as much. In this case, however, the vast majority of the attorney fees and costs Plaintiff seeks to recover, were the result of the unreasonable litigation choices by Plaintiff.

**1. Factors to Consider In Evaluating Reasonableness**

I.R.C.P. 54(e)(3) enumerates the factors that a court should consider in evaluating the amounts sought in an award of attorney fees:

- The time and labor required;
- The novelty and difficulty of the questions;
- The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- The prevailing charges for like work.
- Whether the fee is fixed or contingent.
- The time limitations imposed by the client or the circumstances of the case.
- The amount involved and the results obtained.
- The undesirability of the case.
- The nature and length of the professional relationship with the client.
- Awards in similar cases.
- The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- Any other factor which the court deems appropriate in the particular case.

As will be shown below, under the above factors, the vast majority of Plaintiff's claimed attorney fees are objectively unreasonable.

**2. The Time and Labor Plaintiff Spent Were Due to Its Own Litigation Mismanagement.**

Plaintiff filed its Complaint in this matter on January 8, 2015. The circumstances underlying this case were simple and there should have been few factual issues to be resolved. The parties agreed that Plaintiff had performed the work. The



parties agreed that there were no disputes regarding the quality of the work performed. The main disputes were whether the parties had a written contract and whether Plaintiff's charges were reasonable.

The issue of whether a written contract, or any contract at all, existed was a problem of Plaintiff's own making. First, it alleged in its complaint that an express contract was the basis of its claim, but it could not come forward with a contract executed by the parties. (See Mitchell Aff., Ex. I, Plf.'s First Supp. Answer to Interrogatory No. 5.) Defendant propounded numerous discovery responses seeking the basis for that allegation because Defendant was not aware that an express contract had been entered into. Plaintiff's responses were inconsistent. It maintained that it had a written contract, but also conceded that the parties did not execute a written contract. (See Mitchell Aff., Ex. A, Plf.'s First Discovery Responses.) Plaintiff alleged that it provided a fee schedule to Defendant when the work began (*Id.*), but later abandoned that theory and eventually contended that a contract arose through Defendant's silence. (See Plf.'s Response in Opposition to Mot. for Summ. J.) Plaintiff controlled all of the facts surrounding the issue of the formation of the contract and yet it repeatedly took positions that ultimately proved false, it flip-flopped its positions and ultimately abandoned them on the eve of trial. Indeed, Plaintiff was required to have a factual basis for its allegations concerning the existence of a written contract prior to making those allegations. Idaho R. Civ. P. 11(a)(1).

Still unsure of Plaintiff's contract theory, Defendant took the Idaho R. Civ. P. 30(b)(6) depositions of Plaintiff to investigate the basis of an express contract theory. At the depositions, Plaintiff was unable to support its contention that it had provided the Fee Schedule to Defendant when the work started. In fact, Plaintiff's witness, who had earlier

been identified as the individual who sent the Fee Schedule (see Plf.'s First Supp. Answer to Interrogatory No. 5; King Aff. In Opposition to Def.'s Mot. Summ. J. ¶ 5), testified that he did not in fact send the Fee Schedule and was not sure who might have sent it, if it was sent at all. (See Mitchell Aff., Ex. B, Steven King dep. 19:25–22:16.) Indeed most, if not all, discovery Defendant conducted up to that point-in-time centered on the issue of the existence of, and the basis for, Plaintiff's claim of a written contract, something which Defendant ultimately proved false.

Eventually, in its Pretrial Memorandum, Plaintiff proposed the theory of an express oral contract that lacked the essential term of price. This was finally the contract theory upon which it managed to prevail. Also for the first time, Plaintiff proposed that agreement to all material terms is not required under Idaho law. As Defendant pointed out in its opposition to Plaintiff's proposed findings, Idaho appellate courts do not recognize the exception to the general rule that price is a material term and all material terms must be agreed to in order for an express contract to be formed.

As the above history illustrates, had Plaintiff pursued a clearly articulated theory of recovery for breach of express contract that was supported by evidence, substantial discovery could have been avoided. This was a problem solely of Plaintiff's making. Consequently this factor weighs heavily in favor of disallowing the requested attorney fees and costs. Based on the foregoing, Defendant objects to the attorney fees and costs identified in paragraph 2 of the affidavit of Vaughn Fisher as unreasonably incurred.

### **3. The Novelty and Difficulty of the Questions.**

Cases involving questions that are either novel or difficult, justify a greater hourly rate and/or time spent in litigating the matter. In this case, however, the questions involved were of the most basic nature and neither justify the amount of time nor the hourly rate of Plaintiff's counsel. For example, the existence of a written contract, or quantum meruit as an alternative, is one of the most fundamental concepts in the law and is of a nature that requires neither experience nor expertise. Consequently, this factor likewise weighs against the exorbitant recovery Plaintiff seeks.

**4. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.**

The fundamental nature of Plaintiff's claims in this matter required neither specialized skill nor significant experience. Consequently this factor similarly weighs against Plaintiff's recovery.

**5. The prevailing charges for like work.**

Both the basic nature of the claims and issues involved in this matter, as well as the prevailing rate for handling claims of this nature, weigh against the recovery Plaintiff seeks in this matter. For example, the hourly rate for trial counsel for Defendant in this matter, an attorney with equivalent experience was \$120 per hour. For collection work of the nature Plaintiff's counsel was engaged in, counsel for Defendant charges \$140 per hour. Those rates are consistent with the rates charged by other attorneys in the area for cases of this nature.

**6. Whether the fee is fixed or contingent.**

This factor weighs neither in favor of, nor against, the recovery Plaintiff seeks in this matter.

**7. The time limitations imposed by the client or the circumstances of the case.**

Plaintiff has not identified any time limitations it imposed upon counsel, so it appears that the first portion of the element is irrelevant. Furthermore, there is nothing unique about the circumstances of the case which would justify an attorney fee award so out of proportion to the amount Plaintiff sought in recovery. Consequently, this factor also weighs against the recovery Plaintiff seeks.

**8. The amount involved and the results obtained.**

As this Court has implicitly acknowledged on multiple occasions, proportionality is a significant consideration in determining the amount of any attorney fee award. In this case, Plaintiff seeks to recover attorney fees and costs approximately 8 times the amount at issue in this case. Although Plaintiff ultimately recovered the amount it sought, it did so only after multiple offers of judgment to which it provided no response and only after Defendant defeated both of Plaintiff's original theories of recovery and after multiple advisories by the Court that it would find it very difficult to award more than the amount at issue in attorney fees. Because the amounts expended by Plaintiff were so disproportionate to the amounts at issue, were the result of its own litigation mismanagement and were expended in spite of this Court's admonition, this factor also weighs heavily against the recovery Plaintiff seeks.

**9. The undesirability of the case.**

This factor allows for consideration of the undesirable nature of the matter at issue as a factor in favor of awarding attorney fees in order to encourage attorneys to provide representation to individuals who would otherwise have difficulty securing such representation. This case, however, does not fall into such a category - it involved representation of an institutional client on a collection matter at an hourly rate. In short it involves a matter for which there is an abundance of attorneys willing to provide representation and does not involve a matter of the nature contemplated by the rule. Consequently, this factor weighs against an award of the nature Plaintiff seeks.

**10. The nature and length of the professional relationship with the client.**

Neither the rule nor Idaho authority gives an indication of the manner in which the nature and length of the attorney's relationship with a client ought to affect the amount awarded. However, Plaintiff's counsel has indicated that because of the long-term nature of the relationship, he provides his services at a lower rate, suggesting that this factor also weighs against the recovery Plaintiff seeks.

**11. Awards in similar cases.**

Contrary to Plaintiff's suggestion, there is very little about *Campbell v. Parkway Surgery Center, LLC*, 158 Idaho 957, 354 P.3d 1172 (2015), that is similar to the facts of this case. Similar to this case, the Plaintiff in that case brought suit for breach of contract and breach of the covenant of good faith and fair dealing. *Id.* at 1175. Different from this case, however, the matter also involved counterclaims, crossclaims and claims for tortious interference with contract and constructive fraud. *Id.* The plaintiff sought both damages and specific performance. *Id.* The matter also involved applicability of the statute

of frauds, applicability of exceptions to the statute of frauds, the interpretation of the terms of the agreement actually reached, reformation of a judgment,

After the court found in favor of the plaintiff and awarded damages, Parkway Surgery appealed to the district court, which determined that the magistrate court had not addressed all of the claims between the parties and then remanded the matter. *Id.* On remand the Court entered a second amended judgment and Parkway Surgery once again appealed that decision, which was ultimately affirmed by the district court. *Id.* at 1176. In short, the matter involved issues significantly more complex than those involved in this case, multiple judgments, multiple appeals and, most importantly, an award of attorney fees as a result of the frivolous position taken by Parkway Surgery with regard to a term of the agreement that Parkway had drafted itself.

Any complexities in this case, however, arose as a result of Plaintiff's own mismanagement of the litigation:

- Prosecution of a claim for breach of written express contract when no such contract existed;
- Prosecution of a claim for breach of the implied covenant of good faith and fair dealing, ultimately abandoned at trial;
- Failure to promulgate basic discovery requests - Plaintiff failed to promulgate a single interrogatory and its sole request for production sought production of the applicable insurance policy. In other words Plaintiff did not serve a single interrogatory designed to flesh out the factual basis for the positions taken, witnesses with applicable knowledge, did not seek production of relevant documents, did not seek expert witness disclosures or any other basic form of discovery that is within the standard of care for attorneys and instead elected to force submission through the use of expensive and ill-conceived litigation tactics as described in the following bullet points:

- o Taking the 30(b)(6) deposition of Defendant regarding topics for which counsel was expressly informed the organization had no knowledge;
- o Forcing defendant to file a motion for protective order with regard to the foregoing deposition;
- o Engaging in gamesmanship by failing to disclose its own experts in an effort to force the court to exclude the defendant's experts and thereby necessitating the filing a motion in limine on the subject;
- o Filing a motion to preclude defendant from offering expert testimony;
- o Forcing Defendant to file a motion for mediation;
- o Insistence that both the personal representative of defendant, as well as its insurer, attend the pretrial conference, which was then ordered by the court;
- o Offering the affidavit of Steven King raising issues of fact in opposition to Defendant's motion for summary judgment, indicating that he had, in fact, provided a fee schedule to defendant, and yet Mr. King testified in his deposition that he had not, in fact, sent such a fee schedule and was not sure that one had ever been provided;
- o Failing to seek amendment of its complaint until after Defendant had filed its motion for summary judgment based on a lack of factual support for Plaintiff's claim for breach of an express written contract.

In short, the issues in the *Campbell* case were significantly more complex than the issues in this case. And to the extent any complexities arose in this matter, they were the result of conscious litigation choices that Plaintiff made and for which Plaintiff should not be rewarded.

11. **Any other factor which the court deems appropriate in the particular case.**

In addition to the factors enumerated I.R.C.P. 54(e)(3), the rule permits this court to consider any other factors it deems relevant to the particular case.

**a. *Plaintiff Was Intent on Punishing Defendant.***

Plaintiff has repeatedly attempted to paint itself as an innocent victim in this matter. For example, Plaintiff took the position at the hearing on November 24, 2015, that, had the data in Defendant's expert witness disclosure been provided pre-suit, that it would likely not have commenced litigation. It then reaffirmed that position at the January 6, 2016 hearing. (Transcript of January 6, 2016 Hearing, Pp. 15-16). That position is wholly inaccurate. In fact, as can be seen from Exhibit H to the Affidavit of Hans A. Mitchell, defendant's insurer offered to provide the very information Plaintiff sought and Plaintiff rejected the offer, electing to file suit. Furthermore, as can be seen from the items in No. 10 above, there were simple, cost-effective means available to Plaintiff at almost every point in this litigation, and at almost every such point, Plaintiff elected to proceed in as expensive a manner as possible.

**b. *Plaintiff invited a motion for summary judgment.***

Although Plaintiff's counsel recounts his extensive experience as a commercial litigation attorney, the fact remains that Plaintiff originally brought this action as a claim for breach of written contract, even though no such written contract existed.

Because Plaintiff alleged only theories based upon the breach of an express contract but could not support fundamental contract requirements of offer, acceptance, and meeting of the minds, Defendant moved for summary judgment. Even though Defendant had asked in various forms what type of contract Plaintiff was alleging, Plaintiff never answered that it was alleging an express oral contract. Rather, it doggedly contended that



either the Fee Schedule or its invoices gave rise to an express written contract. (See Plf.'s Response in Opposition to Def.'s Mot. Summ. J.)

Furthermore, though it was obvious that an equitable form of relief such as an implied-in-fact contract or unjust enrichment would apply based on the undisputed facts, Plaintiff did not seek to add such a cause of action until after Defendant had filed its Motion for Summary Judgment and set the matter for hearing and then did not even seek a hearing on the motion to amend until months later. Considering the state of the pleadings, Defendant was compelled to move for summary judgment because Plaintiff had failed to provide supporting evidence for its claim in discovery.

***c. Plaintiff did not negotiate in good faith.***

Throughout this litigation, Defendant has made numerous efforts to resolve this matter short of trial. Early in the litigation process, Defendant served Plaintiff with an offer of judgment. (Mitchell Aff., Ex. D, First offer of judgment). Plaintiff did not deign to even make a counter-offer.

Defendant again attempted to explore settlement, and at one point was forced to file a Motion to Compel Mediation in order to get Plaintiff to the table. Plaintiff could not be nailed down on whether it would agree to mediate— Plaintiff's counsel initially agreed, then changed course and stated that his agreement was conditional on Defendant's insurance adjuster appearing in person from the East Coast. (Mitchell Aff., Ex. E, Fisher e-mail re. mediation.)

Following the unsuccessful mediation, Defendant again served an offer of judgment. (Mitchell Aff., Ex. F, Second offer of judgment.) Again, Plaintiff provided no response. Finally, this Court ordered a settlement conference and ordered, at Plaintiff's

insistence, that Defendant's insurance adjuster appear in person. In good faith, the adjuster traveled to Boise for the settlement conference. Plaintiff, however, did not engage in the settlement conference in good faith and instead sent an individual who had not been involved in the litigation until that time and who was not even aware that Defendant had served offers of judgment.

In sum, Plaintiff was responsible for the unnecessary complexity of this litigation. Its fees are not reasonable, and Plaintiff is entitled to no more in fees than the amount that was in dispute.

***D. Plaintiff's attempt to put the blame on Defendant for the bloated fee bill is unfounded.***

**1. Defendant had a reasonable basis for a defense in this matter.**

Defendant's insurer retains a third party to investigate claims which includes review of bills from vendors to determine if the bills are appropriate for the work performed. It is undisputed that this vendor was engaged in its investigation within days of the accident which gave rise to this case. It is also undisputed that the vendor made recommendations regarding reasonable value of services performed and that Defendant's insurer adopted those recommendations. The third party investigator holds itself out as an expert in the field, and its employees individuals with expertise in the environmental cleanup field. Based on the recommendations from its expert, Defendant's insurer disputed Plaintiff's bills because they appeared excessive. Though Defendant's expert opinions and testimony were not found to be persuasive, Defendant had a good faith basis to pursue its defense.

**2. Defendant complied with its discovery obligations regarding the basis of its opposition to Plaintiff's rates, and Plaintiff elected an odd, inefficient means of pursuing discovery.**

As with much of this case, Plaintiff attempts to shift the burden of proof onto Defendant for Plaintiff's own failure to conduct discovery in an efficient, reasonable manner. Plaintiff was obligated to prove the reasonableness of its bills in order to prove quantum meruit. "Under either theory, the plaintiff carries the burden of proof." *Peavey v. Pellandini*, 97 Idaho 655, 661, 551 P.2d 610, 616 (1976). Defendant complied with its obligations to disclose experts.

Plaintiff contends that it filed its lawsuit to "get to the bottom of Farm Supply's insurance company's 'unreasonableness' claim," but Plaintiff only put reasonableness of its charges at issue 11 months after it filed its original complaint. Plaintiff's original complaint lacked any cause of action to recover the reasonable value of services provided. (See Compl.) Plaintiff knew Mr. Miceli's identity months before it filed this lawsuit. Once the lawsuit was initiated, Plaintiff could have deposed Mr. Miceli or others at his firm involved in this matter. See Idaho R. Civ. P. 30 and 45. It also could have subpoenaed records from Mr. Miceli or his firm. See Idaho R. Civ. P. 45. Plaintiff also could have propounded written discovery commanding Defendant to produce its documentation regarding Mr. Miceli's involvement. Plaintiff did none of those things and instead chose an ill-advised, expensive, method of discovery, even though Defendant had advised it on multiple occasions that the people in its organization had no knowledge of most of the topics identified in the deposition notice.

Furthermore, Plaintiff did not need to travel to conduct the deposition of Defendant's designees— the rules clearly allow telephonic depositions and teleconference depositions. See Idaho R. Civ. P. 30. Though telephonic depositions may not make sense in all cases, here, with the small amount at issue, certainly cost-saving practices would

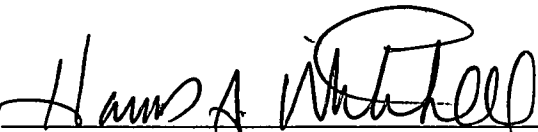
have been reasonable. Plaintiff did not avail itself of the numerous rules that would have allowed it to investigate Mr. Miceli and his company's pre-suit involvement in this matter, but it failed to do so, and its failure should not be a basis for an attorney's fee award against Defendant.

**III.  
CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that this Court find no prevailing party and deny Plaintiff's motion for costs and fees. In the alternative, if this Court finds Plaintiff was the prevailing party, Defendant respectfully requests that this Court award Plaintiff no more than \$7,354.65 in reasonable fees and costs.

DATED this 16 day of May, 2016.

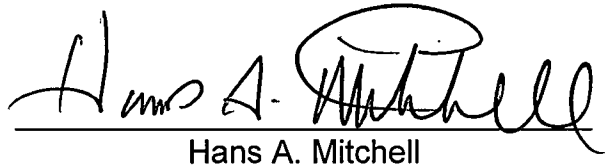
CAREY PERKINS LLP

By   
Hans A. Mitchell, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of May, 2016, I served a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

  
Hans A. Mitchell

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:40

MAY 16 2016

CHRISTOPHER D. RICH, Clerk  
By SARAH TAYLOR  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

AFFIDAVIT OF HANS A. MITCHELL  
IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR COSTS AND FEES

STATE OF IDAHO )  
                                          : ss.  
County of Ada        )

**HANS A. MITCHELL**, having been first duly sworn upon oath, deposes and  
says:

1. I am one of the attorneys of record in this matter, and make this  
affidavit based upon my own personal knowledge.

AB

2. I am an attorney licensed to practice in the State of Idaho since 1997 and Oregon since 1996. I am also a member of the bar of the Federal District Courts of Idaho and Oregon, as well as the bankruptcy courts of those jurisdiction. I am an active member of DRI, and the Claims and Litigation Management (CLM) organization. I am an AV rated attorney, a recipient of the Best Lawyer award from AM Best, and the managing partner of Carey Perkins LLP.

3. I received my undergraduate degree from the University of Oregon in 1991 and my juris doctor from Willamette University College of Law in 1996.

4. My practice is a multi-state practice that has ranged from Oregon to Idaho to Utah and has focused primarily on defense of civil litigants in settings ranging from personal injury to product liability to complex commercial litigation. My practice has also involved and representation of corporate clients in all aspects of their existence, including collection matters.

5. As the handling partner for this matter I was the attorney responsible for determining the deployment and allocation of resources to respond to the litigation as prosecuted by Plaintiff. Furthermore, as the managing partner of Carey Perkins LLP I am also responsible for allocation of resources as needed and dictated by the needs of each case and am familiar with the rates charged by my firm for its work.

6. My current rates for collection litigation of the nature involved in this case range from \$120-\$140 per hour long term clients, to \$165 per hour for newer clients. Associate time is billed at \$110-\$130/hr. and \$150/hr. respectively. As someone who has litigated hundreds of cases to conclusion, seen multiple cost memoranda as well as multiple attorney fee bills in such cases, I am familiar with the prevailing rates for work of

this nature. In my opinion, given what should have been the simple and straightforward nature of the issues involved in this matter, my rates fall within the typical range for such work in this area and Plaintiff's counsel's rates do not.

7. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiff's Responses to Defendant's Discovery Requests dated June 30, 2015.

8. Attached hereto as **Exhibit B** is a true and correct copy of pages 1, 19–25, and 48–52, of the deposition of Plaintiff's 30(b)(6) designee Steven King taken in this matter.

9. Attached hereto as **Exhibit C** is a true and correct copy of pages 1-4 and 10 of the trial transcript in this matter.

10. Attached hereto as **Exhibit D** is a true and correct copy of an offer of judgment that was served on Plaintiff's counsel on April 27, 2015 in this matter.

11. Attached hereto as **Exhibit E** is a true and correct copy of a September 8, 2015 e-mail from Plaintiff's counsel regarding mediation.

12. Attached hereto as **Exhibit F** is a true and correct copy of an offer of judgment that was served on Plaintiff's counsel on October 23, 2015 in this matter.

13. Attached hereto as **Exhibit G** is a true and correct copy of correspondence to and from Plaintiff's counsel regarding the 30(b)(6) deposition of Defendant.

14. Attached hereto as **Exhibit H**, is a true and correct copy of correspondence between Plaintiff's counsel and the insurance carrier for Defendant in which the carrier offers to provide the basis for the reductions to Plaintiff's bill, which offer was rejected by Plaintiff in favor of litigation.



15. Attached hereto as **Exhibit I** is a true and correct copy of Plaintiff's First Supplemental Interrogatory Answers in this matter.

16. Defendant objects to Plaintiff's request for discretionary costs as they were neither exceptional, nor necessary. Notably Plaintiff elected to travel to take a deposition which it knew would yield no information and which could have been accomplished via telephone. Furthermore, there is nothing unique about incurring the cost of a trial transcript and, although it may have been convenient, it was certainly not necessary. (Travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are common, not exceptional. *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998)).

17. Defendant also object to the most of the paralegal time for which Plaintiff seeks recovery since, based on the vague nature of the descriptions provided, the activities undertaken appear to be clerical in nature e.g. updating a discovery file, rather than an exercise of independent judgment by someone with the skill and training in paralegal activities. Just because an activity is performed by a paralegal, does not make it a paralegal activity.

18. Defendant objects to Plaintiff's request for attorney fees for the reasons set forth in its Response to Plaintiff's Motion for Costs and Fees and for the reasons as follows as such entries are either unreasonable or lack sufficient information to determine their reasonableness. Defendant further objects because most of the time entries for which Plaintiff seeks recovery, fail to allocate time to specific tasks as required to permit the court to evaluate the appropriateness of the time actually spent on that specific task. *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887 (1996):

| <b>Date</b> | <b>Timekeeper</b> | <b>Objection</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-------------|-------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10/23/2014  | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                                                                                                                                                                                   |
| 10/24/2014  | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                                                                                                                                                                                   |
| 10/27/2014  | VWF               | No indication of the nature of the conversation so no means of determining reasonableness of time charged.                                                                                                                                                                                                                                                                                                                                                                |
| 10/28/2014  | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                                                                                                                                                                                   |
| 12/03/2014  | VWF               | Multiple tasks billed as a single entry (drafting and revision) without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                                                                                                                                                                                                                        |
| 12/29/2014  | NAW               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. In addition, it is unreasonable to bill for time for pleading which lacked a factual basis (formation of written contract.) Description also fails to identify what was reviewed or how that assisted preparation of the complaint where other counsel had recently prepared demand letter based on same set of alleged facts. |
| 12/30/2014  | NAW               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Furthermore venue was not at issue and did not require research to determine same.                                                                                                                                                                                                                                             |
| 01/06/2015  | NAW               | Insufficient description of the activity involved – it should not take a half hour to edit a 4 page, double spaced document. In addition there appears to be either duplication of time or an attorney engaging in clerical work as the edits were edits by VWF according to the entry.                                                                                                                                                                                   |
| 01/07/2015  | JJH               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. In addition the tasks are clerical in nature as they are simply the completion of forms and/or implementing edits by counsel.                                                                                                                                                                                                  |
| 01/27/2015  | NAW               | No description of the individual with whom counsel spoke is given, nor the nature or substance of the conversation is                                                                                                                                                                                                                                                                                                                                                     |

|                              |     |                                                                                                                                                                                                                                                                                         |
|------------------------------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                              |     | identified so there is no basis to determine whether the time spent was reasonable.                                                                                                                                                                                                     |
| 02/05/2015                   | SRC | No description is given concerning what exactly was updated. It appears likely to have been filing which is clerical in nature and does not require a paralegal to perform.                                                                                                             |
| 02/05/2015                   | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation for necessity of meeting with VWF given.                                                                                      |
| 03/05/2015                   | NAW | Plaintiff never filed a motion for summary judgment.                                                                                                                                                                                                                                    |
| 03/11/2015<br>(first entry)  | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken.                                                                            |
| 03/11/2015<br>(second entry) | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken.                                                                            |
| 04/07/2015                   | RAR | This is the third attorney involved in a very basic collection matter. Three attorneys is unreasonable without further explanation.                                                                                                                                                     |
| 04/07/2015                   | NAW | No explanation given for the necessity of a conference between attorneys concerning a scheduling conference.                                                                                                                                                                            |
| 04/08/2015                   | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                                                              |
| 04/08/2015                   | VWF | Duplicate attorney time – already billed by NAW on same date.                                                                                                                                                                                                                           |
| 04/13/2015                   | NAW | Multiple tasks billed as a single entry (drafting and revision) without allocation to any specific task so no means of determining reasonableness of time charged. Furthermore, initial preparation of deposition notices is properly the subject of paralegal time, not attorney time. |
| 04/14/2015                   | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given for the need for multiple attorneys to bill for review and preparation of the same document.                            |
| 04/15/2015                   | SRC | Clerical activity.                                                                                                                                                                                                                                                                      |
| 04/15/2016                   | NAW | This is the third revision of the same deposition notice, for a total of 1.6 hours being spent in its preparation, an unreasonable amount of time.                                                                                                                                      |
| 04/15/2016                   | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining                                                                                                                                                                              |

|            |     |                                                                                                                                                                                                                                                                                                            |
|------------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | reasonableness of time charged.                                                                                                                                                                                                                                                                            |
| 04/23/2016 | RAR | Attorney not counsel of record and no claim for bad faith was, or could be, asserted in matter and no explanation given of the need for the consultation.                                                                                                                                                  |
| 04/23/2015 | NAW | No explanation of the substance of the communication given so no basis to determine the reasonableness of time spent on the task.                                                                                                                                                                          |
| 04/23/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken.                                                                                               |
| 04/25/2015 | NAW | The document prepared contained a single request for production for which it is patently unreasonable to take .5 hours to draft.                                                                                                                                                                           |
| 04/27/2015 | JJH | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken.                                                                                               |
| 05/08/2015 | JJH | No explanation of the content of the letter prepared or sent provided so there is no basis to determine whether the amount of time spent was reasonable.                                                                                                                                                   |
| 05/08/2015 | NAW | Duplicate billing by attorneys NAW and VWF for the same activity.                                                                                                                                                                                                                                          |
| 05/08/2015 | VWF | Duplicate by attorneys VWF and NAW for the same activity.                                                                                                                                                                                                                                                  |
| 05/11/2015 | SRC | Insufficient description of activity given, likely clerical, not paralegal activity.                                                                                                                                                                                                                       |
| 05/11/2015 | VWF | Insufficient description of activity given – discovery from which party? What documents or other discovery were reviewed? What quantity of documents or discovery were reviewed?                                                                                                                           |
| 05/28/2015 | SRC | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken. 1.6 hours already billed for preparation of the notice of deposition, now totaling 2.2 hours. |
| 06/12/2015 | NAW | Insufficient description of the correspondence given – no description of the substance of the correspondence provided.                                                                                                                                                                                     |
| 06/17/2015 | NAW | Duplication of activities undertaken by JJH on the same date.                                                                                                                                                                                                                                              |
| 06/17/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken and, in fact, a                                                                                |

|            |     |                                                                                                                                                                                                                                                                                                                                                                                             |
|------------|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | portion of that description has actually been redacted.                                                                                                                                                                                                                                                                                                                                     |
| 06/17/2015 | NAW | Second instance of duplication of activities undertaken by JJH on the same date.                                                                                                                                                                                                                                                                                                            |
| 06/17/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken.                                                                                                                                                                                |
| 06/26/2015 | SRC | Duplication of activities undertaken by JJH and NAW on 06/17/2015                                                                                                                                                                                                                                                                                                                           |
| 06/26/2015 | JJH | Duplication of activities already undertaken by JJH, NAW on 06/17/2015 and SRC on 06/26/2015.                                                                                                                                                                                                                                                                                               |
| 06/27/2015 | NAW | Duplication of activities Duplication of activities already undertaken by JJH, NAW on 06/17/2015 and SRC and JJH on 06/26/2015.                                                                                                                                                                                                                                                             |
| 06/27/2015 | NAW | No explanation of the substance of a conversation that lasted almost an hour given.                                                                                                                                                                                                                                                                                                         |
| 06/29/2015 | JJH | Duplication of activities Duplication of activities already undertaken by JJH, NAW on 06/17/2015 and SRC and JJH on 06/26/2015 or clerical work.                                                                                                                                                                                                                                            |
| 06/30/2015 | JJH | Duplication of activities Duplication of activities already undertaken by JJH, NAW on 06/17/2015 and SRC and JJH on 06/26/2015 and JJH on 6/29/2015 or clerical work.                                                                                                                                                                                                                       |
| 06/30/2015 | NAW | Duplication of JJH activity on same date.                                                                                                                                                                                                                                                                                                                                                   |
| 07/07/2015 | NAW | Inadequate description given.                                                                                                                                                                                                                                                                                                                                                               |
| 07/07/2015 | NAW | Inadequate description given – what activities did counsel actually undertaken in preparation for the deposition.                                                                                                                                                                                                                                                                           |
| 07/07/2015 | VWF | Inadequate description given and duplication of billing for the same activity by NAW on the same date.                                                                                                                                                                                                                                                                                      |
| 07/08/2015 | VWF | Inadequate description given.                                                                                                                                                                                                                                                                                                                                                               |
| 07/20/2015 | NAW | Inadequate description given of nature of the call or its pertinence to case at issue as client is longstanding and ongoing client of counsel.                                                                                                                                                                                                                                              |
| 07/27/2015 | RAR | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the activities undertaken. No explanation given of the need for consult with third attorney, who is not of record in the matter. Furthermore entry has been redacted, although time has not been reduced. |
| 07/27/2015 | SRC | Duplication of work by attorney NAW or clerical work, insufficient description given.                                                                                                                                                                                                                                                                                                       |
| 07/27/2015 | NAW | Duplication of work by SRC.                                                                                                                                                                                                                                                                                                                                                                 |
| 07/27/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of                                                                                                                                                                                                                          |

|            |                    |                                                                                                                                                                                                                                                                                     |
|------------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |                    | the reason for the individual activities undertaken.                                                                                                                                                                                                                                |
| 07/27/2015 | NAW                | Duplication of work by VWF and or clerical work as simply incorporating edits by other counsel.                                                                                                                                                                                     |
| 07/27/2015 | VWF                | No explanation given for activities undertaken or substance of consult. Duplicative of time billed by RAR on same date.                                                                                                                                                             |
| 07/28/2015 | SRC                | Entry fails to state activities undertaken for almost 2 hours to finalize – likely clerical in nature.                                                                                                                                                                              |
| 07/28/2015 | NAW                | No explanation given of the pleadings revised, or the manner of their revision.                                                                                                                                                                                                     |
| 07/30/2015 | SRC                | No explanation given of the manner in which the file was updated, likely clerical activity.                                                                                                                                                                                         |
| 07/30/2015 | VWF                | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                             |
| 08/06/2015 | SRC                | Insufficient description given – activity likely clerical in nature.                                                                                                                                                                                                                |
| 08/07/2015 | SRC                | Insufficient description given – likely collection and gathering of documents for counsel to use at hearing- a clerical activity.                                                                                                                                                   |
| 08/07/2015 | NAW (Both entries) | Insufficient description given – no description of the nature of the calls or that they pertained to the case at hand.                                                                                                                                                              |
| 08/10/2015 | NAW                | Insufficient description given – no description of the nature of the call or that it pertained to the case at hand.                                                                                                                                                                 |
| 08/10/2015 | VWF                | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken. (Time entry for NAW for attendance at hearing was only .60) |
| 08/14/2015 | VWF                | Insufficient description – No explanation given regarding party with whom counsel corresponded or the substance of the correspondence.                                                                                                                                              |
| 08/17/2015 | NAW                | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                             |
| 08/20/2015 | NAW                | Insufficient description given – no explanation of the matters researched. Unsuccessful motion in limine was undertaken without a factual or legal basis and as an act of gamesmanship and ultimately denied.                                                                       |
| 08/24/2015 | NAW                | Research appears likely to have been undertaken as part of unsuccessful motion in limine filed in bad faith and as act of gamesmanship.                                                                                                                                             |
| 08/24/2015 | NAW                | Document prepared in without factual or legal basis and as an act of pure gamesmanship.                                                                                                                                                                                             |

|            |                                 |                                                                                                                                                                                                                                                                      |
|------------|---------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 08/24/2015 | VWF                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                              |
| 08/25/2016 | SRC                             | Insufficient explanation given - no description of the activities undertaken to finalize the document or demonstration of the exercise of independent judgment. Activities likely clerical in nature.                                                                |
| 08/25/2015 | JJH                             | Duplication of activities by SC – activities clerical in nature.                                                                                                                                                                                                     |
| 08/28/2015 | RAR                             | Insufficient and redacted description, without corresponding deduction from time. No explanation of need for or substance of intraoffice conference.                                                                                                                 |
| 08/28/2015 | VWF                             | Duplicate billing for same activity by RAR, insufficient explanation of activities undertaken.                                                                                                                                                                       |
| 08/31/2015 | JJH                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. All activities undertaken were clerical in nature.                                                                        |
| 08/31/2015 | NAW                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                              |
| 09/08/2015 | VWF (both entries with charges) | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                              |
| 09/09/2015 | VWF                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                              |
| 09/09/2015 | VWF                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.<br>Duplication of activity undertaken by NAW |
| 09/09/2015 | NAW                             | Duplication of activity undertaken by VWF.                                                                                                                                                                                                                           |
| 09/29/2015 | RAR                             | Insufficient description given – pertinent portion of time entry has been redacted. Duplicative of time billed by VWF                                                                                                                                                |
| 09/29/2015 | VWF                             | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.<br>Duplicative of time billed by RAR         |
| 10/06/2015 | VWF                             | Insufficient description – no indication of the parties involved in the correspondence or the substance of the                                                                                                                                                       |

|            |     |                                                                                                                                                                                                                                                                                                        |
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|            |     | communications.                                                                                                                                                                                                                                                                                        |
| 10/16/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken. Furthermore, explanation has been redacted, without regard to the time billed. |
| 10/20/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                |
| 10/26/2015 | NAW | Scheduling activities are considered clerical in nature.                                                                                                                                                                                                                                               |
| 10/28/2015 | VWF | Double billing for same time spent by NAW on activity.                                                                                                                                                                                                                                                 |
| 10/28/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken. Double billing for time spent by VWF on same activity.                         |
| 11/10/2015 | JJH | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken. Description includes clerical activities.                                      |
| 11/10/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                |
| 11/16/2015 | NAW | No explanation of the research undertaken or the need for it is given.                                                                                                                                                                                                                                 |
| 11/16/2015 | NAW | No explanation of the research undertaken or the need for it is given.                                                                                                                                                                                                                                 |
| 11/16/2015 | NAW | No explanation of the documents reviewed is given.                                                                                                                                                                                                                                                     |
| 11/16/2015 | VWF | No explanation of the substance or need for conference given.                                                                                                                                                                                                                                          |
| 11/17/2015 | SRC | Insufficient explanation given – no information concerning activities undertaken to finalize the motion or how SRC exercised independent judgment – likely clerical activity.                                                                                                                          |
| 11/17/2015 | NAW | Duplicative of 11/16/2015 entry.                                                                                                                                                                                                                                                                       |
| 11/17/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                |
| 11/17/2015 | VWF | Duplicative of drafting activities undertaken by other counsel.                                                                                                                                                                                                                                        |
| 11/18/2015 | SRC | Insufficient description – likely clerical filing.                                                                                                                                                                                                                                                     |



|            |     |                                                                                                                                                                                                                                                                                                                                    |
|------------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 11/24/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken – No description given of the activities or time spent in preparation and the time spent attending hearing. |
| 11/30/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                                            |
| 12/4/2015  | SRC | No description of the stipulation prepared is given.                                                                                                                                                                                                                                                                               |
| 12/09/2015 | NAW | Duplicative of time billed by VWF for same activity.                                                                                                                                                                                                                                                                               |
| 12/09/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken. Also duplicative of time billed by NAW                                                                     |
| 12/16/2015 | NAW | Document was not prepared as rebuttal disclosure, but rather case-in-chief disclosure, was long after original deadline for such disclosure by the court and undertaken when Plaintiff's act of gamesmanship failed and ultimately disallowed by court.                                                                            |
| 12/16/2015 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                                                            |
| 12/17/2015 | VWF | Insufficient explanation – description of substance of correspondence redacted.                                                                                                                                                                                                                                                    |
| 12/18/2015 | VWF | Duplicate billing for activities undertaken by NAW.                                                                                                                                                                                                                                                                                |
| 12/21/2015 | NAW | Insufficient description of the substance or reasons for the conference call provided. Likely duplicate billing of time billed by VWF.                                                                                                                                                                                             |
| 12/21/2015 | VWF | Insufficient description provided – no explanation of substance or reasons for call, likely duplicate billing of time billed by NAW.                                                                                                                                                                                               |
| 12/29/2015 | NAW | Clerical activity – incorporation of edits by other counsel.                                                                                                                                                                                                                                                                       |
| 12/29/2015 | NAW | Insufficient description – substance and purpose of meeting redacted. Duplicative of time billed by VWF for same activity.                                                                                                                                                                                                         |
| 12/29/2015 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.<br>Duplicative of time billed by NAW for same activity.                                                    |
| 12/31/2015 | VWF | Multiple tasks billed as a single entry without allocation to                                                                                                                                                                                                                                                                      |

|            |     |                                                                                                                                                                                                                          |
|------------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | any specific task so no means of determining reasonableness of time charged. No explanation given of the reason for the individual activities undertaken.                                                                |
| 01/06/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation for hearing. |
| 01/06/2016 | VWF | Duplicate billing of same activity billed by NAW                                                                                                                                                                         |
| 01/06/2016 | NAW | Duplicate billing of same activity billed by VWF                                                                                                                                                                         |
| 01/08/2016 | VWF | Duplicate billing of same activity billed by NAW                                                                                                                                                                         |
| 01/08/2016 | NAW | Duplicate billing of same activity billed by VWF                                                                                                                                                                         |
| 01/11/206  | NAW | Insufficient description given – No explanation for who RL is, or the substance or need for the conference.                                                                                                              |
| 01/15/2016 | RAL | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation.             |
| 01/15/2016 | NAW | Duplicate billing for same activity by RAL and VWF                                                                                                                                                                       |
| 01/15/2016 | VWF | Duplicate billing for same activity by NAW and RAL                                                                                                                                                                       |
| 01/18/2016 | NAW | Insufficient description of nature or substance of conversation                                                                                                                                                          |
| 01/18/2016 | NAW | Insufficient description of nature or substance of conversation                                                                                                                                                          |
| 01/18/2016 | NAW | Duplicate billing for same activity by RAL and VWF; Insufficient description                                                                                                                                             |
| 01/18/2016 | VWF | Insufficient description – redacted, no description of trial preparation activity; duplicate billing                                                                                                                     |
| 01/18/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken.                            |
| 01/19/2016 | RAR | No description provided.                                                                                                                                                                                                 |
| 01/19/2016 | NAW | No description provided.                                                                                                                                                                                                 |
| 01/19/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken.                            |
| 01/19/2016 | VWF | Insufficient description – substantive portion of activity redacted.                                                                                                                                                     |
| 01/19/2016 | VWF | Insufficient description – no detail concerning substance of conversation or individual with whom conversation held.                                                                                                     |
| 01/19/2016 | VWF | Insufficient description                                                                                                                                                                                                 |
| 01/20/2016 | RAL | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of                                                       |

|            |     |                                                                                                                                                                                                                                                       |
|------------|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | the activities undertaken. Clerical activities.                                                                                                                                                                                                       |
| 01/20/2016 | NAW | Insufficient description of activities done in preparation for conference, particularly where conference handled in its entirety by different counsel. Duplicative of time billed by VWF for same activities                                          |
| 01/20/2016 | NAW | Duplicative and unreasonable.                                                                                                                                                                                                                         |
| 01/20/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation.                                          |
| 01/20/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation.                                          |
| 01/22/2016 | NAW | Duplicative of time billed by VWF                                                                                                                                                                                                                     |
| 01/22/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. Duplicative of time billed by NAW        |
| 01/25/2016 | NAW | Duplicative of VWF billed time; insufficient description.                                                                                                                                                                                             |
| 01/25/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. Duplicative of time billed by NAW.       |
| 01/26/2016 | NAW | Paralegal activity.                                                                                                                                                                                                                                   |
| 01/26/2016 | NAW | Paralegal activity.                                                                                                                                                                                                                                   |
| 01/26/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. Duplicate billing of time billed by NAW. |
| 01/27/2016 | RAR | No explanation given.                                                                                                                                                                                                                                 |
| 01/27/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                            |
| 01/27/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                            |
| 01/27/2016 | NAW | No explanation given.                                                                                                                                                                                                                                 |
| 01/28/2016 | RAL | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                            |
| 01/28/2016 | RAL | Multiple tasks billed as a single entry without allocation to                                                                                                                                                                                         |

|            |     |                                                                                                                                                                                                              |
|------------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | any specific task so no means of determining reasonableness of time charged. Clerical activities.                                                                                                            |
| 01/28/2016 | NAW | Insufficient description – No information concerning nature or substance of conversation.                                                                                                                    |
| 01/28/2016 | NAW | Motion for reconsideration unreasonable and ultimately denied.                                                                                                                                               |
| 01/28/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. |
| 01/28/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Motion in limine ill-advised and ultimately denied.               |
| 01/30/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. |
| 01/31/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. |
| 02/01/2016 | RAL | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Insufficient description.                                         |
| 02/01/2016 | RAL | Phone calls re equipment are clerical activity.                                                                                                                                                              |
| 02/01/2016 | RAR | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Time entry redacted.                                              |
| 02/02/2016 | RAL | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Clerical activities.                                              |
| 02/02/2016 | RAR | Insufficient description.                                                                                                                                                                                    |
| 02/04/2016 | RAR | Insufficient description, redacted entry.                                                                                                                                                                    |
| 02/08/2016 | RAL | Clerical activity.                                                                                                                                                                                           |
| 02/08/2016 | RAL | Clerical activity.                                                                                                                                                                                           |
| 02/10/2016 | RAL | Clerical activity.                                                                                                                                                                                           |
| 02/10/2016 | RAL | Clerical activity.                                                                                                                                                                                           |
| 02/01/2016 | NAW | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. |
| 02/01/2016 | NAW | Insufficient description.                                                                                                                                                                                    |
| 02/01/2016 | NAW | Insufficient description; Paralegal activity.                                                                                                                                                                |
| 02/01/2016 | VWF | Multiple tasks billed as a single entry without allocation to                                                                                                                                                |

|            |                   |                                                                                                                                                                                                                                                |
|------------|-------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |                   | any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation.                                                                                                 |
| 02/02/2016 | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation.                                   |
| 02/03/2016 | NAW               | Insufficient description – no indication of activity undertaken in preparation.                                                                                                                                                                |
| 02/23/2016 | SRC               | Clerical activity.                                                                                                                                                                                                                             |
| 02/25/2016 | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                     |
| 03/07/2016 | RAR               | Insufficient description; Duplicate billing.                                                                                                                                                                                                   |
| 03/07/2016 | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Duplicate billing.                                                                                  |
| 03/08/2016 | VWF               | Duplicate billing for time spent by NAW on same task.                                                                                                                                                                                          |
| 03/08/2016 | NAW               | Duplicate billing of time spent by VWF on same task.                                                                                                                                                                                           |
| 03/09/2016 | SRC               | Clerical work.                                                                                                                                                                                                                                 |
| 03/09/2016 | SRC               | Clerical work.                                                                                                                                                                                                                                 |
| 03/09/2016 | VWF               | Duplicate billing for time spent by NAW on same task.                                                                                                                                                                                          |
| 03/09/2016 | NAW (all entries) | Duplicate billing for time spent by VWF on the same task.                                                                                                                                                                                      |
| 03/22/2016 | VWF               | Entry documents ex parte communication with the court and should be disallowed.                                                                                                                                                                |
| 04/04/2016 | NAW               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                     |
| 04/04/2016 | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Duplicative of time billed by NAW for activities. Insufficient description as description redacted. |
| 04/07/2016 | VWF               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                     |
| 04/12/2016 | JJH               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged.                                                                                                     |
| 04/21/2016 | JJH               | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Some activities also paralegal in nature.                                                           |
| 04/22/2016 | VWF               | Multiple tasks billed as a single entry without allocation to                                                                                                                                                                                  |

|            |     |                                                                                                                                                                                                                                                                     |
|------------|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            |     | any specific task so no means of determining reasonableness of time charged.                                                                                                                                                                                        |
| 04/25/2016 | JJH | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. Duplicative of time billed by VWF for same activities.                                                                   |
| 04/25/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation given of the activities undertaken in preparation. Duplicative of time billed by JJH for same activities. |
| 05/02/2016 | VWF | Multiple tasks billed as a single entry without allocation to any specific task so no means of determining reasonableness of time charged. No explanation of "other documents" edited given.                                                                        |

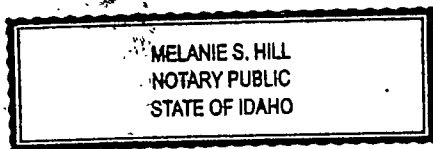
Because of the manner in which Plaintiff has documented, or not documented, its counsels' time in this matter, the foregoing entries fail to comply with the requirements of I.R.C.P. 54. Furthermore, the use of 4 different attorneys in what was a small, simple collection matter that ultimately ballooned into the case heard by the Court, simply demonstrates the inefficient and unreasonable manner in which Plaintiff has prosecuted this case. For the foregoing reasons, Plaintiff's request to recover the above fees should be denied.


FURTHER your Affiant saith not.

  
HANS A. MITCHELL

SUBSCRIBED AND SWORN to before me this 11 day of May, 2016.

(SEAL)

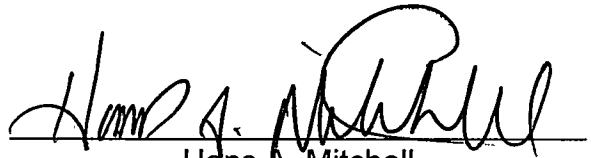


  
Notary Public for Idaho  
Residing at Boise, Idaho  
Commission expires Sept. 02, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of May, 2016, I served a true and correct copy of the foregoing AFFIDAVIT OF HANS A. MITCHELL IN OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

  
Hans A. Mitchell

# **EXHIBIT A**



Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

**MAGISTRATE DIVISION**

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,  
Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation  
Defendant.

Case No. CV OC 1500236

**PLAINTIFF'S RESPONSES TO  
DEFENDANT FARM SUPPLY'S FIRST  
SET OF INTERROGATORIES,  
REQUESTS FOR ADMISSION AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO PLAINTIFF**

**INTERROGATORY NO. 1:** Please state the name, address, and telephone number of each person answering or assisting in answering these interrogatories, requests for admission and requests for production.

**RESPONSE TO INTERROGATORY NO. 1:** Ed Savre c/o Fisher Rainey Hudson, 950 W. Bannock St., Ste. 630, Boise, ID 83702.

**INTERROGATORY NO. 2:** Please identify each and every person known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this action. By this Interrogatory, we seek the identities of all persons who have

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF  
INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO PLAINTIFF - 1**

any knowledge of any fact pertinent to the issues involved in this action. For each such person, describe the nature and substance of such knowledge.

**RESPONSE TO INTERROGATORY NO. 2:** Plaintiffs object to this Interrogatory No. 2 on the grounds that it is overly broad, unduly burdensome, and that it invades the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving such objection, Plaintiff responds that the following people may have information related to this action:

**H2O:** Each of the following people participated in the site clean-up performed by H2O.

Steven King, Project Manager

Craig Simmons, Guzzler Vac-tanker

James Traver, 70 Barrel Vac-tanker

Ryan Piper, Crew Truck

Forrest Lehmer

**Farm Supply Distributors:** Each of the following people may have information regarding the request for services by H2O and the initiation of the clean-up, however, Farm Supply Distributors likely has better access to this information:

Greg Willis

Steve Jederberg, driver

Carol Ward

**Vertex:** Each of the following people may have information regarding the payment of H2O's invoices by the insurance company, however, Farm Supply Distributors likely has better access to this information:

Kathryn Johnson, Assistant Project Manager

Chris Miceli

**Maverick Employees:** Each of the following people may have information related to the spill, the initiation of the clean-up and the clean-up efforts:

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 2**

Ray Adams Jr.

Travis Goff

Boise Fire Department: Each of the following people may have information related to the reporting of the spill and the initiation of the clean-up:

Jeff Root

Kendal Smith

Aaron Hummel, Battalion Chief

ACHD: Each of the following people may have information related to the spill and instructions to H2O regarding the clean-up of the spill:

Robert Hutchings

Timothy Morgan

Boise City Public Works: Each of the following people may have information related to the spill and instructions to H2O regarding the clean-up of the spill:

Brian Feather

DEQ: Each of the following people may have information related to the spill and instructions to H2O regarding the clean-up of the spill:

Mark Vankleek

**INTERROGATORY NO. 3**: Please identify all persons you intend to call as factual witnesses at the trial of this case and describe their anticipated testimony.

**RESPONSE TO INTERROGATORY NO. 3**: Plaintiff objects to this Interrogatory No. 3 to the extent that it is premature and supplants the scheduling order issued by the Court. Subject to and without waiving these objections, Plaintiff may call any of the persons listed in response to these interrogatories. Plaintiff reserves the right to supplement this response.

**INTERROGATORY NO. 4:** Please identify each person whom you expect to call as an expert witness at the trial of this case, and for each such person, provide the information listed in I.R.C.P. 26(b)(4)(A)(1)(i)-(ii).

**RESPONSE TO INTERROGATORY NO. 4:** Plaintiff objects to this Interrogatory No. 4 to the extent that it is premature and supplants the scheduling order issued by the Court. Plaintiff reserves the right to supplement this response.

**INTERROGATORY NO. 5:** Please identify any and all contracts between you and Farm Supply relating to the Spill. For each such contract provide the date and place the contract was executed, the individuals executing them, all terms and conditions of the contract, the persons with knowledge or information concerning the contract, and describe all documents that relate or refer to the contract.

**RESPONSE TO INTERROGATORY NO. 5:** Defendant hired H2O to conduct environmental remediation services in response to spill at a gas station. Pursuant to the agreement between the parties, H2O performed the services requested and cleaned the spill. Defendant has paid some, but not all of the charges for those services. Plaintiff is unaware of any written contract for remediation services executed by both parties.

**INTERROGATORY NO. 6:** Please state whether you, or any of your representatives, had any discussions or negotiations with Farm Supply or its representatives at any time on or after July 12, 2014, concerning the terms of any contract between the Plaintiff and Farm Supply regarding remediation services for the Spill at issue in this case. For each discussion or negotiation, state:

- a. the date of each discussion or negotiation;
- b. the place of each discussion or negotiation;

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 4**

- c. the name and address of each participant;
- d. the matters discussed;
- e. any decisions or agreements reached; and
- f. whether any written record was made of any discussion or negotiation.

**RESPONSE TO INTERROGATORY NO. 6:** Plaintiff states that Steven King had several discussions with representative(s) of Farm Supply on or after July 12, 2014, regarding remediation services for the Spill and payment for those services. The precise date of these discussions is presently unknown

**INTERROGATORY NO. 7:** State whether you have received any written communication pertaining to the matters involved in this action from any non-party individual, agency, or entity having knowledge of the issues involved in this matter, and, if so, state:

- a. the date of each written communication;
- b. the contents of each written communication; and
- c. the full name and address of each and every person from whom and to whom each written communication was received.

**RESPONSE TO INTERROGATORY NO. 7:** Plaintiff states that Steven King may have received written communication via email from the following representatives of non-party entities during the time period from the date of the Spill to the filing of this lawsuit, however at this point Plaintiff has been unable to locate any communication from the agencies;

Timothy Morgan of the Ada County High Way District

Mark Vankleek of the Idaho Department of Environmental Quality

Kathryn Johnson of Vertex (Please see documents bates numbered H2O 001-004 and 092-096)

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 5**

Please refer to Plaintiff's response to Interrogatory No. 2 above for a description of the contents of each written communication. The precise dates of each written communication is presently unknown. Plaintiff reserves the right to supplement this response.

**INTERROGATORY NO. 8:** Have you, your agents, your investigators, or anyone acting on your behalf interviewed or obtained from you or any other person, including the Defendant, statements of any kind, with or without the knowledge of the person making the statement, relating to the issues involved in this action, whether written, recorded, stenographically transcribed, oral or otherwise? If so, please identify and describe each such person and each such statement.

**RESPONSE TO INTERROGATORY NO. 8:** None.

**INTERROGATORY NO. 9:** If you have been a litigant in any other litigation, at any time, whether civil, bankruptcy, administrative, or otherwise, please identify and describe your involvement. To provide a complete response, please include in your response the name and address of each and every court wherein any related action was filed; an identification of the parties to any related proceedings; an identification of the number assigned to any related litigation; an identification of the attorneys for all parties; and a description generally of what the matter consisted of and the disposition thereof.

**RESPONSE TO INTERROGATORY NO. 9:** Plaintiff objects to this Interrogatory No. 9 on the grounds that a request regarding "any other litigation" regardless of type, topic or location "at any time" without any sort of temporal restriction is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

**INTERROGATORY NO. 10:** Please identify and describe all documents, items, exhibits, photographs, or things you intend to offer into evidence at the trial of this action.

**RESPONSE TO INTERROGATORY NO. 10:** Plaintiff objects to this Interrogatory No. 10 to the extent that it is premature and supplants the scheduling order issued by the Court. Plaintiff reserves the right to supplement this response.

**INTERROGATORY NO. 11:** Please identify each and every person (including, but not limited to, attorneys, investigators, expert witnesses, agents, or employees) who investigated, on your behalf, any of the facts or circumstances relating to this action, or who participated in providing the services for which you seek compensation, setting the rates for these.

**RESPONSE TO INTERROGATORY NO. 11:** Plaintiff has not hired any investigators. Expert witness disclosures will conform to the Court's scheduling order. Plaintiff has hired attorneys of the law firm of Fisher Rainey Hudson. Agents and employees of H2O presently known with knowledge of the facts relating to this action are listed in response to Interrogatory No. 2 above. The individuals presently known to H2O who participated in providing the services for which H2O seeks compensation are listed in response to Interrogatory No. 2 above. H2O's rates are primarily set by CEO John Bradley and President Greg Scyphers.

**INTERROGATORY NO. 12:** With respect to your answer to Request for Admission No. 3, if your response is anything others than an unconditional admission, please state:

- a. The date of all communications or discussions;
- b. The place of each discussion or communication
- c. The full name of each and every person with whom Plaintiff's rates were discussed;

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 7**

- d. The substance of any oral or written communication regarding Plaintiff's rates; and
- e. Any decisions or agreements reached.

**RESPONSE TO INTERROGATORY NO. 12:** Upon further investigation, Plaintiff revises its response to Request for Admission No. 3 from "Denied" to "Admitted".

**INTERROGATORY NO. 13:** With respect to your answers to Request for Admission No. 4, if your response is anything other than an unconditional admission, please state:

- a. The date the Fee Schedule was provided
- b. The substance of any oral or written communications regarding the Fee Schedule; and
- c. The full name of each and every person who was provided a Fee Schedule.

**RESPONSE TO INTERROGATORY NO. 13:** Upon further investigation, Plaintiff revises its response to Request for Admission No. 4 from "Denied" to "Admitted".

**REQUEST FOR PRODUCTION NO. 1:** Please produce any and all reports, documents, notes, memoranda, letters, audio tapes, video tapes, original color photographs, and any other materials prepared by or relied upon by the person or persons you expect to call as an expert witness in this action, and please produce a current curriculum vitae for each expert witness you intend to call to testify at the trial of this action.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 1:** Plaintiff objects to this Request for Production No. 1 to the extent that it is premature and supplants the scheduling order issued by the Court. Plaintiff reserves the right to supplement this response.

**REQUEST FOR PRODUCTION NO 2:** Please produce all documents, contracts, records, reports, notes, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 5 above, or relating to the substance of Interrogatory No. 5.

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 8**



**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:** Please see documents bates numbered H2O 005-012.

**REQUEST FOR PRODUCTION NO. 3:** Please produce all documents, contracts, records, reports, notes, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 6 above, or relating to the substance of Interrogatory No. 6.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:** None.

**REQUEST FOR PRODUCTION NO. 4:** Please produce all documents, contracts, records, reports, notes, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 7 above, or relating to the substance of Interrogatory No. 7.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:** None. Plaintiff reserves the right to supplement this response.

**REQUEST FOR PRODUCTION NO. 5:** Please produce all documents, contracts, records, reports, notes, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 8 above, or relating to the substance of Interrogatory No. 8.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 5:** None.

**REQUEST FOR PRODUCTION NO. 6:** Please produce all documents, contracts, records, reports, notes, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 9 above, or relating to the substance of Interrogatory No. 9.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:** None.

**REQUEST FOR PRODUCTION NO. 7:** Please produce all documents, items, exhibits, photographs, or things you may offer into evidence at the trial of this action, including all those identified in response to Interrogatory No. 10, above.

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 9**

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:** Plaintiff objects to this Request for Production No. 7 to the extent that it is premature and supplants the scheduling order issued by the Court. Plaintiff reserves the right to supplement this response.

**REQUEST FOR PRODUCTION NO. 8:** Please produce all documents, contracts, records, reports, notes, communications, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 12 above, or relating to the substance of Interrogatory No. 12.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:** None.

**REQUEST FOR PRODUCTION NO. 9:** Please produce all documents, contracts, records, reports, notes, communications, or other tangible materials you identified or relied upon in your Answer to Interrogatory No. 13 above, or relating to the substance of Interrogatory No. 13.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:** None.

**REQUEST FOR PRODUCTION NO. 10:** Please produce all documents including, but not limited to, contracts, specifications, fee agreements, letters, invoices, receipts, time sheets, or other items of a tangible nature which you have provided to or received from the Defendant, Vertex, or Zurich North America.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 10:** Please see documents bates numbered H2O 005-069 and 072-090, 097, 101-103.

**REQUEST FOR PRODUCTION NO. 11:** Please produce all documents including, but not limited to, contracts, letters, billings or other items of a tangible nature that you have provided to or received from any other person or entity who provided labor, materials, or otherwise worked on the Spill.

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 10**

**RESPONSE TO REQUEST FOR PRODUCTION NO. 11:** Documents bates numbered H2O 001-113.

**REQUEST FOR PRODUCTION NO. 12:** Please produce all documents in your possession which are or may be relevant to any of the facts, circumstances, allegations, and/or defenses set forth in the pleadings on file in this matter.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 12:** Please see documents bates numbered H2O 001-004 and 070-071.

**REQUEST FOR PRODUCTION NO. 13:** Produce all documents relating or pertaining in any way to the Spill which is the subject matter of this litigation or your involvement with the Spill. Such documents shall include the following: photographs, drawings, files, records, reports, letters, transmittals, submittals, correspondence, memoranda, minutes, emails, recordings, purchase orders, contracts, agreements, statements, invoices, logs, calendars, schedules, time sheets, drawings, plans, specifications, sketches, maps, shop drawings, estimates, calculations, budgets, bids, change orders, proposed change orders, requests for information, manuals, test results, appointment books, telephone call records and logs, notes, notebooks, invoices, trip tickets, diaries, reports, notations, files, shipping manifests, bills of lading, organizational charts, policy statements, procedures, instructions, guidelines, charts, diagrams, indices and/or chronological listings of documents which relate to the Spill.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 13:** Please see documents bates numbered H2O 001-113. Plaintiff reserves the right to supplement its response.

**REQUEST FOR ADMISSION NO. 3:** Please admit that you did not discuss the rates to be charged for Plaintiff's remediation services with any representatives of Defendant Farm Supply before providing the remediation services on the Spill.

**PLAINTIFF'S RESPONSES TO DEFENDANT FARM SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 11**

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 12 as part of a supplemental response to discovery.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admitted.

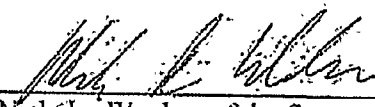
REQUEST FOR ADMISSION NO. 4: Please admit that you did not provide a Fee Schedule to Defendant Farm Supply or its representative before you provided remediation services on the Spill.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Denied. The basis for Plaintiff's denial will be provided in response to Interrogatory No. 13 as part of a supplemental response to discovery.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 4: Admitted.

DATED this 30 day of June, 2015.

FISHER RAINEY HUDSON

  
\_\_\_\_\_  
Nicholas Warden, of the firm  
Attorney for Plaintiff

# **EXHIBIT B**

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

H2O ENVIRONMENTAL, INC., an Idaho )  
Corporation, )  
Plaintiff, )

vs. ) Case No. CV OC 1500236

FARM SUPPLY DISTRIBUTORS, INC., an )  
Oregon corporation, )  
Defendant. )

\_\_\_\_\_ )

I.R.C.P. 30(B)(6) DEPOSITION OF H2O ENVIRONMENTAL, INC.

TESTIMONY OF STEVEN KING

AUGUST 17, 2015

REPORTED BY:

MONICA M. ARCHULETA, CSR NO. 471

NOTARY PUBLIC

1 Q. And on the next page this appears to be an  
2 e-mail from you to Ms. Johnsen dated August 13. And it  
3 appears you are replying to a few of the items she has  
4 requested. At the end you say, you know, I've got to  
5 address the other ones tomorrow morning. I'll get back  
6 to you.

7 A. Yes.

8 Q. Does this appear to be an e-mail that you did  
9 send out on August 13?

10 A. Yes.

11 Q. Do you recall sending that e-mail out?

12 A. Yes.

13 Q. On the next page is another e-mail. This one  
14 dated August 14. It appears to be from you to Ms.  
15 Johnsen. And the summary is you appear to be responding  
16 to a few of her additional questions from her initial  
17 e-mail on August 11. Is that a correct summary of this  
18 e-mail?

19 A. Yes.

20 Q. Do you recall sending this e-mail?

21 A. Yes.

22 Q. And does this appear to be an authentic  
23 representation of that e-mail?

24 A. Yes.

25 Q. So if you would go back to your affidavit,

1 which is Exhibit 1. In Paragraph 5 you testify, "Prior  
2 to completing cleanup of the spill I submitted a copy of  
3 H2O's standard fee schedule, a true and correct copy of  
4 which is attached hereto as Exhibit A to Defendant."

5 Do you still contend that that is a correct statement?

6 A. Yeah. They got a copy of that fee schedule.

7 Q. When did they get it?

8 A. Probably on or about the 16th.

9 Q. How was it sent? And who was it sent to?

10 A. It would have been sent by e-mail. Or,  
11 actually, let's see. Nichole probably sent this. If  
12 she didn't, I did.

13 Q. I'll tell you I don't have an e-mail that  
14 shows you or Nichole sending anyone a fee schedule.

15 A. Okay.

16 Q. So --

17 A. A fee schedule was not denied.

18 Q. That wasn't my question. I'm trying to find  
19 out when a fee schedule was sent. And who sent it. And  
20 sent to who.

21 A. Okay.

22 Q. So you think it was sent by e-mail?

23 A. Um-hmm.

24 Q. You are not sure who sent it; is that correct?

25 A. No. Well, let's see, was it requested by me?



1 Was that one of the requests that was in here? I think  
2 Nichole sent this to Farm Supply with the first invoice.

3 Q. What makes you think that?

4 A. Because it is kind of standard policy of what  
5 we would do.

6 Q. Is it standard policy to send invoices by  
7 e-mail?

8 A. Yes, it is. And we usually follow it up with  
9 mail.

10 Q. Is it standard process to send invoices dated  
11 after the date they are sent? For example, would it be  
12 standard process to send an invoice dated July 18 on  
13 July 16?

14 Q. It is possible if it was a Friday and didn't  
15 go right out in the mail on Friday. It could have sat  
16 until Saturday or Monday.

17 Q. I'm asking the reverse. Is it possible that  
18 an invoice with a date on it of July 18 is actually sent  
19 two days before that date on July 16? Is that standard  
20 procedure?

21 A. I would say I don't know. Because I wouldn't  
22 be the one sending it.

23 Q. But you do know some of the standard  
24 procedures related to sending invoices?

25 A. Some of them, yes.

1 Q. And can you explain why, if it is standard  
2 procedure, to send invoices by e-mail? The one e-mail  
3 we have from Ms. Simmons with an invoice attached  
4 doesn't appear to have a fee schedule attached.

5 A. Okay.

6 Q. Is that standard procedure?

7 A. I would say probably not.

8 Q. Can you still state with certainty that you  
9 submitted a copy of H2O standard fee schedule to Farm  
10 Supply?

11 MR. WARDEN: Objection. Counsel, you have  
12 asked this several times. He has answered it several  
13 times. Go ahead and answer it to the extent that you  
14 can.

15 THE WITNESS: I just don't recall at this  
16 point.

17 Q. (BY MR. LYON) Paragraph 6 of your affidavit  
18 states, "On more than one occasion during the cleanup I  
19 submitted invoices to the Defendant for work H2O had  
20 done in order to clean up the fuel spill."

21 A. I submitted invoices -- that is probably  
22 incorrect. I would have submitted field work orders.

23 Q. And who would you submit those work orders to?

24 A. Probably Nichole. Or I would have them  
25 proofed through Joe Wickenden.

1 Q. It sounds to me like you submit those work  
2 orders to someone internally within H20, who then  
3 generally generates invoices based on those?

4 A. That's correct. But they would have showed me  
5 that invoice and I probably would have gone back through  
6 the work order before I said yes, send that.

7 Q. Paragraph 7 of your affidavit, "The first such  
8 invoice, a true and correct copy of which is attached  
9 hereto as Exhibit B, was submitted to Farm Supply on or  
10 about July 16."

11 It is my understanding from your testimony  
12 that Exhibit B, the invoice attached as Exhibit B, if  
13 you would please take a look at that, is the invoice  
14 that was actually submitted to Farm Supply or Ms.  
15 Johnsen on August 4; is that correct?

16 A. That's possible that it was sent August 4.

17 Q. And I'll tell you why I ask that and see if  
18 you can confirm. So if you -- I'm looking at your  
19 affidavit. And the invoice attached to your affidavit.  
20 Which is the last couple of pages. So if you look  
21 at kind of coming from the bottom we have Roto-Rooter  
22 services. And on the quantity you have applied 1.2. Or  
23 H20 as has applied 1.2. Is that correct?

24 A. Yes.

25 Q. Then if we go to Exhibit 2. And this is the

1 e-mail chain. And included in that e-mail chain is --  
2 and I'm looking at pages Bates numbers H20 100. And  
3 then the invoice behind that.

4 A. Okay.

5 Q. So for invoice 3501 dated 7-18, and if we look  
6 at the Roto-Rooter Jetter Services, the quantity is also  
7 1.2.

8 A. That is correct.

9 Q. And I believe you testified that this 3501  
10 invoice starts on H20 101. That is the invoice attached  
11 to your August 4 e-mail where you were saying, "Hey, we  
12 have the wrong rate. I'm sending you a new invoice."

13 A. Yeah, this was the corrected rate.

14 Q. And so Paragraph 7 of your affidavit where you  
15 say Exhibit B was submitted to Farm Supply on July 16,  
16 is that a correct statement after having reviewed these  
17 invoices?

18 MR. WARDEN: I apologize. I think this  
19 confusion is actually our office's fault. Exhibit B  
20 appears to be a copy of the corrected invoice sent on  
21 August 4 rather than the original that was sent prior to  
22 that. So I apologize.

23 Q. (BY MR. LYON) So, Mr. King, is Paragraph 7 a  
24 correct statement? Paragraph 7 of your affidavit? I'm  
25 sorry.

1           A. Let's find out. I believe to the best of my  
2 knowledge that is a correct statement.

3           Q. Even though that is the invoice that was  
4 attached to your August 4 e-mail where you state, "Hey,  
5 I'm submitting you this new invoice"?

6           A. Maybe.

7           Q. So you are just not sure about Paragraph 7?

8           A. No, I am not sure. There was two initial  
9 invoices created. And one was corrected.

10          Q. So the first version of that 3501 invoice that  
11 went out had an incorrect charge on it; is that correct?

12          A. That's correct.

13          Q. So is Paragraph 8 of your affidavit where you  
14 state, "The charges contained in the invoices were  
15 consistent with the prices contained in the fee  
16 schedule," is that a correct statement?

17          A. Which one?

18          Q. Paragraph 8 of your affidavit.

19          A. Okay.

20          Q. And, again, Paragraph 8 states, "The charges  
21 contained in the invoices were consistent with the  
22 prices contained in the fee schedule." Is that a  
23 correct statement?

24          A. For the most part, yes.

25          Q. But not completely?

1 do you have any other relationship of any sort right now  
2 with H20?

3 A. No.

4 Q. And what are the current terms of you being  
5 here to testify on behalf of H20?

6 A. There is no terms. They are not paying me.  
7 I'm not billing them. This was my project. I felt  
8 compelled to see this project through.

9 Q. So it is my understanding you have been  
10 identified as the representative -- or the designee,  
11 rather, of H20 to speak on three specific topics. Did  
12 you attempt to determine what knowledge H20 has on the  
13 three topics that I understand you have been designated  
14 to testify to? And let me -- I'll go through each one  
15 independently rather than try to combine it all  
16 together.

17 A. Okay.

18 Q. So did you do any research at H20 regarding  
19 all information concerning the work performed on the job  
20 at issue in this case, including how the scope of the  
21 work was determined, who participated in that process,  
22 the work actually performed, and the equipment/personnel  
23 used to perform the work?

24 MR. WARDEN: I'm going to object to the form  
25 of the question. Go ahead and answer if you can.

1 THE WITNESS: Yes.

2 Q. (BY MR. LYON) What did you do to investigate  
3 that?

4 A. Oh, no, I have not investigated that since I  
5 have left H20.

6 Q. Do you have any knowledge beyond just your  
7 personal knowledge related to topic number two?

8 A. I have no knowledge; no.

9 Q. Did you speak with anyone within H20 about the  
10 information included in topic number two?

11 A. No.

12 Q. Did you request that all documents related to  
13 number two be provided to you to take a look at?

14 A. There has been no request; no. Not from me.

15 MR. WARDEN: Objection to form. Number two is  
16 not a request for production of documents.

17 Q. (BY MR. LYON) And that is not my question.  
18 My question is, did you, in your capacity as the  
19 designee for H20, designated to testify today on behalf  
20 of H20 as to topic number two, did you go to H20 and  
21 say, "I want to look at all of the documents we've got  
22 responsive to this"?

23 A. No, I did not.

24 Q. And category number three in the notice of  
25 deposition, did you investigate any information H20 has

1 regarding category number three? And I'll read that.

2 "All information related to invoicing for the job at  
3 issue in this case, including the content of the  
4 invoices, when they were sent, the manner in which they  
5 were sent, preparation of the invoices and payment  
6 thereof."

7 A. No, I have not.

8 Q. Did you make a request to H20 to review all of  
9 the documents they might have responsive to that  
10 category?

11 A. No, I did not.

12 Q. Did you --

13 MR. WARDEN: Same objection. No. 3 is not a  
14 request for production.

15 Q. (BY MR. LYON) Did you speak with anyone at  
16 H20 to see if anyone had any knowledge regarding  
17 category number three? And, I'm sorry, I'm referring to  
18 category number three in the Notice of Deposition.

19 A. No, I haven't talked to anybody about that.

20 Q. Did you do anything to prepare -- to become  
21 familiar with the knowledge that H20 has regarding  
22 category number three in the 30(b)(6) Notice of  
23 Deposition to H20?

24 A. Other than meeting with --

25 Q. And I will stop you right there. I don't want



1 to know anything about discussions you had with counsel.  
2 I'm not trying to get into that. Anything outside of  
3 discussions you've had with H20's attorneys?

4 A. No.

5 Q. And category number five. And, again, I'm  
6 referring to category number five in the Notice of  
7 Deposition to H20. "All communications with anyone  
8 other than their attorney regarding the need for spill  
9 remediation at issue in this case, the scope of work,  
10 the charges or pricing for work to be performed, the  
11 charges or pricing for work already performed, and any  
12 agreement or dispute regarding any of the foregoing."

13 MR. WARDEN: I'm going to jump and object and  
14 clarify for the record that Mr. King is not the designee  
15 for all topics addressed by topic number five.

16 Mr. Wickenden will be responding to the portion of -- so  
17 to the extent number five goes to the content of the fee  
18 schedule, or the reasonableness of those charges, then I  
19 would ask Mr. King's testimony be restricted to that.

20 Q. (BY MR. LYON) With the exception of what  
21 counsel just stated did you do anything to determine  
22 what information or knowledge H20 has regarding topic  
23 number five?

24 A. No.

25 Q. Did you speak with anyone at H20 to see if

1 they had documents that might provide information about  
2 knowledge or information H20 might have about category  
3 number five?

4 A. I never requested any documentation from H20  
5 on this matter.

6 Q. Did you speak with anyone at H20 at any time  
7 about determining what they know about category number  
8 five?

9 A. I would have to say no.

10 Q. So it is my understanding that besides your  
11 personal knowledge you have done nothing to familiarize  
12 yourself with any additional knowledge or information  
13 H20 might have regarding the three topics we just went  
14 over in the notice?

15 A. I got most of this information today. I  
16 reviewed it before coming here. Other than that I know  
17 my cell phone is gone. I know my e-mail is gone. So  
18 there was no reason to ask H20 for any of this.

19 MR. LYON: Let's take a quick break and go off  
20 the record.

21 (Recess.)

22 MR. LYON: We are back on the record after a  
23 short recess. Counsel and I have agreed that we will  
24 continue Mr. King's deposition as to his personal  
25 knowledge. We have discussed the issue of whether H20

# **EXHIBIT C**

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF ADA

x Case No. CVOC-2015-236

H2O ENVIRONMENTAL, INC., an Idaho Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC., an Oregon corporation,

Defendant.

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

Held on February 3, 2016, before

Judge Patricia Young, Magistrate Court

Reported by Dianne E. Cromwell CSR No. 21

APPEARANCES

FOR PLAINTIFF

Vaughn Fisher and Nicholas A. Warden FISHER RAINEY HUDSON 950 W Bannock St, Ste 630 Boise, ID 83702 Tel: (208) 345-7000 Fax: (208) 514-1900 vauhn@ftriallawyers.com naw@ftriallawyers.com

FOR DEFENDANT

Hans A. Mitchell CAREY PERKINS, LLP 300 N 6th St, Ste 200 PO Box 519 Boise, ID 83701-0519 Tel: (208) 345-8600 Fax: (208) 345-8660 hamitchell@careyperkins.com

\*\*\*\*\*

INDEX

Table with 2 columns: Description and Page number. Includes Plaintiff rested (96), Defense moved for directed verdict (97), Plaintiff response (104), Court's ruling (110), Plaintiff's request to revisit motion in limine (184), Court ruling (184), Defense rested (216), Motion for directed verdict (219), Court's ruling (219).

PLAINTIFFS WITNESSES

PAGE:

Table with 2 columns: Name and Page number. Includes BRADLEY, John (Direct Examination by Mr. Fisher: 29, Cross Examination by Mr. Mitchell: 63, Redirect Examination by Mr. Fisher: 82, Examination by the Court: 218), SIMMONS, Craig (Direct Examination by Mr. Fisher: 14), WILLIS, John Craig (Direct Examination by Mr. Fisher: 86).

DEFENSE WITNESSES

PAGE:

Table with 2 columns: Name and Page number. Includes MICELI, Christopher (Direct Examination by Mr. Mitchell: 111, Cross Examination by Mr. Fisher: 170, Redirect Examination by Mr. Mitchell: 212).

\*\*\*\*\*

STIPULATED EXHIBITS

- 1 Facsimile from Farm Supply to H2O dated 7-14-14 (H2O 091)....
2 Email from Johnson to King dated 7-16-14.....
3 Email from Simmons to Johnson dated 7-18-14 with attachment...
4 Email from Simmons to King dated 7-22-14 (H2O 098).....
5 Email from King to Farm Supply dated 7-24-14 with attachments
6 Email from King to Farm Supply dated 7-25-14 with attachments
7 Email from Wickenden to Johnson dated 7-30-14 with attachments
8 Email from Johnson to Wichenden dated 7-30-14 with attachments
9 Email from King to Johnson dated 8-4-14 with attachment.....
10 Email from Simmons to Johnson dated 8-11-14 with attachment...
11 Email from Johnson to King dated 8-11-14.....
12 Email from King to Johnson dated 8-13-14 2:12 p.m. with attachments
13 Email from King to Johnson dated 8-13-14 4:52 p.m. with attachments
14 Email from King to Johnson dated 8-14-14 with attachment....
15 Email from Sayre to Johnson dated 9-26-14 with attachment...
16 Email from Fisher to Johnson dated 10-22-14 with attachment...
17 Email from Miceli to Fisher dated 10-23-14 with attachments...
18 Email from Fisher to Miceli dated 10-24-14.....
19 3501 and 3741 invoices with strikeouts (H2O 072 to 078).....
20 Zurich check (H2o 089 to 090).....
21 Chris Miceli curriculum vitae (Exhibit 1 to defendant's expert witness disclosure)
22 Chris Miceli report spreadsheet of reasonable and disputed charges (Exhibit 2 to defendant's expert witness disclosure)
23 Aerial photograph of site of spill.....
24 Photographs of scene of accident (11 photographs).....

\*\*\*\*\*

1 that the very first time that the defendant ever  
2 said why was when their consultant issued an  
3 expert disclosure September 9 of 2015. Some 13  
4 months after they said the rates were too high was  
5 the first time they ever said why.

6 There's two claims in this case,  
7 Your Honor. The first one is for breach of an  
8 express contract. There is going to be evidence  
9 at trial that an express contract existed and that  
10 it was an express oral contract. And there was  
11 originally a pleading that there was an express  
12 written contract, and I think that that came from  
13 the client's course of dealing that no written  
14 contract was ever turned up during course of  
15 discovery or this case. So we're not going to  
16 find a signed written contract.

17 But we do think there's going to be a  
18 lot of evidence of an express oral contract and  
19 that all the elements will be met, that there was  
20 a meeting of the minds, that there was full  
21 performance, et cetera.

22 There may be some dispute as to whether  
23 or not the essential term of how much would be  
24 paid was part of that express oral contract.  
25 However, we provided the court with ample case law

# **EXHIBIT D**

Hans A. Mitchell, ISB No. 5565  
Jessica E. Pollack, ISB No. 8700  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

OFFER OF JUDGMENT

TO: PLAINTIFF and its Attorneys of Record:

Pursuant to Rule 68 of the Idaho Rules of Civil Procedure, Defendant Farm Supply Distributors, Inc., by and through its attorneys of record, Carey Perkins LLP, hereby offers to allow judgment to be taken against Farm Supply Distributors, Inc. in the amount of TWO THOUSAND AND NO/100 DOLLARS (\$2,000.00). The amount set forth herein includes any attorney fees allowable by contract or law and costs incurred to date. This Offer of Judgment is made for the purpose specified in Rule 68 and is not to be construed

as an admission that said Defendant is liable in this action or that the Plaintiff has suffered any damage.

DATED this 27<sup>th</sup> day of April, 2015.

CAREY PERKINS LLP

By /s/  
Jessica E. Pollack, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of April, 2015, I served a true and correct copy of the foregoing OFFER OF JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

/s/

Jessica E. Pollack



# **EXHIBIT E**

## Aubrey Lyon

---

**From:** Vaughn Fisher <vaughn@frhtriallawyers.com>  
**Sent:** Tuesday, September 08, 2015 9:41 AM  
**To:** Aubrey Lyon; dprice2@adaweb.net  
**Cc:** Hans Mitchell; naw@frhtriallawyers.com  
**Subject:** RE: H2O Environmental Inc. vs. Farm Supply Distributors Inc. - CVOC1500236 Mediation

Thanks Aubrey. To be more precise, we agreed to mediate, we agreed to use the mediator defendant wanted and we agreed to provide dates. My client wanted to know whether defendant's insurance carrier would have the adjuster present at the mediation. They were waiting for an answer regarding whether an insurance adjuster would be physically present like my client before deciding whether to ask the court if it would require it.

Do you have an answer as to whether the adjuster will be physically present in Boise at the mediation they wanted to have? If we can get an answer to that question, then we may be able to dispense with the hearing.

Thanks,

Vaughn



**Vaughn Fisher**  
Attorney  
Fisher Rainey Hudson  
a: 950 W. Bannock St., Suite 630, Boise, ID 83702  
p: (208) 345-7000  
f: (208) 514-1900  
e: [vaughn@frhtriallawyers.com](mailto:vaughn@frhtriallawyers.com)

This message contains information which may be confidential and privileged and has been sent solely for the use of the intended recipient. If you are not the intended recipient, you may not use, copy or disclose to anyone, by any means, the message or any information contained in the message. If you have received this message in error, please immediately notify the sender by reply e-mail and then delete the message.

---

**From:** Aubrey Lyon [<mailto:adlyon@careyperkins.com>]  
**Sent:** Tuesday, September 8, 2015 9:35 AM  
**To:** [dprice2@adaweb.net](mailto:dprice2@adaweb.net)  
**Cc:** Hans Mitchell <[hamitchell@careyperkins.com](mailto:hamitchell@careyperkins.com)>; [vaughn@frhtriallawyers.com](mailto:vaughn@frhtriallawyers.com); [naw@frhtriallawyers.com](mailto:naw@frhtriallawyers.com)  
**Subject:** RE: H2O Environmental Inc. vs. Farm Supply Distributors Inc. - CVOC1500236 Mediation

Ms. Price:

We attempted with Mr. Fisher last week to set a mediation where we, along with a representative from our client, would be personally present. Unfortunately Mr. Fisher has indicated that was not acceptable and that he wished

to discuss the matter with the Court at the conference set for this week. We would love to get a mediation set as soon as possible.

Very truly yours,

Aubrey D. Lyon  
Carey Perkins LLP  
300 North 6th Street, Suite 200  
P.O. Box 519  
Boise, Idaho 83701-0519  
Telephone (208)345-8600  
Facsimile (208)345-8660  
[adlyon@careyperkins.com](mailto:adlyon@careyperkins.com)

Carey Perkins LLP, [www.careyperkins.com](http://www.careyperkins.com), has offices in Boise and Idaho Falls, Idaho, and has attorneys admitted to practice in Idaho, Oregon, Washington, and Wyoming.

CONFIDENTIALITY NOTICE: This e-mail is intended only for the personal and confidential use of the individual(s) named as recipients and is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2521. It may contain information that is privileged, confidential and/or protected from disclosure under applicable law including, but not limited to, the attorney-client privilege and/or work product doctrine. If you have received this e-mail in error, please notify the sender and delete this message from your computer. Do not deliver, distribute or copy this transmission, disclose its contents or take any action in reliance on the information it contains.

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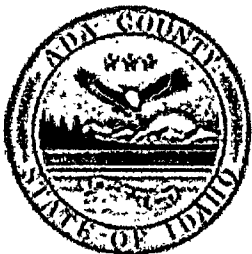
**From:** Deirdre Price [<mailto:dprice2@adaweb.net>]  
**Sent:** Tuesday, September 08, 2015 9:01 AM  
**To:** Marshall Martinez; [jennifer@frhtriallawyers.com](mailto:jennifer@frhtriallawyers.com)  
**Subject:** H2O Environmental Inc. vs. Farm Supply Distributors Inc. - CVOC1500236 Mediation

Good Morning,

I was just checking to see if Mediation has been set up on the above case?

Thank you.

**Deirdre Price**  
**In Court Clerk for**  
**Judge Patricia Young and Judge Roger Cockerille**  
**200 W. Front St., Boise, ID 83702**  
**(208) 287-7495, (208) 287-7487**



# EXHIBIT F

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyons, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

OFFER OF JUDGMENT

TO: PLAINTIFF and its Attorneys of Record:

Pursuant to Rule 68 of the Idaho Rules of Civil Procedure, Defendant Farm Supply Distributors, Inc., by and through its attorneys of record, Carey Perkins LLP, hereby offers to allow judgment to be taken against Farm Supply Distributors, Inc. in the amount of SEVEN THOUSAND THREE HUNDRED FIFTY-FOUR AND 65/100 DOLLARS (\$7,354.65). The amount set forth herein is inclusive of any attorney fees allowable by contract or law and costs incurred to date. This Offer of Judgment is made for the purpose

specified in Rule 68 and is not to be construed as an admission that said Defendant is liable in this action or that the Plaintiff has suffered any damage.

DATED this 23<sup>rd</sup> day of October, 2015.

CAREY PERKINS LLP

By /s/  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of October, 2015, I served a true and correct copy of the foregoing OFFER OF JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

/s/  
Aubrey D. Lyon

# **EXHIBIT G**



**FISHER RAINEY HUDSON**

May 8, 2015

Jessica Pollack  
Carey Perkins, LLP  
Capitol Park Plaza  
300 N. 6th St., Ste. 200  
P.O. Box 519  
Boise, Idaho 83701-0519

Sent via fax

RE: H2O v. FSD – Motion for Protective Order

Dear Jessica,

I am writing in response to the motion for protective order, pursuant to Rule 37(a)(2) and in a good faith effort to resolve a discovery dispute without court intervention.

- As I stated in my April 21, 2015, email we are agreeable to having the deposition in Enterprise. I am uncertain why you believe this is still an issue.
- As to items 3, 4, and 5 on the 30(b)(6) deposition notice, we are content to receive that information in response to written discovery and will prepare the appropriate interrogatories.
- The crux of this matter is your client's obligation to appoint a designee to answer items 1 and 2 on the 30(b)(6) deposition notice. Your client has refused to pay the charges based, we believe, upon the insurance company's (or its expert Vertex's) assessment the charges were unreasonable. If there is some other reason your client has refused to meet its contractual obligations then please let me know.
- Otherwise, the information from its insurance company is "reasonably available" to your client as contemplated by the rule. As well, your client may "appoint other persons who consent to testify on its behalf" to respond to our notice. Since your client is relying on the insurance company and its expert as a



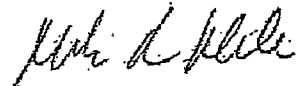
justification for not paying the invoice, then your client has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify.

This is a good faith effort to resolve a discovery dispute. We also believe this two item 30(b)(6) deposition is the most efficient way to conduct the limited discovery necessary to prepare this case for trial. Please withdraw your motion and work with us to schedule the 30(b)(6) deposition for items 1 and 2 in Enterprise, OR.

Also, if your client is not relying on the insurance company and its expert, then please tell us why it is not paying the invoice. In your motion your client makes an admission that it, "has no knowledge regarding the reasonableness of the amount charged by Plaintiff..." If that is the case and your client is not relying on the information reasonably available to it from its insurance carrier, then there appears to be no good faith basis for your client's decision to continue this litigation and summary judgment is appropriate.

I look forward to hearing from you.

Best regards,



Nick Warden

# CAREY PERKINS LLP

E. B. SMITH (1896-1975)  
LESLIE S. BROWN  
DONALD F. CAREY\*  
MARISA S. CRECELIUS  
WILLIAM K. FLETCHER  
DAVID W. KNOTTS  
AUBREY D. LYON  
BRUCE R. McALLISTER  
HANS A. MITCHELL  
DAVID S. PERKINS  
CARSTEN A. PETERSON  
JESSICA E. POLLACK  
WILLIAM G. POPE  
LINDSEY R. ROMANKIW  
DINA L. SALLAK  
RICHARD L. STUBBS  
TRACY L. WRIGHT

ATTORNEYS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH 6<sup>TH</sup> STREET, SUITE 200  
P. O. BOX 519  
BOISE, IDAHO 83701-0519  
TELEPHONE (208) 345-8600  
FACSIMILE (208) 345-8660  
www.careyperkins.com  
email: info@careyperkins.com

OFFICES IN  
IDAHO FALLS, IDAHO 83405-1388  
980 PIER VIEW DRIVE, SUITE B  
P. O. BOX 51388  
TELEPHONE (208) 529-0000  
FACSIMILE (208) 529-0005

WITH ATTORNEYS ADMITTED  
TO PRACTICE LAW IN  
IDAHO, OREGON, UTAH,  
WASHINGTON AND WYOMING

\*ADMITTED TO PRACTICE IN  
IDAHO AND WYOMING

May 15, 2015

## VIA FACSIMILE

Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702

Re: ***H2O Environmental, Inc. vs. Farm Supply Distributors, Inc.***  
Case No.: CV-OC-1500236  
Our File No.: 1004/26-987

Dear Nick:

Thank you for your letter of May 8. We welcome your efforts to reach a mutually agreeable solution regarding your proposed Rule 30(b)(6) deposition. We will be happy to withdraw our Motion for Protective Order if we are able to find a mutually agreeable solution. We will not set the Motion for hearing unless, and until, an impasse is reached.

With regard to the location of the deposition, it was a bit unclear whether this issue was resolved based on your April 23 e-mail stating "I will go ahead and notice the deposition for a date, time and place of my choosing." That was the reason the location issue was included in our Motion for Protective Order. Based on your May 8 letter, we will consider that issue resolved.

Based on your letter, H2O will conduct written discovery regarding the subjects identified in paragraphs 3, 4, and 5 of your proposed 30(b)(6) deposition, which narrows the scope of topics for your proposed Rule 30(b)(6) deposition to those identified in paragraphs 1 and 2. As you know, Rule 30(b)(6) obligates Farm Supply to designate a person or persons who can testify regarding matters that are discoverable and within its "corporate knowledge." If the information sought by paragraphs 1 and 2 is motivated by the

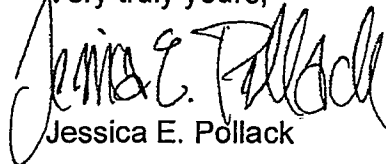
Nicholas A. Warden  
FISHER RAINEY HUDSON  
May 15, 2015  
Page 2

affirmative defense in paragraph 4 of Farm Supply's Answer, it may be possible to designate a deponent that can testify regarding facts known or reasonably obtainable by Farm Supply pertaining to that defense. However, as written, these proposed deposition topics seek much more than facts known or knowable by Farm Supply—they also seem to seek information that would constitute an expert opinion not known or reasonably obtainable by Farm Supply, or a legal opinion, which is protected from discovery.

As discussed in our Motion for Protective Order, Farm Supply is not a fuel remediation company and does not have independent corporate knowledge of what may constitute "reasonable" remediation charges or the "validity and accuracy" of H2O's own invoices. Any facts that support Farm Supply's fourth affirmative defense were gathered and shared with Farm Supply by our law firm. Thus, we are concerned that your proposed line of inquiry will overlap with topics protected by the attorney-client privilege and work-product doctrine. If Farm Supply were to designate an officer, director, or managing agent on those topics, without any narrowing or refining of the scope, Farm Supply risks being found in violation of its duty to designate. This is the reason for the motion for protective order—we wish to avoid any surprises or disappointment, by either party, associated with a proposed 30(b)(6) deposition of Farm Supply. Not to mention either side unnecessarily incurring attorney fees. We will, of course, designate experts in due course.

In the meantime, if your proposed deposition topics can be narrowed to account for the concerns discussed above and focus on factual discovery, which is the intended use of a 30(b)(6) deposition, we will be happy to withdraw our Motion and work with you to schedule the requested deposition. Please feel free to contact me if you would like to discuss these matters in further detail.

Very truly yours,



Jessica E. Pollack

JEP:nn

000430

# CAREY PERKINS LLP

E. B. SMITH (1896-1975)  
LESLIE S. BROWN  
DONALD F. CAREY\*  
MARISA S. CRECELIUS  
WILLIAM K. FLETCHER  
DAVID W. KNOTTS  
AUBREY D. LYON  
BRUCE R. McALLISTER  
HANS A. MITCHELL  
DAVID S. PERKINS  
CARSTEN A. PETERSON  
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TELEPHONE (208) 345-8600  
FACSIMILE (208) 345-8660  
www.careyperkins.com  
email: info@careyperkins.com

OFFICES IN  
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P. O. BOX 51388  
TELEPHONE (208) 529-0000  
FACSIMILE (208) 529-0005

WITH ATTORNEYS ADMITTED  
TO PRACTICE LAW IN  
IDAHO, OREGON, UTAH,  
WASHINGTON AND WYOMING

\*ADMITTED TO PRACTICE IN  
IDAHO AND WYOMING

June 9, 2015

## VIA FACSIMILE

Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702

Re: ***H2O Environmental, Inc. vs. Farm Supply Distributors, Inc.***  
Case No.: CV-OC-1500236  
Our File No.: 1004/26-987

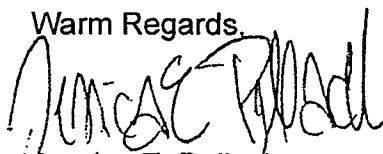
Dear Nick:

Based on your explanation and further clarification in your May 29 letter regarding the scope of your proposed deposition topics, we feel we are able to select a designee to testify on behalf of Farm Supply. Farm Supply's designee will prepare to testify regarding the two topics identified in your deposition notice, as those topics are clarified in your letter. However, pursuant to our previous conversations on this issue, I believe you are aware that the facts known or reasonably available to Farm Supply on these topics is quite limited.

In speaking with my client, it appears Farm Supply's designee for the Rule 30(b)(6) deposition has a scheduling conflict on June 24. Therefore, if it works with your schedule, I propose that the deposition be reset for 10:00 a.m. PST on June 30. Furthermore, Farm Supply's office does not have a conference room, but I am told there may be suitable space available at the courthouse in Enterprise, the chamber of commerce, or one of the local hotels. I have no preference regarding which of these locations you choose.

Please let me know whether you are available on June 30.

Warm Regards,



Jessica E. Pollack

JEP:nn

000431

# EXHIBIT H

From: "Vaughn Fisher" <vaughn@frhtriallawyers.com>  
To: "Erin Brewer" <erin.brewer@zurichna.com>  
Cc: "Ed Savre" <esavre@envcleanup.com>, "John Bradley" <john@envcleanup.com>  
Date: 10/29/2014 05:25 PM  
Subject: Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

---

Thanks for the email Erin.

Again, to ensure no confusion, you informed me that Zurich would be making no further payments and you left no impression whatsoever that my client would be paid, regardless of any ongoing dialogue. I also told you my client had a contract to be paid those rates, my client can prove the rates are reasonable and if you had an objection, it should have been raised prior to the work being performed. My client and your consultant continue to disagree on whether my client agreed to the reduced payment. You have provided me with no evidence that H2O agreed to the reduced rates on other files.

If you wanted to pay the people helping Farm Supply Distributors a lower rate, you should have voiced the objection prior to the commencement of the work.

I remain open to continuing discussions with you and I will be happy to receive any of the information you have promised. However, my client intends to sue Farm Supply Distributors for breach of contract, prejudgment interest and attorney fees because you said my client would not be paid on the remainder of the invoice.

Thanks,  
Vaughn

**From:** Erin Brewer  
**Sent:** Wednesday, October 29, 2014 6:29 AM  
**To:** vaughn@frhtriallawyers.com  
**Cc:** Ed Savre ; John Bradley  
**Subject:** Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Good Morning Mr. Fisher:

Please allow this correspondence to confirm that you are choosing to close our dialogue by filing suit after I advised you that I would request from Vertex their supporting documentation to show that the rates charged by H2O are unreasonable and inconsistent with what is used in the industry. In addition, as I stated to you previously, H2O has not only agreed to the rates on this claim, but they have agreed to the same rates on other claims that they have worked with Zurich in the past. Please forward me a copy of all court documents that are filed.

Sincerely,

Erin L. Brewer, J.D.

Environmental Claims Specialist  
Zurich North America  
P.O. Box 4034

000433

Schaumburg, Illinois 60168  
Phone: (847) 605-6900  
Fax: (888) 515-1452  
[erin.brewer@zurichna.com](mailto:erin.brewer@zurichna.com)

From: "Vaughn Fisher" <[vaughn@frhtriallawyers.com](mailto:vaughn@frhtriallawyers.com)>  
To: "Erin Brewer" <[erin.brewer@zurichna.com](mailto:erin.brewer@zurichna.com)>  
Cc: "John Bradley" <[john@envcleanup.com](mailto:john@envcleanup.com)>, "Ed Savre" <[esavre@envcleanup.com](mailto:esavre@envcleanup.com)>  
Date: 10/28/2014 04:10 PM  
Subject: Re: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

---

Hi Erin:

Thanks for the email and thanks for taking the time to speak with me yesterday. For the record, I want to confirm that H2O never agreed to a reduction of its invoice beyond the one described in my letter to Vertex. Secondly, H2O's rates are reasonable and consistent with the market. Vertex was unable to produce any document, studies or other data indicating the rates Vertex "recommended" were based upon anything other than Vertex' arbitrary opinion. Finally, and most saliently, your insured signed a contract at those rates and no one from Farm Supply Distributors or Zurich ever complained of or challenged the rates until well after the work was done.

I want to finally confirm that Zurich has been put on notice that its insured, Farm Supply Distributors, will be sued for the remaining amount of the invoices, that Zurich is aware its insured will be sued and that Zurich has been notified that its inactions are the reason its insured is going to be sued.

If you have any questions, please feel free to contact me.

Sincerely,  
Vaughn

From: [Erin Brewer](mailto:Erin.Brewer@zurichna.com)  
Sent: Monday, October 27, 2014 2:52 PM  
To: [vaughn@frhtriallawyers.com](mailto:vaughn@frhtriallawyers.com)  
Subject: Zurich Claim No. 4120003656: Insured: Farm Supply Distributors; Boise, ID; VERTEX No. 29964

Good Afternoon Mr. Fisher:

Pursuant to our telephone conference, please find my contact information below. Should you have any questions or concerns, feel free to contact me at any time.

Sincerely,

Erin L. Brewer, J.D.

Environmental Claims Specialist

000434

Zurich North America  
P.O. Box 4034  
Schaumburg, Illinois 60168  
Phone: (847) 605-6900  
Fax: (888) 515-1452  
[erin.brewer@zurichna.com](mailto:erin.brewer@zurichna.com)

\*\*\*\*\* PLEASE NOTE \*\*\*\*\*

This message, along with any attachments, may be confidential or legally privileged. It is intended only for the named person(s), who is/are the only authorized recipients. If this message has reached you in error, kindly destroy it without review and notify the sender immediately. Thank you for your help.

\*\*\*\*\* PLEASE NOTE \*\*\*\*\*

This message, along with any attachments, may be confidential or legally privileged. It is intended only for the named person(s), who is/are the only authorized recipients. If this message has reached you in error, kindly destroy it without review and notify the sender immediately. Thank you for your help.

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# EXHIBIT I

Vaughn Fisher, ISB No. 7624  
 Nicholas A. Warden, ISB No. 9179  
 FISHER RAINEY HUDSON  
 950 W. Bannock St., Ste. 630  
 Boise, ID 83702  
 Email: vaughn@frhtriallawyers.com  
 Email: naw@frhtriallawyers.com  
 Telephone: (208) 345-7000  
 Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
 Corporation,  
 Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
 an Oregon corporation  
 Defendant.

Case No. CV OC 1500236

**PLAINTIFF'S FIRST SUPPLEMENTAL  
 RESPONSE TO DEFENDANT FARM  
 SUPPLY'S FIRST SET OF  
 INTERROGATORIES, REQUESTS FOR  
 ADMISSION AND REQUESTS FOR  
 PRODUCTION OF DOCUMENTS TO  
 PLAINTIFF**

**INTERROGATORY NO. 5:** Please identify any and all contracts between you and Farm Supply relating to the Spill. For each such contract provide the date and place the contract was executed, the individuals executing them, all terms and conditions of the contract, the persons with knowledge or information concerning the contract, and describe all documents that relate or refer to the contract.

**RESPONSE TO INTERROGATORY NO. 5:** Defendant hired H2O to conduct environmental remediation services in response to spill at a gas station. Pursuant to the

**PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT FARM  
 SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND  
 REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 1**

agreement between the parties, H2O performed the services requested and cleaned the spill. Defendant has paid some, but not all of the charges for those services. Plaintiff is unaware of any written contract for remediation services executed by both parties.

**FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:**

Plaintiff objects to Interrogatory No. 5 on the grounds that the request is vague as to the meaning of "executed." Subject to and without waiving this objection, Plaintiff responds as follows. Defendant entered into a contract with H2O for professional services in response to a spill at a gas station. The price of those services is contained in H2O's standard fee schedule. The fee schedule was sent to Defendant by Steven King sometime prior to completion of the clean up. It is Steven King's common practice to send a copy of H2O's fee schedule with the first invoice. The first invoice was sent on or around July 16, 2014. The terms of the fee schedule were ratified by Defendant when they received the fee schedule and invoices reflecting the prices contained in the fee schedule and voiced no objection for the duration of the clean up. The persons with knowledge or information concerning the contract presently known to the Plaintiff are Steven King, John Bradley, Ed Savre, and any representatives of the Defendant, the Defendant's insurance carrier, or the consulting company hired by the Defendant's insurance carrier to review the costs of work performed who received a copy of the fee schedule or the invoices. The documents that relate or refer to the contract are the fee schedule, the invoices, and communications between those with knowledge containing or referring to the fee schedule, the invoices, or the contents of either. To the extent "executed" means signed and delivered, H2O maintains no contract executed by both parties exists. To the extent "executed" means performed by the parties, H2O responds that the "date and place the contract was executed" was the period during which H2O conducted clean up of the spill at Defendant's request.

**PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT FARM  
SUPPLY'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND  
REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 2**

**INTERROGATORY NO. 6:** Please state whether you, or any of your representatives, had any discussions or negotiations with Farm Supply or its representatives at any time on or after July 12, 2014, concerning the terms of any contract between the Plaintiff and Farm Supply regarding remediation services for the Spill at issue in this case. For each discussion or negotiation, state:

- a. the date of each discussion or negotiation;
- b. the place of each discussion or negotiation;
- c. the name and address of each participant;
- d. the matters discussed;
- e. any decisions or agreements reached; and
- f. whether any written record was made of any discussion or negotiation.

**RESPONSE TO INTERROGATORY NO. 6:** Plaintiff states that Steven King had several discussions with representative(s) of Farm Supply on or after July 12, 2014, regarding remediation services for the Spill and payment for those services. The precise date of these discussions is presently unknown

**FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6:**

The Interrogatory addresses “discussions or negotiations” between the parties concerning the terms of the contract. H2O’s response to Interrogatory No. 6 addresses “discussions” between the parties.

Plaintiff objects to Interrogatory No. 6 on the grounds that it is vague as to the meaning of “negotiations.” There were no terms of the agreement to be bargained for or a dispute between the parties to be resolved or settled. On July 12, 2014 Defendant contacted H2O and informed it of the spill. Defendant then asked H2O to clean up the spill and H2O agreed. H2O

**PLAINTIFF’S FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT FARM SUPPLY’S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 3**

cleaned up the spill pursuant to that agreement. To the extent this falls within the meaning of "negotiations" as used by Defendant, H2O identifies this communication on July 12, 2014 as responsive to Interrogatory No. 6.

DATED this 6 day of August, 2015.

FISHER RAINEY HUDSON



Nicholas Warden, of the firm  
Attorney for Plaintiff

RECEIVED

JUN 27 2016

Ada County Clerk

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

JUL 05 2016

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE PRICE  
DEPUTY

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

ORDER ON PLAINTIFF'S MOTION  
FOR COSTS AND FEES

THIS MATTER, came before the Court on Plaintiff's Motion for Costs and Attorney Fees June 22, 2016. Plaintiff appeared by and through its counsel of record, Vaughn Fisher. Defendant appeared by and through its counsel of record, Hans A. Mitchell.

WHEREFORE, having reviewed the materials and heard oral argument, this Court finds that Plaintiff was the prevailing party in this matter within the meaning of I.R.C.P. 54(d)(1)(B). However, for the reasons set forth in Defendant's Response in

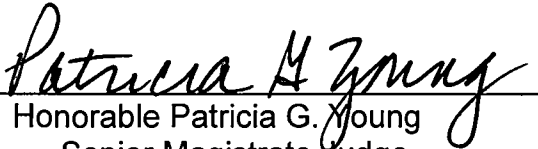


Opposition to Plaintiff's Motion for Costs and Fees and the Affidavit of Hans A. Mitchell in Opposition to Plaintiff's Motion for Costs and Fees, which are incorporated herein by reference, as well as the reasons identified on the record at the hearing, this Court finds:

1. That only a portion of Plaintiff's attorney fees were reasonably incurred;
2. That none of the discretionary costs sought by Plaintiff were necessary and exceptional costs reasonably incurred;
3. That Plaintiff is entitled to those costs as a matter of right set forth in its Memorandum in Support of Motion for Cost's and Attorney Fees.

Accordingly, Plaintiff is awarded costs as a matter of right in the amount of **\$1,525.53** and, for the foregoing reasons, Plaintiff is awarded attorney fees in the amount of **\$7,354.65**.

DATED this 29 day of June, 2016.

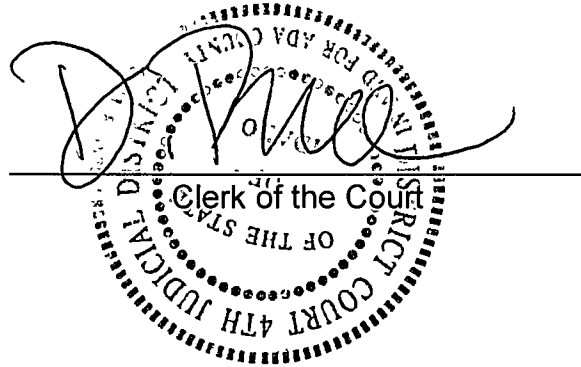
  
Honorable Patricia G. Young  
Senior Magistrate Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~11th~~ <sup>5th</sup> day of June, 2016, I served a true and correct copy of the foregoing ORDER ON PLAINTIFF'S MOTION FOR COSTS AND FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

|                                             |                                     |                            |
|---------------------------------------------|-------------------------------------|----------------------------|
| Hans A. Mitchell                            | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Aubrey D. Lyon                              | <input type="checkbox"/>            | Hand-Delivered             |
| CAREY PERKINS LLP                           | <input type="checkbox"/>            | Overnight Mail             |
| Capitol Park Plaza                          | <input type="checkbox"/>            | Facsimile (208) 345-8660   |
| 300 North 6 <sup>th</sup> Street, Suite 200 |                                     |                            |
| P. O. Box 519                               |                                     |                            |
| Boise, Idaho 83701                          |                                     |                            |
| Telephone: (208) 345-8600                   |                                     |                            |
| <i>Attorneys for Defendant</i>              |                                     |                            |





NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

AUG 01 2013

CHRISTOPHER D. RICH, Clerk  
By SARAH TAYLOR  
DEPUTY

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallywers.com  
Email: naw@frhtriallywers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

**NO TRANSCRIPT  
REQUESTED**

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**NOTICE OF APPEAL TO  
DISTRICT COURT**

TO: THE ABOVE NAMED RESPONDENT, Farm Supply Distributors, Inc., AND THE PARTY'S ATTORNEYS Hans A. Mitchell, Carey Perkins, LLP., 300 N. 6<sup>th</sup> St., Ste. 200, Boise, ID 83702, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant H2O Environmental, Inc., appeals against the above named respondent from the Magistrate Division of the District Court for the Fourth

Judicial District of the State of Idaho to the District Court for the Fourth Judicial District of the State of Idaho.

2. Appellant appeals from the Order on Plaintiff's Motion for Costs and Fees (entered on July 5, 2016), Honorable Judge Patricia G. Young presiding.

3. This appeal is taken on matters of law and fact.

4. The testimony and proceeding of the original trial were recorded by audiotape at the time of the trial, February 3, 2016. The audiotape was subsequently transcribed by Dianne E. Cromwell and the transcript was submitted to the Court on February 24, 2016.

5. The proceeding on the on the Motion for Costs and Fees was recorded by audiotape at the time of the hearing, June 22, 2016. The audiotape was subsequently transcribed by Vanessa M. Starr and the transcript was submitted to the Court on July 25, 2016.

6. That the party has a right to appeal to the District Court of the Fourth Judicial District of the State of Idaho, and the order described in Paragraph 2 above is appealable under and pursuant to Rule 11(a)(7) I.A.R.

7. A preliminary statement of the issues which the appellant intends to assert in the appeal:

- a. The Magistrate Court erred in deciding arbitrarily both before and after the trial that the reasonable attorney fees for the prevailing party would be limited to the amount in controversy, despite the Court's determination that respondent failed to produce any evidence refuting appellants claim.

8. I certify:

- a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested—Not Applicable.
- b. That the clerk of the district court has been paid the estimated fee for the preparation of the reporter's transcript—Not Applicable.
- c. That the estimated fee for preparation of the clerk's record has been paid.

DATED this 1<sup>st</sup> day of August, 2016.

FISHER RAINEY HUDSON

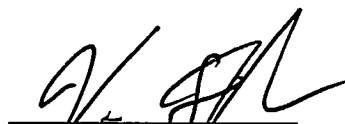
  
\_\_\_\_\_  
Vaughn Fisher  
*Attorney for Plaintiff*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of August, 2016, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

  
\_\_\_\_\_  
Vaughn Fisher

JUL 05 2016

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE PRICE  
DEPUTY

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,  
  
Plaintiff,  
  
vs.  
  
FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation  
  
Defendant.

Case No. CV OC 1500236

ORDER ON PLAINTIFF'S MOTION  
FOR COSTS AND FEES

THIS MATTER, came before the Court on Plaintiff's Motion for Costs and Attorney Fees June 22, 2016. Plaintiff appeared by and through its counsel of record, Vaughn Fisher. Defendant appeared by and through its counsel of record, Hans A. Mitchell.

WHEREFORE, having reviewed the materials and heard oral argument, this Court finds that Plaintiff was the prevailing party in this matter within the meaning of I.R.C.P. 54(d)(1)(B). However, for the reasons set forth in Defendant's Response in

Opposition to Plaintiff's Motion for Costs and Fees and the Affidavit of Hans A. Mitchell in Opposition to Plaintiff's Motion for Costs and Fees, which are incorporated herein by reference, as well as the reasons identified on the record at the hearing, this Court finds:

1. That only a portion of Plaintiff's attorney fees were reasonably incurred;
2. That none of the discretionary costs sought by Plaintiff were necessary and exceptional costs reasonably incurred;
3. That Plaintiff is entitled to those costs as a matter of right set forth in its Memorandum in Support of Motion for Cost's and Attorney Fees.

Accordingly, Plaintiff is awarded costs as a matter of right in the amount of **\$1,525.53** and, for the foregoing reasons, Plaintiff is awarded attorney fees in the amount of **\$7,354.65**.

DATED this 29<sup>th</sup> day of June, 2016.

**PATRICIA YOUNG**

---

Honorable Patricia G. Young  
Senior Magistrate Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~JUL 05 2016~~ day of June, 2016, I served a true and correct copy of the foregoing ORDER ON PLAINTIFF'S MOTION FOR COSTS AND FEES by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                 |                                     |                            |
|---------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                   | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden              | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON            | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630 | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702              |                                     |                            |
| Telephone: (208) 345-7000       |                                     |                            |
| <i>Attorneys for Plaintiff</i>  |                                     |                            |

|                                             |                                     |                            |
|---------------------------------------------|-------------------------------------|----------------------------|
| Hans A. Mitchell                            | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Aubrey D. Lyon                              | <input type="checkbox"/>            | Hand-Delivered             |
| CAREY PERKINS LLP                           | <input type="checkbox"/>            | Overnight Mail             |
| Capitol Park Plaza                          | <input type="checkbox"/>            | Facsimile (208) 345-8660   |
| 300 North 6 <sup>th</sup> Street, Suite 200 |                                     |                            |
| P. O. Box 519                               |                                     |                            |
| Boise, Idaho 83701                          |                                     |                            |
| Telephone: (208) 345-8600                   |                                     |                            |
| <i>Attorneys for Defendant</i>              |                                     |                            |

DEIRDRE PRICE

\_\_\_\_\_  
Clerk of the Court

**SEAL**

SEP 12 2016

CHRISTOPHER D. RICH, Clerk  
By KATRINA HOLDEN  
DEPUTY

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff/Appellant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Appellant

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

**APPELLANT'S BRIEF**

**APPELLANT'S BRIEF**

CV - OC - 2015 - 236  
BRFF  
Brief Filed  
129895



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## I. STATEMENT OF THE CASE

This legal dispute began when Defendant Farm Supply Distributors’ (“Farm Supply”) insurance company disputed the reasonableness of the rates charged by Plaintiff H2O Environmental, Inc. (“H2O”) for environmental cleanup work it had already performed. This case, the discovery, and the trial were always about the reasonableness of the rates charged by H2O. After the trial, the Magistrate Court made extensive findings of fact and determined the testimony of Farm Supply’s rate expert, Mr. Miceli, was not credible and not probative. H2O was awarded a judgment for the total amount it sought (\$7,354.64).

The Magistrate Court then determined H2O was the prevailing party, but limited H2O’s recovery of attorney fees to \$7,354.64. The attorney fees award was an arbitrary, predetermined amount of attorney fees that the Magistrate Court reached by focusing on a single factor—the amount in controversy. Further, the Magistrate Court improperly relied on settlement conduct and made findings in support of the award of fees that were unsupported by substantial and competent evidence. For all of these reasons the Magistrate Court abused its discretion and the award of \$7,354.64 in attorney fees should be vacated and replaced with an award of the actual, reasonable attorney fees and costs incurred.

## II. STATEMENT OF FACTS

On July 12, 2014, a truck owned by Farm Supply spilled fuel at a Maverick gas station in Boise, ID. Findings of Fact and Conclusions of Law (“FOF”), filed March 30, 2016, ¶ 1. Local authorities informed Farm Supply they needed to dispatch a HAZMAT team to clean up the spill and Farm Supply hired H2O for the job. *Id.* at ¶¶ 1-3. The initial response was completed by July 16, 2014, and Farm Supply thought H2O did a tremendous job. *Id.* at ¶ 4. The final work was completed on August 4, 2014. *Id.*

**A. Miceli and Vertex dispute the reasonableness of H2O's rates**

H2O sent its first invoice and supporting documentation to Farm Supply on July 18, 2014. *Id.* at ¶ 5. On July 30, 2014, a company called Vertex<sup>1</sup> (hired by Farm Supply's insurance company) emailed a spreadsheet to H2O objecting to the reasonableness of several of H2O's charges. *Id.* at ¶ 6; *see* Trial Ex. 8. Ultimately, Farm Supply, through Vertex, disputed charges for \$7,354.64 from two invoices totaling \$45,828.19. *Id.* at ¶ 10; *see* Trial Ex. 17. The only dispute ever articulated by Farm Supply and Vertex in this matter was the reasonableness of the rates charged by H2O. *See*, FOF at ¶¶ 20-21.

**B. H2O tries to get basis for the rate dispute prior to litigation**

On October 22, 2014, counsel for H2O sent a letter to Vertex advising them that H2O's inquiries regarding the discrepancy of \$7,354.64 have gone unanswered and explaining that if not paid the balance due, H2O would initiate a lawsuit "for breach of contract for the unpaid balance."<sup>2</sup> Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine ("Fisher Aff."), filed November 10, 2015, Ex. D. Mr. Miceli responded on behalf of Vertex and directed H2O's counsel to the spreadsheets which disputed the reasonableness of the charges, but provided no information regarding why the charges were alleged to be unreasonable. *Id.* at Ex. E. On October 24, 2014, Plaintiff's counsel responded explaining that, "H2O's rates are reasonable, competitive and based on the actual market."<sup>3</sup> *Id.* at Ex. G. The correspondence implored Mr. Miceli to reassess his position and to contact Plaintiff's counsel to discuss the matter further. *Id.* at Ex. G. On October 28 and 29, 2014, Plaintiff's counsel had a series of emails with Farm Supply's insurance company reiterating that "H2O's rates are reasonable and consistent with the market. Vertex was unable to

---

<sup>1</sup> Vertex is the same company that Mr. Miceli (Farm Supply's rate expert) works for and he is copied on the email.

<sup>2</sup> At trial H2O prevailed on a theory of breach of contract for the unpaid balance of \$7,354.64.

<sup>3</sup> The Magistrate Court reached the same conclusion after fifteen months of litigation.

produce any document, studies, or other data indicating the rates Vertex “recommended” were based upon anything other than Vertex’s arbitrary opinion.”<sup>4</sup> *Id.* at Ex. H.

Unable to get Farm Supply or its insurer to pay the remaining \$7,354.64 and unable to get an explanation as to why its rates were unreasonable, H2O filed this lawsuit on January 8, 2015, seeking \$7,354.64 for breach of contract. *See* Complaint.

**C. H2O tries to get basis for rate dispute through litigation**

Farm Supply filed its Answer and Demand for Jury Trial (“Answer”) on February 4, 2015. In paragraph five of its Answer, Farm Supply denied that it entered into a contract with H2O. Farm Supply’s fourth of seven affirmative defenses claimed that “Plaintiff has been fully compensated for the reasonable value of goods or services provided.”<sup>5</sup> Answer, p. 4.

On April 15, 2015, H2O attempted to get to the bottom of Farm Supply’s challenge to its rates by requesting a corporate deposition pursuant to Rule 30(b)(6). Fisher Aff., Ex. I. Instead of appointing someone to explain why it claimed H2O’s rates were unreasonable, Farm Supply filed a motion for protective order complaining, amongst other things, that “...Farm Supply has no knowledge regarding the reasonableness of the amount charged by Plaintiff H2O Environmental for fuel remediation services.” Motion for Protective Order Regarding Plaintiff’s Notice of Deposition Pursuant to Rule 30(b)(6), filed April 28, 2015, ¶ 4.<sup>6</sup>

Nonetheless, H2O tried its best to work through the issues presented in the motion for protective order by moving the deposition to Enterprise, OR and reforming and narrowing the proposed deposition topics. Fisher Aff., at ¶¶ 10-12, Exs. I, J, K. H2O’s counsel sent

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<sup>4</sup> The rates “recommended” in October 2014 did turn out to be Vertex’s arbitrary opinion as Mr. Miceli testified at trial that it was not until August 2015 (nine months later) that he procured the information used to attempt to justify the recommended rates.

<sup>5</sup> Since Farm Supply at no time challenged the scope or quality of work, the reasonableness must refer to the rates.

<sup>6</sup> Rule 11 would require the signer of Farm Supply’s answer to have based the reasonability challenge on evidentiary support, which would be available to Farm Supply.

correspondence on May 8, 2015, in a good faith effort to resolve the issue and find out why Farm Supply disputed the reasonableness of its rates. *Id.* at Ex. J. H2O's counsel pointed out that the basis of Farm Supply's defense—Mr. Miceli's opinion—was “reasonably available” to Farm Supply as set forth in Rule 30(b)(6) and that Farm Supply need not appoint someone from the company but instead could appoint other persons who consent to testify on their behalf. *Id.*

Since your client is relying on the insurance company and its expert as a justification for not paying the invoice, then your client has information reasonably available to it and should appoint the most appropriate person from the insurance company or its expert to testify.

*Id.*

On May 29, 2015, H2O's counsel continued to try to learn why Farm Supply challenged the reasonableness of H2O's rates, again reminding Farm Supply of its duty to appoint someone that could explain why Farm Supply claimed the rates were unreasonable. *Id.* at Ex. K. The letter stated in the most direct terms: “... we seek information regarding the facts that serve as the basis for your claim that what H2O charged Farm Supply was unreasonable.” *Id.* H2O's counsel also pleaded that, “(Farm Supply) cooperate with us to complete this short deposition so that we can get this \$9,000 dispute resolved quickly.” *Id.*

At the deposition, Greg Willis, owner, CEO and 30(b)(6) designee of Farm Supply testified that Farm Supply had no basis to contest whether H2O charged a reasonable amount for the services that it provided. *See* Affidavit of Nicholas A. Warden in Support of Motion in Limine, filed August 25, 2015, Ex. 4.

Still having not disclosed its reasons for contesting the reasonableness of the rates charged by H2O, Farm Supply filed a summary judgment motion on July 9, 2015, arguing there was no enforceable contract between the parties. *See*, Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 4-6. On August 25, 2015, H2O filed a Motion in Limine requesting

an order barring Farm Supply from introducing its, thus far, undisclosed evidence regarding the reasonableness of the rates charged by H2O. *See* Motion in Limine. The next day the Magistrate Court entered an Order Denying Defendant's Motion for Summary Judgment.

**D. Farm Supply discloses its basis for disputing the rates**

On September 9, 2015, more than 13 months after Farm Supply's insurance company's consultant first contested the rates charged by H2O, Mr. Miceli was "disclosed" as a testifying expert.<sup>7</sup> *See* Defendant Farm Supply Distributors, Inc.'s Expert Witness Disclosure. On December 3, 2015, the Magistrate Court entered an order permitting Mr. Miceli's testimony, but also permitting Plaintiff to offer rebuttal opinion evidence. *See* Order Re: Motions in Limine, filed December 3, 2015. On December 3, 2015, Farm Supply filed a motion to preclude H2O from offering expert rebuttal testimony, essentially asking the Magistrate Court to reverse that portion of its December 3, 2015, Order permitting H2O to rebut the last-minute Miceli disclosure. *See*, Defendant Farm Supply Distributors, Inc.'s Motion to Exclude Experts. Also on December 3, 2015, the Magistrate Court granted Plaintiff's motion to amend the Complaint to seek a claim for unjust enrichment alternatively to its claim to enforce an express contract. *See*, Order Granting Leave to Amend.

On January 27, 2016, the Magistrate Court granted the motion to exclude H2O's expert testimony, essentially reversing the second portion of its Order Re: Motions in Limine which permitted H2O to rebut Mr. Miceli's late-disclosed opinion regarding the reasonableness of H2O's rates. Order Granting Defendant's Motion to Exclude Plaintiff's Expert Witnesses. H2O then

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<sup>7</sup> Pursuant to the June 18, 2015, Order Governing Proceedings and Setting Trial this was the last day to disclose an expert and the last day to conduct discovery.

sought an Order barring Mr. Miceli from testifying<sup>8</sup> or having the Court reconsider its decision not to let H2O rebut the testimony. Motion to Exclude the Testimony of Christopher Miceli or to Reconsider Order Granting Motion to Exclude Witnesses, filed January 28, 2016. That motion was denied and a trial was held on February 3, 2016. Order Granting Defendant's Motion to Exclude Plaintiff's Expert Witness.

**E. Trial results**

On March 30, 2015, the Magistrate Court entered 15 pages of Findings of Fact and Conclusions of Law, seven pages of which were devoted to evidence regarding the reasonableness of the rates charge by H2O. *See*, FOF, pp. 4-10. In its conclusions, the Court determined that:

H2O has provided evidence of the reasonable rate customarily charged for emergency response services in the Boise market in 2014 and that evidence is consistent with the rates it charged Farm Supply.

*Id.* at ¶ 17. The Court also found that:

In response, Farm Supply produced only the testimony of Mr. Miceli to refute H2O's claims regarding the reasonableness of the rates they charged in Boise in 2014. However, Mr. Miceli demonstrated absolutely no knowledge of the 2014 Boise market. He attempted to rely on rate sheets from companies based in locations with no proximity to Boise. For several, he did not know the location of the city from which they operated. He also used rate sheets from years other than 2014 and was uncertain in some cases whether he was using rates that were emergency response.

*Id.* at ¶¶ 30-35.

Further, Mr. Miceli admitted that he was aware of at least one company that provided emergency response services in Boise in 2014, Clean Harbors, but that he did not know why he failed to try to get their rate sheet. He also failed to get rate sheets for the other cities where H2O had bases and failed to search the hundreds of files

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<sup>8</sup> H2O argued that Farm Supply had Mr. Miceli reasonably available to appoint to respond to H2O's Rule 30(b)(6) deposition regarding the reasonableness of H2O's rates but, in a clear act of gamesmanship, withheld disclosing him until the last day of discovery.



available to him from other Vertex jobs to try to locate rate sheets for Idaho or any of the other state where H2O has bases.

*Id.* at ¶¶ 39-42.

Mr. Miceli's testimony was not probative and was not credible.

*Id.* at p. 14.

The Court finds for Plaintiff on Count One of its First Amended Complaint for breach of an express oral contract. In so doing, the Court finds that H2O has demonstrated by a preponderance of the evidence that the rates in its two invoices were reasonable rates for the Boise market for 2014.

*Id.* at p. 15.

#### **F. Attorney Fees**

On April 19, 2016, the Magistrate Court entered judgment against Farm Supply for the full amount claimed, \$7,354.64, plus interest in the amount of \$597.32. *See* Judgment. On May 2, 2016, H2O moved for its costs and attorney fees pursuant to I.C. §§ 12-120(3) and 12-121 requesting \$55,924.46. *See* Memorandum in Support of Motion for Costs and Attorney's Fees.

The Magistrate Court held oral argument on the motion on June 22, 2016, and ruled without hearing argument from counsel. *See* Transcript of Audio-Recorded Proceedings, June 22, 2016 ("June 22 Transcript"), filed July 25, 2016. During the hearing the Magistrate Court stated that "...I obviously was very persuaded and found in favor of H2O and that you did a very nice job. That I modified only minutely on the findings of fact that in the trial for me, clearly proved that you did the work and your fees were reasonable." June 22 Transcript, p. 2, L. 11-16.

The Magistrate Court chose not to award the amount of fees requested, but instead limited the award of fees to the amount in controversy. The Judge stated, "I find it amazing that you didn't settle." *Id.* at p. 2, L. 9-10. "I sort of feel like I have a bit of a track record of doing that, of getting cases resolved before they go to trial. And in my court they don't turn into attorney fees cases.

You were a rare one that did. But I do not find a basis to award more than what was in dispute.”  
*Id.* at p. 4, L. 6-11.

The Magistrate Court then awarded \$7,354.65 in attorney fees and \$1,525.53 in costs as a matter of right. *See* Order on Plaintiff’s Motion for Costs and Fees (“Order re: Costs and Fees”), filed July 5, 2016, p. 2. The Magistrate Court made no specific findings regarding the reasonableness of any specific actions or charges, but instead incorporated by reference the entirety of Defendant’s opposition papers, including many points which are not supported by the record and which are directly contradictory to the Magistrate Court’s explicit and implicit findings. *Id.* For the following reasons, the Magistrate Court’s Order on Plaintiff’s Motion for Costs and Attorney Fees must be reversed.

### III. ISSUES PRESENTED ON APPEAL

- a. **Did the Magistrate Court abuse its discretion by limiting H2O’s recovery of attorney fees to the amount in controversy, which limitation it determined before hearing the merits of the case or receiving the attorney fees request?**
- b. **Did the Magistrate Court abuse its discretion by limiting H2O’s recovery of attorney fees to the amount in controversy because of its perception of the parties’ settlement conduct, where the Magistrate Court’s perception was not based on the admissible evidence in the record?**
- c. **Did the Magistrate Court abuse its discretion by limiting H2O’s recovery of attorney fees to the amount in controversy, where the Magistrate Court relied on reasoning regarding summary judgment, discovery and other pretrial behavior which is not supported by substantial and competent evidence?**

### IV. ATTORNEY FEES ON APPEAL

Appellant H2O requests an award of attorney’s fees on appeal pursuant to I.C. §§ 12-120(3) and 12-121. For a recitation of the standard for awarding attorney’s fees under I.C. §§ 12-120(3) and 12-121 please refer to Plaintiff’s Memorandum in Support of Motion for Costs and Fees, pages 4-5. This action is for a commercial transaction and the appellant was the prevailing party at trial.

In the event the appellant prevails on this appeal, it is entitled to an award of attorney's fees on appeal pursuant to I.C. § 12-120(3).

## V. STANDARD OF REVIEW

When a district judge considers an appeal from a magistrate judge (not involving a trial de novo), the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 596, 826 P.2d 1306, 1308 (1992). The district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court. Rule 83(f)(1). The district court is required to determine whether there is substantial evidence to support the magistrate's findings of fact and conclusions of law. *Hentges v. Hentges*, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct. App. 1988). If those findings are so supported, and if the conclusions of law demonstrate proper application of legal principles to the facts found, then the district court will affirm the magistrate's judgment. *Id.*

The calculation of reasonable attorney fees is within the discretion of the trial court. *Bates v. Seldin*, 146 Idaho 772, 775, 203 P.3d 702, 705 (2008); *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996). The burden is on the party opposing the award to demonstrate that the court abused its discretion. *E. Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 412, 987 P.2d 314, 324 (1999). In assessing whether an award of attorney fees was an abuse of discretion, the district court applies a three-factor test: 1) whether the trial court correctly perceived the issue as one of discretion; 2) whether the trial court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and 3) whether the trial court reached its decision by an exercise of reason. *Burns v. Baldwin*, 138 Idaho 480, 486-87, 65 P.3d 502, 508-09 (2003). The party opposing the award carries the burden to demonstrate that the district court abused its discretion. *Johannsen v. Utterbeck*, 146 Idaho 423,

432, 196 P.3d 341, 350 (2008) (citing *E. Idaho Agric. Credit Ass'n.*, 133 Idaho at 412, 987 P.2d at 324).

## VI. ARGUMENT

### A. **The Magistrate Court abused its discretion by predetermining that reasonable attorney fees could not exceed the amount in controversy.**

Judicial discretion “requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair, and just determination, and a knowledge of the facts upon which the discretion may properly operate.” *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 887, 664 P.2d 787, 794 (Ct. Ap. 1983) (Burnett, J. specially concurring) (citing 27 C.J.S. *Discretion* at 289 (1959)). In other words, the Court may not “pull the award of attorney’s fees out of thin air. Basing attorney’s fees on pure conjecture is inappropriate.” *Johannsen v. Utterbeck*, 146 Idaho 423, 433, 196 P.3d 341, 351 (2008) (holding the trial judge’s determination that the case was “about a \$10,000 project” constituted a failure to exercise reason in determining the amount of fees to be awarded).

In this case the Magistrate Court also awarded an arbitrary amount, based entirely on the amount in controversy.<sup>9</sup> The Court also made its decision prior to hearing the merits of the case and prior to hearing the attorney fees request. The Magistrate Court conceded as much adopting Farm Supply’s recitation of its previous admonition to the parties:

[a]lthough Plaintiff ultimately recovered the amount it sought, it did so only after . . . multiple advisories by the Court that it would find it very difficult to award more than the amount at issue in attorney fees . . . the amounts expended by Plaintiff . . . were expended in spite of this Court’s admonition, this factor weighs heavily against the recovery Plaintiff seeks.

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<sup>9</sup> This basis is but a portion of a single factor under Rule 54(e)(3).

Response in Opposition to Plaintiff's Motion for Costs and Fees, p. 10, incorporated by reference in the Court's Order re: Costs and Fees. The Magistrate Court reiterated its predetermined decision during the hearing on Plaintiff's motion for fees noting it had previously "indicated at some point of encouraging more settlement that it was going to be very hard for [the judge] to approve any fees more than the amount in dispute." June 22 Transcript, p. 2, L. 19-22.

It was an abuse of discretion for the Court to put so much emphasis on the amount in controversy. The trial court is required to consider the existence and applicability of each factor without placing undue weight or emphasis upon any one element. *Nalen v. Jenkins*, 113 Idaho 79, 81, 741 P.2d 366, 368 (Ct. Ap. 1987). Further, the Magistrate Court determined the amount of reasonable attorney fees prior to receiving the Rule 54(d)(5) memorandum of costs and fees and Rule 54(e)(5) affidavit. In *Medical Recovery Services, LLC v. Jones*, 145 Idaho 106, 175 P.3d 795 (Ct. App. 2007), the Idaho Court of Appeals stated that such a predetermination is improper.

Additionally, a trial court may not use the award or denial of attorney fees to vindicate its sense of justice beyond the judgment rendered on the underlying dispute, provide indirect relief from an adverse judgment, or penalize a party for misdeeds during the litigation. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 720 (2005). The Magistrate Court was clear that it was protecting its reputation for getting cases settled before trial and that it was punishing H2O for exercising its right to judicial relief.<sup>10</sup>

And what struck me that I thought was very interesting in this particular case, I still find it amazing, that you didn't settle it . . . I sort of feel like I have a bit of a record of doing that, of getting cases resolved before they go to trial. And in my court they don't turn into attorney fees cases. You were a rare one that you did. But I do not find a basis to award more than what was in dispute. And if you will prepare me an order along those lines, I will sign it.

June 22 Transcript, p. 2, L. 8-10 and p. 4, L. 4-13.

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<sup>10</sup> Idaho Const. Art. 1, §18.

The Magistrate's decision to limit H2O to a predetermined amount of attorney fees based on the singular factor of the amount in controversy as a means to protect its reputation for getting cases settled is an abuse of discretion. The Magistrate Court should have weighed all of the Rule 54(e)(3) factors and made a reasonable award of the attorney fees necessitated by Farm Supply and its insurance company's decision to force H2O into a year of litigation, which concluded with the Magistrate Court's finding that Farm Supply and its insurer had no credible evidence to challenge the rates they were charged for cleaning up their hazardous waste. The Magistrate Court's failure to consider all of the factors, was an abuse of discretion.

**B. The Magistrate Court abused its discretion by adopting Farm Supply's argument that H2O failed to negotiate in good faith.**

The Magistrate Court committed reversible error by adopting Farm Supply's reasoning that H2O failed to negotiate in good faith and by relying on evidence that was neither in the record nor admissible, resulting in conclusions inconsistent with the evidence in the record.

Farm Supply provided the Magistrate Court with an inaccurate recitation of the progression of settlement discussions throughout the case, and relied on information that was not properly before the court and which, in some instances, is patently untrue. *See* Response in Opposition to Plaintiff's Motion for Costs and Attorney Fees, filed May 16, 2016, pp. 15-16. For example, Farm Supply attempts to cast aspersions on H2O by claiming Farm Supply was required to file a Motion to Compel Mediation to advance settlement discussions. The record reveals, however, that Farm Supply filed its Motion to Compel Mediation the day its summary judgment was denied (August 26, 2015), nearly two weeks prior to filing its expert witness disclosure that, after 13 months of requests, finally identified the basis for its challenge to the reasonableness of H2O's rates. Farm

Supply's motion was its next move after unsuccessfully arguing there was no enforceable contract and while the deadline to finally explain its reasonableness challenge was fast approaching.

Farm Supply also provided the Magistrate Court with inaccurate information not in the record about who appeared where and when for various settlement discussions. Farm Supply's insurance adjuster appeared at the mediation by telephone, while H2O's CEO flew in from Arizona to attend in person. Farm Supply and, by adoption, the Magistrate Court cite other facts not properly before the Court by any form of admissible evidence.<sup>11</sup>

The Magistrate Court reached an erroneous conclusion not supported by the settlement information that is properly before the Court. Both offers of judgment made by Farm Supply were less than the verdict, providing the Magistrate Court with a reason independent of I.C. §12-120 to award H2O its attorney fees.<sup>12</sup> The second offer, for the full amount of H2O's claim, was made on October 23, 2015, and only after Farm Supply's insurance company put H2O through eight months of litigation, trying first to get a summary judgment win without having to make Mr. Miceli's vapid expert disclosure.

The Magistrate Court's finding that H2O failed to negotiate in good faith is not supported by any competent evidence and its willingness to rely on settlement conduct at all is an abuse of discretion. In *Ross v. Coleman Co., Inc.*, the Idaho Supreme Court overturned an award of attorney fees finding:

The district court's imposition of attorney fees was based in substantial part upon its finding that the defense counsel had failed to conduct settlement negotiations in good faith. However, this Court has held that the failure to enter into or conduct settlement negotiations is not a basis for awarding attorney fees under I.C. § 12-121 and I.R.C.P. 54(e)(1). . . . Today, we again make explicit that which we held in *Payne v. Foley, supra*, that "there is no authority in a trial court to insist upon,

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<sup>11</sup> Idaho Rule of Evidence 408 exists to encourage frank discussion between litigating parties, but it also serves to prevent the folly of relying on the lawyerly commentary of a series of events, many of which were not recorded.

<sup>12</sup> H2O would also be entitled to the comparison benefit of costs and attorney fees through the date of offers in its adjusted award, but the offers were small enough that is unnecessary. *See* Rule 68(d).

oversee, or second guess settlement negotiations, if any, and certainly no authority to impose sanctions for ‘bad faith’ bargaining.

*Ross v. Coleman Co.*, 114 Idaho 817, 836, 761 P.2d 1169, 1188 (1988), aff’d, 119 Idaho 152, 804 P.2d 325 (1991) (citing *Payne v. Foley*, 102 Idaho 760, 639 P.2d 1126 (1982)).

The Magistrate Court’s decision to utilize settlement discussions as an additional Rule 54(e)(3) factor in reducing H2O’s attorney fees request was an abuse of discretion. It was also an abuse of discretion to rely on the parties’ failure to settle the case as a basis to cap the fees awarded to the amount in controversy.

**C. The Court’s award of an amount of fees equal to the amount in controversy was an abuse of discretion because it was based upon the adoption of factual findings that are clearly erroneous.**

A trial court’s determination of a reasonable amount of attorney fees is a factual determination to which this Court applies an abuse of discretion standard of review. *See, Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004); *see also, State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999). Factual findings that are the basis for an exercise of discretion such as the award of fees are subject to a substantial and competent evidence standard of review. This is consistent with the clearly erroneous standard of I.R.C.P. 52(a). A finding of fact is not clearly erroneous if it is supported by substantial and competent evidence. *Miller v. EchoHawk*, 126 Idaho 47, 49, 878 P.2d 746, 748 (1994) (citing *Mulch v. Mulch*, 125 Idaho 93, 867 P.2d 967 (1994)).

There are extensive portions of the Magistrate Court’s reasoning that are not supported by substantial and competent evidence and, in some cases, are clearly erroneous. For instance, the Magistrate Court adopted Farm Supply’s reasoning that “[i]nitially, Plaintiff sought recovery for breach of express written contract . . . [and] [o]nly after nearly a year of litigation, and after Defendant’s Motion for Summary judgment and discovery had eviscerated Plaintiff’s express



written contract theories, did Plaintiff amend its complaint to include a claim to recover under quantum meruit-the claim for which it finally established a right to relief.” Response in Opposition to Plaintiff’s Motion for Costs and Fees, p. 4. The record, however, shows that H2O did not plead the existence of a written contract and prevailed upon Count I of its complaint for breach of an express contract. The Complaint does not allege that a written contract existed and it has never been disputed that Farm Supply requested that H2O provide it services and that H2O accepted by providing those services.

Contrary to the Magistrate Court’s adoption of Farm Supply’s argument, the existence of a written contract was not even in dispute on summary judgment and Farm Supply admitted as much in its own briefing: “In this case, the parties did not execute a written contract regarding the fuel remediation services provided by the Plaintiff.” Memorandum in Support of Defendant’s Motion for Summary Judgment, p. 5. The primary issue on summary judgment as presented by Farm Supply was whether the express contract alleged by H2O was enforceable due to the absence of agreement to a price term. *See*, Memorandum in Support of Defendant’s Motion for Summary Judgment, p. 4 (arguing “The Plaintiff’s claims must be dismissed because there is no enforceable contract between the Plaintiff and Farm Supply based on the parties’ failure to discuss the contract price.”). The Magistrate Court determined there were material facts regarding the existence of an express contract and Farm Supply lost its summary judgment bid. At trial the Magistrate Court concluded that it could supply the missing price term and granted H2O all of its requested relief. *See*, FOF, pp. 10-14.

Likewise, the Magistrate Court’s criticism of the discovery process adopted from pages 12 and 13 of the memorandum is unsupported by the record. *See*, Response in Opposition to Plaintiff’s Motion for Costs and Fees, pp. 12-13. H2O only tried to assess the basis of Farm

Supply's challenge to the reasonableness of its rates and only requested the insurance policy and a corporate representative to testify as to why Farm Supply answered with the affirmative defense that it had already paid a reasonable amount for the services it was provided.<sup>13</sup> Contrary to the Magistrate Court's findings, H2O disavowed the existence of a written contract throughout discovery.

First, H2O admitted without reservation that H2O did not execute a written contract with Defendant Farm Supply regarding remediation services for the spill. When asked to identify any and all contracts it had with Farm Supply, H2O responded that, ". . . Plaintiff is unaware of any written contract for remediation services executed by both parties." *See*, Affidavit of Hans Mitchell in Opposition to Plaintiff's Motion for Costs and Fees, Ex. A, Ex. I (Plaintiff's Response to Interrogatory No. 5).

The Magistrate Court's determination that H2O invited summary judgment by alleging a written contract is contrary to the substantial and competent evidence in the record.

## VII. CONCLUSION

The Magistrate Court appreciated the significance of the service H2O provided: "Well, an interesting case. And I guess the bottom line is work was done and it was done well and no lasting damage came from this, which is sort of a miracle all by itself. You know, that there wasn't a whole lot more environmental damage or other things that certainly could have been part of what the accident was all about." June 22 Transcript, p. 4, L. 22 – p. 5, L. 4. The Magistrate Court also found that Mr. Miceli's testimony - Farm Supply's only basis for challenging the reasonableness of the rates charged by H2O - was not credible and not probative. Its subsequent decision to disallow the vast majority of H2O's attorney fees and to adopt Farm Supply's

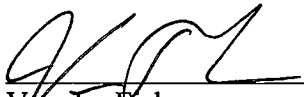
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<sup>13</sup> Oddly Farm Supply attempts to argue that H2O's very conservative use of discovery somehow contributed to the increased attorney fees.

reasoning therefore, was an abuse of discretion. The amount it awarded was arbitrary, done for the wrong reasons and focused almost entirely on the amount in controversy. The Magistrate Court also improperly considered settlement conduct and its findings related thereto, and based its findings regarding the reasonable amount of fees to be awarded on a characterization of summary judgment and discovery procedures, which were not supported by substantial and competent evidence. For these reasons, the attorney fee award should be vacated.

DATED this 12 day of September, 2016.

FISHER RAINEY HUDSON



Vaughn Fisher


*Attorney for Plaintiff/Appellant*

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of September, 2016, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

( ) Via U.S. Mail  
() Via Facsimile - (208) 345-8660  
( ) Via Overnight Mail  
( ) Via Hand Delivery  
( ) Email



Vaughn Fisher

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant/Respondent

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

DEFENDANT/RESPONDENT'S  
MOTION TO DISMISS APPEAL AS  
MOOT

COMES NOW Defendant/Respondent Farm Supply Distributors, Inc., by and through its counsel of record, Carey Perkins LLP, and hereby moves this Court for its Order dismissing Appellant's appeal because the appellate issues are moot. Appellant appeals the lower court's grant of attorney fees, but Respondent fully satisfied the judgment ordering attorney fees and Appellant accepted Respondent's payment.

Respondent respectfully requests its costs and fees pursuant to Idaho Code sections 12-120(3) and 12-121.

This Motion is supported by the Memorandum in Support and Affidavit of Counsel filed herewith and the papers and pleadings on file in this matter.

Oral argument is hereby requested.

DATED this 6<sup>th</sup> day of October, 2016.

CAREY PERKINS LLP

By/s/Hans A. Mitchell  
Hans A. Mitchell, Of the Firm  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the iCourt/E-Filing system which sent a Notice of Electronic Filing to the iCourt/E-Filing Registered Participants as follows:

|                                          |                                     |                            |
|------------------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                            | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden                       | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON                     | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630          | <input type="checkbox"/>            | Facsimile (208) 297-2689   |
| Boise, Idaho 83702                       | <input checked="" type="checkbox"/> | iCourt/E-Filing System     |
| Telephone: (208) 345-7000                |                                     |                            |
| <i>Attorneys for Plaintiff/Appellant</i> |                                     |                            |

/s/Hans A. Mitchell  
Hans A. Mitchell

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant/Respondent

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

MEMORANDUM IN SUPPORT OF  
DEFENDANT/RESPONDENT'S  
MOTION TO DISMISS APPEAL AS  
MOOT

**I.**  
**INTRODUCTION**

This matter should be dismissed as moot because Plaintiff H2O Environmental, Inc. accepted payment of the attorney fee award it now challenges. Therefore, the issues before this Court have been fully resolved.

**II.**  
**FACTUAL BACKGROUND**

Judgment was entered in this matter on April 19, 2016 and the Judgment awarded H2O certain damages. Defendant/Respondent Farm Supply immediately satisfied the Judgment. (Hans A. Mitchell Aff. ¶ 2, Oct. 6, 2016.)

Following entry of Judgment, H2O sought its costs and fees. At a June 22, 2016 hearing, the magistrate court ordered that H2O could recover some, but not all, of the costs and fees sought. (Attorney Fee Hr'g Tr. 2-4, Jun. 22, 2016.) On June 29, 2016, Farm Supply fully satisfied the award of costs and fees by delivering a check to H2O's counsel for the amount awarded. (Mitchell Aff. ¶ 3.) On July 5, 2016, the magistrate court issued an order awarding H2O certain costs and fees which, by that time, had already been satisfied.

H2O accepted and retained both checks.

**III.**  
**MOTIONS BEFORE THIS COURT**

Motions on appeals from the magistrate court are to be filed with the district court. I.R.C.P. 83(n). Motions to dismiss are allowed under the Idaho Appellate Rules. I.A.R. 32.

**IV.**  
**ARGUMENT**

**A.        *The issues on appeal are moot because Appellant accepted the benefit of the lower court's judgment.***

Mootness is a jurisdictional issue. *In re Doe I*, 145 Idaho 337, 340, 179 P.3d 300, 303 (2008); *Webb v. Webb*, 143 Idaho 521, 524, 148 P.3d 1267, 1270 (2006). "A case becomes moot when the issues addressed are no longer live or the parties lack a legally

cognizable interest in the outcome.” *Troupis v. Summer*, 148 Idaho 77, 80, 218 P.3d 1138, 1141 (2009) (citations omitted). “A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.” *Goodson v. Nez Perce Bd. of County Comm’rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000) (citing *Rational Predator Mgt. v. Dept. of Agriculture*, 129 Idaho 670, 672, 931 P.2d 1188, 1190 (1997)). “The appellants have received all the relief to which they might have been found to be entitled. Only hypothetical questions remain. It being impossible for this court to grant appellants other or additional relief, we will not proceed to formal judgment on the hypothetical issues but will dismiss the appeal.” *Dorman v. Young*, 80 Idaho 435, 436-437, 332 P.2d 480, 481-82 (1958). When considering a motion to dismiss an appeal based on mootness, an appellate court is free to review evidence outside the record. *England v. Phillips*, 96 Idaho 830, 831, 537 P.2d 1019, 1020 (1975); *Bedford v. Gem Irr. Dist.*, 4 P.2d 366, 367 (Idaho 1931).

Mootness has a particular application to appeals arising from a judgment that has been satisfied because the issues are no longer alive. “[A] successful party should not be allowed to gather in and enjoy the fruits of his judgment, and thereafter prosecute an appeal and complain of error committed against him.” *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212, 212–13, 77 P. 212 (1904). “If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal, thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed.” *Id.* at 213.

In this case, the judgment has been paid and satisfied and Plaintiff’s appeal is moot. Plaintiff obtained an attorney fee award which Farm Supply promptly satisfied. Plaintiff accepted the benefit Farm Supply conferred upon it. As set forth in *Betchel*, a party



is not entitled to enjoy the benefit of its judgment and pursue an appeal on the same judgment where the appeal could result in a lesser award. That is the case here. After accepting Farm Supply's check, Plaintiff appealed upon the basis that the magistrate court abused its discretion in awarding Plaintiff approximately \$7,500 in attorney fees. (See Appellant's Brief.) If successful, Plaintiff would achieve a remand to the lower court where the court could, in its discretion, award less than it has already awarded. Accordingly, Plaintiff risks recovering less, and its appeal should be dismissed.

**B. Farm Supply is Entitled To Recover Its Attorney Fees in This Appeal**

Farm Supply is claiming its attorney fees on appeal pursuant to Idaho Code sections 12-120(3) and 12-121. Idaho Code section 12-120(3) provides, in relevant part:

In any civil action 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, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

In addition to providing for attorney fees at the trial court level, Idaho Code section 12-120(3) allows a party to recover its attorney fees incurred on appeal. *Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585, 590 (2016) (prevailing respondent entitled to attorney fees on appeal under section 12-120(3)).

In this case, the dispute surrounds allegations of breach of a contract for services. (Compl. ¶ 5.) Accordingly, in the event Farm Supply prevails in this appeal, it will be entitled to its reasonably incurred attorney fees pursuant to Idaho Code section 12-120(3).

Idaho Code section 12-121 provides another basis upon which Farm Supply can recover its attorney fees on this appeal. An award of fees under Idaho Code section 12-121 to the prevailing party is permitted if the court determines "the case was brought, pursued, or defended frivolously, unreasonably or without foundation." *Nation v. State, Dep't of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007); see also I.R.C.P. 54(e)(1). In this case, Plaintiff's appeal is being pursued without foundation. As set forth above, Plaintiff accepted the benefit of the judgment and cannot pursue the appeal further. For that reason, under Idaho Code section 12-121, Farm Supply is entitled to its attorney fees incurred in this appeal.

**V.**  
**CONCLUSION**

For the foregoing reasons, Defendant/Respondent Farm Supply respectfully requests that this Court dismiss Plaintiff/Respondent's appeal with prejudice.

DATED this 6<sup>th</sup> day of October, 2016.

CAREY PERKINS LLP

By/s/Hans A. Mitchell

Hans A. Mitchell, Of the Firm  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the iCourt/E-Filing system which sent a Notice of Electronic Filing to the iCourt/E-Filing Registered Participants as follows:

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| Boise, Idaho 83702                       | <input checked="" type="checkbox"/> | iCourt/E-Filing System     |
| Telephone: (208) 345-7000                |                                     |                            |
| <i>Attorneys for Plaintiff/Appellant</i> |                                     |                            |

\_\_\_\_\_  
/s/Hans A. Mitchell

Hans A. Mitchell

ORIGINAL

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant/Respondent

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Case No. CV OC 1500236  
  
AFFIDAVIT OF HANS A. MITCHELL  
IN SUPPORT OF  
DEFENDANT/RESPONDENT'S  
MOTION TO DISMISS APPEAL AS  
MOOT

STATE OF IDAHO )  
                              : ss.  
County of Ada     )

**HANS A. MITCHELL**, having been first duly sworn upon oath, deposes and  
  
says:

1. I am an attorney with the firm Carey Perkins LLP, counsel of record for Defendant/Respondent Farm Supply Distributors, Inc. in this matter, and the following statements are true and correct and made from personal knowledge.

2. Judgment was entered in this matter on April 19, 2016 and the Judgment awarded H2O certain damages. Farm Supply immediately satisfied the Judgment and unconditionally tendered a check in the amount of the Judgment.

3. Plaintiff moved for an award of its costs and fees. At a June 22, 2016 hearing, the magistrate court ordered that H2O could recover some, but not all, of the costs and attorney fees sought. On June 29, 2016, Farm Supply satisfied the award of costs and fees by unconditionally delivering a check to H2O's counsel in the amount awarded by the Court.

4. On July 5, 2016, the magistrate court issued a written order memorializing its June 22, 2016 ruling awarding H2O certain costs and fees which, by that time, had already been satisfied.

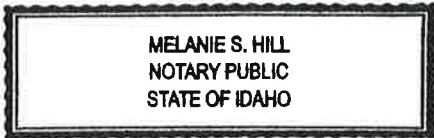
5. H2O has accepted and retained both checks, including the check Farm Supply delivered on June 29, 2016.

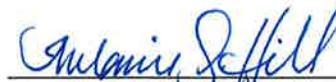
FURTHER your Affiant saith not.

  
Hans A. Mitchell

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of October, 2016.

(SEAL)



  
Notary Public for Idaho  
Residing at Boise, Idaho  
Commission expires Sept. 02, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the iCourt/E-Filing system which sent a Notice of Electronic Filing to the iCourt/E-Filing Registered Participants as follows:

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| Telephone: (208) 345-7000                |                                     |                            |
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/s/Hans A. Mitchell  
Hans A. Mitchell

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H2O ENVIRONMENTAL, INC., an Idaho  
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Plaintiff/Appellant,

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FARM SUPPLY DISTRIBUTORS, INC., an  
Oregon corporation

Defendant/Respondent.

District Court Case No. CV OC 1500236

**RESPONDENT'S BRIEF**

---

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

---

Honorable Patricia Young, Magistrate Judge, presiding.

---

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900  
*Attorneys for Plaintiff/Appellant*

Hans A. Mitchell  
Aubrey D. Lyon  
CAREY PERKINS LLP  
300 North 6<sup>th</sup> Street, Suite 200  
P.O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660  
*Attorneys for Defendant/Respondent*

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## I.

### STATEMENT OF THE CASE

#### A. Nature Of The Case

This appeal is Plaintiff/Appellant<sup>1</sup> H2O Environmental, Inc.'s (hereinafter "Plaintiff") attempt to recover more of its unreasonably incurred attorney fees. The Magistrate Court properly exercised its discretion and concluded that no more than about \$7,500 in attorney fees were reasonably incurred in prosecuting this simple dispute.

#### B. Statement Of Facts

The underlying dispute in this case involved the value of services rendered. The facts are simple: Respondent Farm Supply's truck leaked fuel, Plaintiff cleaned up the leak, and a disagreement arose regarding the value of the services Plaintiff performed.

Though the facts are simple, Plaintiff's approach to litigation was unnecessarily complicated, and Farm Supply disagrees with Plaintiff's characterization of the litigation. As the Magistrate Court noted, "this was not a hard factual case. . . . It was not a hard legal case." (Attorney Fee Hr'g Tr. 3:14-16, Jun. 22, 2016.) Plaintiff had a simple case to prosecute, but it unnecessarily incurred attorney fees far in excess of what was needed to prove its case. Although Plaintiff ultimately won a recovery, it recovered on a theory different from that which it originally pursued, and only after multiple theories were either defeated or abandoned following Plaintiff's protracted gamesmanship and ill-advised tactics.

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<sup>1</sup> Plaintiff incorrectly identified itself as "Respondent" in its caption.

In its Statement of the Case, Plaintiff reviews the litigation tactics it employed in the underlying matter. Farm Supply disagrees with Plaintiff's characterization of its litigation strategy as reasonable, but because those issues are not directly relevant to this appeal, Farm Supply will not address here specific inaccuracies and exaggerations in Plaintiff's Statement of the Case.<sup>2</sup>

Plaintiff attempts to use this appeal to re-argue the attorney fee issue which was before the Magistrate Court. Plaintiff's time to argue the merits of the fee award have passed—Plaintiff should have done so while the matter was before the Magistrate Court. Plaintiff is precluded from raising issues for the first time on appeal.

The question before this court is simple: Did the Magistrate Court properly exercise its discretion in awarding Plaintiff about \$7,500 in attorney fees? The conclusion is similarly simple: the Magistrate Court properly recognized the determination of reasonable fees as a matter of discretion, acted consistently with legal standards, and reached its decision through the exercise of reason. For that reason, the Magistrate Court's award should be affirmed.

## **II.**

### **ADDITIONAL ISSUES PRESENTED ON APPEAL**

1. Whether Farm Supply is entitled to an award of attorneys' fees on appeal pursuant to Idaho Code sections 12-120(3) and/or 12-121.

---

<sup>2</sup> In its Response in Opposition to Plaintiff's Motion for Costs and Fees, Farm Supply reviewed Plaintiff's unreasonable approach to litigation at length. (*See* Def.'s Response in Opp. 6-18, May 16, 2016.) To the extent relevant to this Court's review, Farm Supply's May 16 brief is incorporated herein by reference.

### III.

#### ATTORNEY FEES ON APPEAL

Farm Supply's request for attorney fees on appeal is analyzed in the Argument section below.

### IV.

#### STANDARD OF REVIEW

"The awarding of attorney fees and costs is within the discretion of the trial court and subject to review for an abuse of discretion." *Idaho Transp. Dep't v. Ascorp, Inc.*, 159 Idaho 138, 140, 357 P.3d 863, 865 (2015). "[T]he calculation of a reasonable attorney fee is within the trial court's discretion." *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012); I.R.C.P. 54(e)(3). When an exercise of discretion is involved, Idaho's appellate courts conduct a three-step inquiry: "(1) whether the trial court properly perceived the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 629, 329 P.3d 1072, 1077 (2014), reh'g denied (Aug. 6, 2014). "The burden is on the party opposing the award to demonstrate that the district court abused its discretion." *Bailey*, 153 Idaho at 529, 284 P.3d at 973.

Trial courts are guided by the factors set forth in I.R.C.P. 54(e)(3) in determining the amount of an attorney fee award. Considering the I.R.C.P. 54(e)(3) factors "is mandatory—it requires the court to consider all eleven factors plus any other factor the court deems appropriate."

*Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005); *see also Sun Valley Potato Growers, Inc., v. Texas Refinery Corp.*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004).

**V.**

**ARGUMENT**

**A. The Magistrate Court Did Not Pre-Determine The Attorney Fee Award**

Plaintiff's contention that the Magistrate Court "made its decision prior to hearing the merits of the case and prior to hearing the attorney fees request" is without foundation. (Appellant's Brief 10.) The only factual basis Plaintiff cites is the court's statements at the June 22, 2016 hearing on the costs and fees motion. In that hearing, the court did not state that it pre-determined the amount of the award. Rather, the court's statement indicated that it had remained open to being convinced to approve fees in a higher amount:

What I find on the attorney's fees – what I don't find reasonable are the attorney's fees. I really do not. And I think I indicated at some point of encouraging more settlement that it was going to be very hard for me to approve any fees more than the amount in dispute. And your fees are eight times more or so.

(Fee Hr'g Tr. 2:17-23.) The court then went on to explain that it considered all of the I.R.C.P. 54(e)(3) factors in reaching its decision. (Fee Hr'g Tr. 3:10-22.) It also explained that it was persuaded by Farm Supply's arguments against Plaintiff's fee request—arguments which were made after Plaintiff made its fee request. (Fee Hr'g Tr. 2:24-3:2.)

Additionally, the court's July 5, 2016 order awarding costs and fees provided that it incorporated Farm Supply's Response in Opposition to Plaintiff's Motion for Costs and Fees, including Farm Supply's analysis of every factor provided in I.R.C.P. 54(e)(3). Considering the

foregoing, Plaintiff has failed to demonstrate that the Magistrate Court abused its discretion by pre-determining the amount of attorney fees reasonably incurred.

**B. The Magistrate Court Did Not Err By Placing Significant Weight on One Factor**

"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). "Though it is not necessary the court address all of the I.R.C.P. 54(e)(3) factors in writing, the record must clearly indicate the court considered all of the factors." *Lee v. Nickerson*, 146 Idaho 5, 11, 189 P. 3d 467, 473 (2008). Statements from a court at a hearing or in an order that it considered all the I.R.C.P. 54(e)(3) factors are sufficient to satisfy this requirement. *Id.*

When determining an attorney fee award, a trial court does not abuse its discretion merely by placing significant weight on one I.R.C.P. 54(e)(3) factor. In *Parsons v. Mut. of Enumclaw Ins. Co.* an insurance company appealed the amount of a trial court's attorney fee award. 143 Idaho 743, 152 P.3d 614 (2007). The insurance company contended that the trial court had placed too much emphasis on a contingent fee agreement. In affirming the trial court, the Idaho Supreme Court noted that the trial court had considered all the I.R.C.P. 54(e)(3) factors, and it found no fault with the trial court placing significant weight on one factor. *Id.* at 747. The Idaho Supreme Court's focus was on whether the trial court clearly understood that it was a matter of discretion and that the trial court reached its decision by an exercise of reason. *Id.* at 747-48.



In this case, the Magistrate Court did not err by placing significant weight on the amount in controversy. The Magistrate Court recognized that the attorney fee award was a matter of discretion, it considered all the I.R.C.P. 54(e)(3) factors, and it reached its decision by an exercise of reason. Plaintiff failed to show in this appeal that the Magistrate Court's fee determination was beyond the outer boundaries of its discretion and inconsistent with the legal standards applicable to the specific choices available to it.

Plaintiff cites to a 1987 Idaho Court of Appeal decision, *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987), for the contention that a court may abuse its discretion by placing too much emphasis on one I.R.C.P. 54(e)(3) factor. (Appellant's Brief 11.) *Nalen* actually undercuts the proposition suggested by Plaintiff. The Idaho Court of Appeals noted that, although the trial court considered one factor heavily, because the trial court also considered all of the other I.R.C.P. 54(e)(3) factors, it did not abuse its discretion in that regard. *Id.* at 81. The Idaho Court of Appeals found that the trial court's fee award was reversible because it relied on an improper factor—the trial court had improperly divided the fee award based on which theories of recovery prevailed. *Id.* Here, the Magistrate Court did not split the fee award based on prevailing theories, so the holding in *Nalen* is not germane.

**C. The Magistrate Court Did Not Pull The Award Out Of Thin Air**

Plaintiff cites to *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008), and contends that the Magistrate Court's award was arbitrary and based entirely on the amount in controversy. (Appellant's Brief 10.) Plaintiff's contention is factually inaccurate and distinguishable

from *Johannsen*. As set forth above, the hearing transcript and July 5, 2016 order demonstrate that the Magistrate Court considered all I.R.C.P. 54(e)(3) factors. (*See* Fee Hr'g Tr. 3:10-22.)

The *Johannsen* case is inapposite because the trial court's fee determination in that case was not based on an exercise of reason, including a failure to consider all the I.R.C.P. 54(e)(3) factors and an analysis of the time spent on the case. 146 Idaho at 433. Unlike the case on appeal, in *Johannsen* the court did not perform an analysis of the time actually spent. *Id.* The Idaho Supreme Court was unable to determine from the trial court's record why it determined that attorney's fees submitted were excessive. *Id.* Based on statements from the trial court, it apparently did not even obtain a breakdown of time spent on the matter. *Id.* Because of the dearth of information on the record, the Idaho Supreme Court viewed the trial court's fee award as having been pulled out of thin air. *Id.*

In this case, the record on appeal is far different from that at issue in *Johannsen*. Here, the Magistrate Court considered all I.R.C.P. 54(e)(3) factors. Additionally, it considered a billing breakdown from Plaintiff's counsel, and it had Farm Supply's line-by-line response to Plaintiff's bills. (*See* Mitchell Aff. In Opp'n to Plf.'s Costs and Fees Mot., May 16, 2016.) It adopted the reasoning in Farm Supply's Response brief which addressed each I.R.C.P. 54(e)(3) factor. For these reasons, the record shows that the Magistrate Court exercised reason in reaching its determination of a reasonable fee award for this case.

**D. For The First Time On Appeal, Plaintiff Takes Issue With The Facts The Trial Court Considered In Determining Its Award**

"The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P. 3d 614

(2007) (citing *Murray v. Spalding*, 141 Idaho 99, 101, 106 P.3d 425, 427 (2005)); *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008); *Garner v. Bartschi*, 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003); *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003).

In this case, Plaintiff raises for the first time on appeal that the Magistrate Court improperly considered certain facts in determining the attorney fee award. (Appellant's Brief 12-16.) At the trial court level, Plaintiff had multiple opportunities to oppose the facts presented to the court for consideration, and which eventually formed the basis of the Magistrate Court's attorney fee award, and Plaintiff failed to raise the issue. First, Plaintiff could have filed a reply brief to Farm Supply's Response in Opposition to Motion for Costs and Fees. *See* I.R.C.P. 7 (allowing reply briefs). Plaintiff did not file a reply. Second, Plaintiff could have filed a motion to strike those portions of Farm Supply's Response that included allegedly improper considerations. Plaintiff did not move to strike. Third, at the hearing on Plaintiff's Motion for Costs and Fees, Plaintiff could have opposed the facts relied upon in Farm Supply's Response. Plaintiff offered no argument at the hearing. (Fee Hr'g Tr. 5:5-14.) Because Plaintiff failed to challenge the facts presented to the trial court for consideration, it is barred from raising the issue on appeal.

**E. Even If Plaintiff Preserved The Issue, The Magistrate Court Properly Considered The Litigation History**

*1. Conduct in negotiations may be considered.*

Plaintiff relies on *Ross v. Coleman*, 114 Idaho 817, 761 P.2d 1169 (1988), for the contention that the Magistrate Court improperly considered settlement negotiations in determining a reasonable fee award. *Ross* is inapposite because it does not disallow the consideration of

settlement practices and it dealt with whether to award fees under a statute which was not the basis of the award in the case at bar.

The court in *Ross* did not prohibit consideration of conduct in settlement in determining the amount of a fee award. Rather, it held that under Idaho Code section 12-121, a trial court could not impose costs and attorney fees as a sanction against the prevailing party for failure to engage in good faith settlement negotiations. *Ross*, 114 Idaho at 836. That holding is inapposite.

Here, the trial court awarded Plaintiff its fees based on commercial transaction/service contract and Idaho Code section 12-120(3), not as a sanction. In determining the reasonable fees, the Magistrate Court properly considered Plaintiff's unreasonable tactics and conduct which led to two mediations and their associated attorney fees and costs. Pursuant to I.R.C.P. 54(e)(3), a trial court may consider the time and labor required and other non-enumerated factors when determining an attorney fee award. Therefore, the Magistrate Court was allowed to consider settlement conduct and associated attorney fees.

2. *Plaintiff's changing theories of recovery may be considered.*

Plaintiff's argument that the Magistrate Court improperly considered Plaintiff's changing theories of recovery is based on a tortured interpretation of the standard of review. Plaintiff argues that a "substantial and competent evidence" standard should apply. (Appellant's Brief 14.) Plaintiff offers no authority for an attorney fee award being subject to the "substantial and competent evidence" standard, and this contention is at odds with the Idaho Supreme Court's consistent holdings that attorney fee awards are reviewed for abuse of discretion. *See Bailey*, 153 Idaho at 529; *Sun Valley Potato*, 139 Idaho at 769; *Bates v. Seldin*, 146 Idaho 772, 775, 203 P.3d

702, 705 (2008); *Bolt v. Idaho State Bldg. Auth.*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996); *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008).

Plaintiff also contends that the Magistrate Court's reasoning is unsupported by the record, but Plaintiff failed to specify what information the Magistrate Court allegedly improperly considered. (Appellant's Brief 14.) The court is entitled to consider, among other factors, the time and skill required for the case and other factors the court deems appropriate. I.R.C.P. 54(e)(3). The court had before it the voluminous file in this matter (Fee Hr'g Tr. 2:4-7), and Plaintiff offers no evidence showing that the court dismissed the contents of the file. Rather, Plaintiff engages in revisionist history and simply disagrees with the court's characterization of the conduct of the parties in this litigation. The Magistrate Court properly considered the nature of this case in making its attorney fee award.

In what should have been a simple matter to prosecute, Plaintiff hid the ball and provided constantly changing theories in discovery. These tactics made discovery in this matter vastly more complicated than it needed to be and also gave rise to motion practice that should have been unnecessary. Farm Supply detailed Plaintiff's unreasonable conduct in its Response in Opposition to Plaintiff's Motion for Costs and Fees, and because that conduct is not directly relevant to this appeal, it will not separately rehash the details of the litigation before the Magistrate Court.

**F. Farm Supply Is Entitled To Recover Its Attorney Fees In This Appeal**

Farm Supply is claiming its attorney fees on appeal pursuant to Idaho Code sections 12-120(3) and 12-121. Idaho Code section 12-120(3) provides, in relevant part:

In any civil action 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, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

In addition to providing for attorney fees at the trial court level, Idaho Code section 12-120(3) allows a party to recover its attorney fees incurred on appeal. *Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585, 590 (2016) (prevailing respondent entitled to attorney fees on appeal under section 12-120(3)).

In this case, the dispute surrounds allegations of breach of a contract for services. (Compl. ¶ 5.) Accordingly, in the event Farm Supply prevails in this appeal, it will be entitled to its reasonably incurred attorney fees pursuant to Idaho Code section 12-120(3).

Idaho Code section 12-121 provides another basis upon which Farm Supply can recover its attorney fees on this appeal. An award of fees under Idaho Code section 12-121 to the prevailing party is permitted if the court determines "the case was brought, pursued, or defended frivolously, unreasonably or without foundation." *Nation v. State, Dep't of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007); *see also* I.R.C.P. 54(e)(1). In this case, Plaintiff's appeal is being pursued without foundation. Plaintiff contends that the Magistrate Court incorrectly decided the fee award before hearing the merits of the case and before it received Plaintiff's motion for fees. Plaintiff's contention is unfounded in the record. On the record at the June 22, 2016 hearing on fees, the Magistrate Court noted that she considered awarding more fees. (Fee Hr'g Tr. 2:19-22.) The court noted that it had considered all the I.R.C.P. 54(e)(3) factors in reaching its conclusion. (Fee Hr'g Tr. 3:10-22.) Consideration of the I.R.C.P. 54(e)(3) factors is also reflected in the court's written order. (Order on Plf.'s Mot. For Costs and Fees, Jul. 5, 2016.) Plaintiff ignores the record

on what the court considered in reaching its fee award and instead relies on supposition to support its appeal. For that reason, under Idaho Code section 12-121, Farm Supply is entitled to its attorney fees incurred in this appeal.

## **VI.**

### **CONCLUSION**

Farm Supply respectfully requests that this Court affirm the Magistrate Court's award of attorney fees. The Magistrate Court correctly recognized that the determination of fees was a matter within its discretion, exercised reason, and correctly applied applicable standards in reaching its award.

Furthermore, Farm Supply respectfully requests that this Court award Farm Supply its attorney fees on appeal.

DATED this 10<sup>th</sup> day of October, 2016.

CAREY PERKINS LLP

By/s/Hans A. Mitchell

Hans A. Mitchell, Of the Firm  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of October, 2016, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

|                                          |                                     |                            |
|------------------------------------------|-------------------------------------|----------------------------|
| Vaughn Fisher                            | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Nicholas A. Warden                       | <input type="checkbox"/>            | Hand-Delivered             |
| FISHER RAINEY HUDSON                     | <input type="checkbox"/>            | Overnight Mail             |
| 950 W. Bannock Street, Ste. 630          | <input checked="" type="checkbox"/> | Facsimile: (208) 514-1900  |
| Boise, Idaho 83702                       | <input checked="" type="checkbox"/> | iCourt/E-filing            |
| Telephone: (208) 345-7000                |                                     |                            |
| <i>Attorneys for Plaintiff/Appellant</i> |                                     |                            |

\_\_\_\_\_  
/s/Hans A. Mitchell

Hans A. Mitchell



Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff/Appellant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Appellant

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

**BRIEF IN OPPOSITION TO MOTION  
TO DISMISS APPEAL AS MOOT**

**ORAL ARGUMENT REQUESTED**

COMES NOW THE Plaintiff/Appellant and files this Brief in Opposition to Motion to Dismiss Appeal as Moot and shows this Court as follows:

**Introduction**

The Defendant/ Respondent's ("Farm Supply") Motion to Dismiss should be denied because the Plaintiff/Appellant ("H2O") did not accept, cash or negotiate the check that Farm Supply's counsel ("Mitchell") sent to H2O's counsel ("Fisher"). Further, this case is factually distinguishable from Farm Supply's 112 years old authority for, amongst other reasons, the lack

**BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT-1**

of a filed satisfaction of judgment executed by the holder of the judgment. For these reasons, Farm Supply's motion should be denied.

### **Facts**

On June 29, 2016, Mitchell sent a letter and check to Fisher. *See* Fisher Affidavit in Opposition to Motion to Dismiss Appeal as Moot ¶3. The check was for the full amount ordered for costs and fees by the Magistrate Judge.<sup>1</sup> Fisher called Mitchell and asked the purpose of the check. Fisher Aff. ¶¶5-6. Mitchell said something to the effect that his client just wanted to take care of the fees and costs so there would be no interest accruing. Fisher Aff. ¶6. Fisher told Mitchell that he did not want the check and Mitchell said that he did not want it back. Fisher Aff. ¶7. Fisher gave the check to a staff member and asked her to put it in her desk drawer. Fisher Aff. ¶8. It has remained there since.<sup>2</sup> Fisher Aff. ¶9.

### **Argument**

Farm Supply has sent two separate checks to H2O. The first, for the \$7,952.56, was in the amount of the Judgment entered April 19, 2016. That check was cashed by H2O, since that portion of the judgment was appealed by neither party. The second check, for \$8,880.18, is in the amount of the Order on Plaintiff's Motion for Costs and Fees entered July 5, 2016. That check was not cashed or accepted. Rather Mitchell sent it to Fisher under false pretenses (i.e. to keep interest from accruing) and declined to accept its return.

Farm Supply's argument misrepresents to the Court that, "the judgment has been paid and satisfied and Plaintiff's appeal is moot." Farm Supply and its attorneys know the check was

---

<sup>1</sup> The Magistrate had ruled previously from the bench. The order on costs and fees was signed by the Magistrate that same day, June 29, 2016 and filed with the clerk on July 5, 2016.

<sup>2</sup> It was Plaintiff's intention to submit the check to the Court with this response. However, the new electronic filing system makes that difficult if not impossible. Instead, the check was delivered to Mr. Mitchell along with his copy of this brief. Plaintiff requests that Mr. Mitchell bring the original check to Court when this motion is heard.

never cashed, so the judgment is not paid. They also know that no Rule 58.1 pleading has been filed and that H2O has not been requested to execute such a pleading, so the judgment is not satisfied.

Farm Supply relies entirely on *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212 (1904) in arguing that H2O's appeal should be dismissed. In so doing, Farm Supply culls from the case two sentences, while providing the Court with no context or explanation. In *Bechtel*, the plaintiff received a \$400 judgment and an award of costs and fees in the amount of \$239.75. The cost and fees award was \$181.00 less than requested. The judgment debtor in that case paid to the clerk of the district court \$646.80<sup>3</sup>, which was then paid to plaintiff's counsel. The plaintiff then executed a satisfaction of judgment which was entered upon the docket. This is clearly distinguishable from the present case where the check was not cashed and no satisfaction of judgment was filed.

### **Conclusion**

This case is clearly different from the *Bechtel* case because the plaintiff did not accept or cash the check for the fees and costs. The portion of the judgment being appealed has not been satisfied and Farm Supply has neither filed nor requested a Rule 58.1 satisfaction of judgment. Instead, Respondent's attorney offered the payment under false pretenses and then declined to accept its return. Respondent's motion must be denied.

Respondent's misrepresentations that the "judgment has been paid and satisfied" is more evidence of Respondent's efforts to unreasonably and frivolously defend this case. Plaintiff's fees incurred in responding to this motion should be awarded pursuant to I.C. §12-121.

---

<sup>3</sup> The decision fails to explain the \$7.05 discrepancy between the amount awarded, appealed and payed.

Submitted this 19 day of October, 2016

FISHER RAINEY HUDSON



Vaughn Fisher  
Attorneys for Plaintiff/Appellate H2O

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19 day of October, 2016, I caused a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- ( ) Via U.S. Mail
- ( ) Via Facsimile - (208) 345-8660
- ( ) Via Overnight Mail
- () Via Hand Delivery
- ( ) Email



Vaughn Fisher



4. The check for \$8,880.18 was in the amount ordered for costs and fees by the Magistrate Judge.

5. Based on both my recollection and time records, I had a very brief phone conversation with Hans Mitchell upon receiving the check.

6. During that conversation, I asked the purpose of the check and he said something to the effect that his client just wanted to take care of it so there would be no interest accruing.

7. I told him that I did not want the check and he said that he did not want it back.

8. I handed the check and letter to my paralegal, Steffanie Coy, and asked her to put it in her desk drawer.


9. The check has remained there since.

Dated this 19 day of October, 2016.

  
\_\_\_\_\_  
Vaughn Fisher

SUBSCRIBED AND SWORN to before me this 19 day of October, 2016.



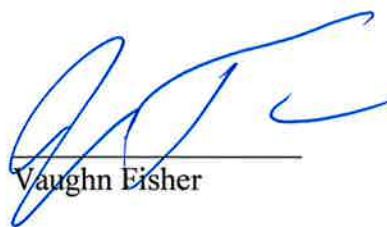
  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at: BOISE  
My commission expires: March 28, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19 day of October, 2016, I caused a true and correct copy of the foregoing **AFFIDAVIT OF VAUGHN FISHER IN OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
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- Email



Vaughn Fisher

# EXHIBIT A



# CAREY PERKINS LLP

ATTORNEYS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH 6<sup>TH</sup> STREET, SUITE 200  
P. O. BOX 519  
BOISE, IDAHO 83701-0519  
TELEPHONE (208) 345-8600  
FACSIMILE (208) 345-8660  
www.careyperkins.com  
email: info@careyperkins.com

## OFFICES IN

IDAHO FALLS, IDAHO 83405-1388  
980 PIER VIEW DRIVE, SUITE B  
P. O. BOX 51388  
TELEPHONE (208) 529-0000  
FACSIMILE (208) 529-0005

WITH ATTORNEYS ADMITTED  
TO PRACTICE LAW IN  
IDAHO, OREGON,  
WASHINGTON AND WYOMING

\* ADMITTED TO PRACTICE IN  
IDAHO AND WYOMING

E. B. SMITH (1896-1975)  
LESLIE S. BROWN  
DONALD F. CAREY\*  
MARISA S. CRECELIUS  
SAMANTHA L. LUNDBERG  
AUBREY D. LYON  
BRUCE R. McALLISTER  
HANS A. MITCHELL  
DAVID S. PERKINS  
LINDSEY R. ROMANKIW\*  
WILLIAM G. POPE  
DINA L. SALLAK  
RICHARD L. STUBBS

June 29, 2016

### VIA HAND DELIVERY

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702

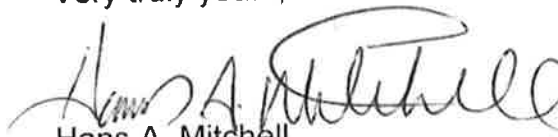
Re: ***H2O Environmental, Inc. vs. Farm Supply Distributors, Inc.***  
Case No.: CV-OC-1500236  
Our File No.: 1004/26-987

Dear Mr. Fisher & Mr. Warden:

Enclosed in regards to the above-referenced matter, please find a check in the amount of \$8,880.18 (check no. 1100870916), the amount awarded as costs and fees by the Court in this matter.

Thank you for your assistance in resolving this matter.

Very truly yours,

  
Hans A. Mitchell

HAM:mm  
Enclosure

000508

THE FACE OF THIS DOCUMENT HAS A BLUE BACKGROUND - NOT A WHITE BACKGROUND. SIMULATED WATERMARK ON BACK. HOLD AT AN ANGLE TO VIEW.



ZURICH AMERICAN INSURANCE COMPANY

CHECK NO. 1100870916

56-1544/441

ZURICH

PO BOX 66946  
CHICAGO

IL 60666 0946

DATE ISSUED: 06/27/16

VOID AFTER 180 DAYS

CLAIM NUMBER: 412-0003656 001 56

AMOUNT: EIGHT THOUSAND, EIGHT HUNDRED EIGHTY AND 18/100 ----- Dollars

\$\*\*8,880.18

PAY TO THE H2O Environmental, Inc.  
ORDER OF

*Dale J. Hall*

JPMORGAN CHASE BANK, N.A.  
COLUMBUS OH

\*\*THE BACKGROUND IS COLORED\*\*

⑈ 1100870916⑈ ⑆044115443⑆

528291201⑈

Hans A. Mitchell, ISB No. 5565  
Aubrey D. Lyon, ISB No. 8380  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Defendant/Respondent

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Respondent,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

RESPONDENT'S REPLY IN  
SUPPORT OF MOTION TO DISMISS  
APPEAL AS MOOT

**I.  
INTRODUCTION**

Plaintiff/Appellant H2O Environmental is trying to unring the bell by returning the check tendered to it three months prior. However, Plaintiff accepted the check, and by accepting, has rendered this appeal moot.

## II. FACTUAL BACKGROUND

On June 29, 2016, long before a notice of appeal was filed in this case, Farm Supply unconditionally tendered payment of the costs and fees awarded by the Magistrate Court. Plaintiff accepted.

Plaintiff filed its appeal on August 1, 2016. Farm Supply filed its motion to dismiss this appeal on October 6, 2016. Twelve days later, on October 18, 2016, Plaintiff returned the check.

## III. ARGUMENT

### A. *Bechtel is still good law*

Plaintiff seems to challenge *Bechtel v. Evans*, 10 Idaho 147 (1904), because the decision was authored over 100 years ago. *Bechtel* is still good law. It has not been overruled, and it has been cited by Idaho's appellate courts numerous times over the last century. See *Basic American, Inc. v. Shatila*, 133 Idaho 726; 992 P.2d 175 (1999); *Long v. Hendricks*, 117 Idaho 1051, 793 P.2d 1223 (1990); *Stockyards Nat. Bank of Chicago v. Arthur*, 45 Idaho 333, 262 P. 510 (1927); *Feeny v. Hanson* 84 Idaho 236, 371 P.2d 15 (1962); *Wallace v. McKenna* 37 Idaho 579, 217 P. 982 (1923); and *Delay v. Foster* 37 Idaho 579, 217 P. 982 (1923).

The principle provided in *Bechtel*, that a party cannot accept the benefit of a judgment and appeal when that party risks a worse result on appeal, makes sense for many reasons. As discussed in *Long v. Hendricks*, 117 Idaho 1051 (1990), one reason for the rule is that a judgment debtor should be entitled to avoid potential liability for post-judgment interest and not be in a position where it may have to attempt to recover

tendered amounts from a judgment creditor who receives a lesser amount on appeal. As the court in *Long* instructed, if a judgment creditor can accept the tendered amount and continue with an appeal, the judgment creditor may eventually be entitled to less than what he received. *Id.*, 793 P.2d at 1226. "In that case, at the time the subsequent judgment was entered he might not have had the amount he received from the [judgment debtor] and might have been insulated from their efforts to recover the overpayment." *Id.*

In this case, Farm Supply was in a position similar to the judgment debtor in *Long*. If Farm Supply did not tender the amount in the costs and fees award, it risked being liable for post-judgment interest. Similarly, if Plaintiff wants to gamble on an appeal and risk receiving less than it was awarded, it cannot avail itself of the benefit of the Magistrate Court's judgment. "The gamble he was taking was that he would be successful in his appeal and obtain a larger judgment on retrial." *Id.*, 793 P.2d at 1225. The rule in *Bechtel* does not require that a satisfaction of judgment be entered. As the court stated, the question is only whether the party has "collected his judgment." *Bechtel*, 10 Idaho at 149-50. Because Farm Supply tendered the amount, and Plaintiff accepted and did not return the check for more than 3 months. The fact that Plaintiff elected not to cash the check is irrelevant as it had the ability to do so at any time and deprived the issuer of the use of the funds. In short, it has accepted and retained the benefit of the Judgment, even though it elected not to make use of those funds. Plaintiff is therefore precluded from pursuing its appeal.

**B. *Plaintiff does not address Farm Supply's request for fees on appeal***

In its Motion to Dismiss, Farm Supply requested its fees incurred on appeal and provided argument supporting the fees request in its supporting memorandum.

Plaintiff does not address Farm Supply's request for fees in its brief in opposition to the motion. Accordingly, if this Court finds that Farm Supply is the prevailing party on appeal, Farm Supply is entitled to the fees incurred in this appeal.

**IV.  
CONCLUSION**

For the foregoing reasons, Defendant/Respondent Farm Supply respectfully requests that this Court dismiss Plaintiff's appeal.

DATED this 26<sup>th</sup> day of October, 2016.

CAREY PERKINS LLP

By/s/Hans A. Mitchell

\_\_\_\_\_  
Hans A. Mitchell, Of the Firm  
Aubrey D. Lyon, Of the Firm  
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26<sup>th</sup> day of October, 2016, I served a true and correct copy of the foregoing RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS MOOT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Vaughn Fisher  
Nicholas A. Warden  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Ste. 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
*Attorneys for Plaintiff/Respondent*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 297-2689  
 iCourt/Email:  
[vaughn@frhtriallawyers.com](mailto:vaughn@frhtriallawyers.com);  
[naw@frhtriallawyers.com](mailto:naw@frhtriallawyers.com).

\_\_\_\_\_  
/s/Hans A. Mitchell

Hans A. Mitchell

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff/Appellant

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff/Appellant

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant/Respondent.

Case No. CV OC 1500236

**APPELLANT'S REPLY BRIEF**

Appellant, H2O Environmental, Inc. ("H2O"), files this Rely Brief pursuant to Appellate Rule 35c.

**A. The Respondent mischaracterizes the standard of review.**

The Respondent ("Farm Supply") falsely accuses H2O of adopting a "tortured interpretation of the standard of review" and advocating for the application of a standard of review different from an abuse of discretion standard. That is incorrect. H2O agrees that the standard of review to be applied is an abuse of discretion standard and it clearly stated as much in its briefing. *See*, App. Br. 14 (citing *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004)); *see also*,



*State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999)). One basis for finding an abuse of discretion is a decision based upon factual findings that are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial and competent evidence. *Miller v. EchoHawk*, 126 Idaho 47, 49, 878 P.2d 746, 748 (1994) (citing *Mulch v. Mulch*, 125 Idaho 93, 867 P.2d 967 (1994)). Therefore, to the extent the Magistrate Court based its award of fees on factual findings that are unsupported by substantial and competent evidence, it abused its discretion. This articulation of the standard of review is in no way at odds with prior Supreme Court precedent cited by Farm Supply or the abuse of discretion standard.

**B. There is no evidence to support the Magistrate Court’s finding that H2O constantly changed its theories of recovery.**

One key factual finding adopted by the Magistrate Court in this case, and repeatedly touted by Farm Supply both in briefing below and on appeal, is that the amount of the fee award was reasonable in light of the H2O’s “constantly changing theories of recovery” and that “[a]lthough [H2O] ultimately won a recovery, it recovered on a theory different from that which it originally pursued, and only after multiple theories were either defeated or abandoned following [H2O’s] protracted gamesmanship and ill-advised tactics.” *See*, Resp. Br., pgs. 1, 10. H2O did not adopt “constantly changing theories of recovery”. Its theory of recovery did not change at all, let alone “constantly” and none of its claims were ever “defeated.” H2O prevailed on the same theory of recovery plead in the original complaint: the existence of an enforceable contract for services.

Throughout the litigation, H2O plead a total of three Counts: Count 1 for breach of an express contract, Count 2 for breach of the covenant of good faith and fair dealing, and Count 3 for quantum meruit. None of the three Counts were amended at any time prior to trial.<sup>1</sup> Prior to

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<sup>1</sup> The Complaint was amended once to add Count 3 for quantum meruit. The contents of the three counts remained unchanged throughout the litigation.

trial, H2O dropped Count 2 for breach of the covenant of good faith and fair dealing. At trial, the H2O prevailed on Count 1 for breach of contract, and Count 3, quantum meruit. None of the H2O's claims were "defeated", as Farm Supply states and the Magistrate Court found. H2O prevailed on two claims and dropped the third unilaterally.

The notion that H2O needlessly drove up the costs of litigation by hiding the ball or giving Farm Supply a moving target with ever-changing legal theories is without merit. It is not only unsubstantiated, but contradicted by the record. It errors because the Magistrate Court indiscriminately adopted the fabricated narrative. Contrary to the Farm Supply's briefing, there is no evidence in the record evidencing an attempt by the Magistrate Court to "consider[] the billing breakdown from Plaintiff's counsel" or to analyze the "line-by-line response to [H2O's] bills" as the Farm Supply claims. Resp. Br., pg. 7. Instead, the record indicates the Court did exactly the opposite: it attempted to circumvent the need to conduct an itemized review of either H2O's bills or Farm Supply's line-by-line criticisms by simply awarding the amount in controversy, a number which had no substantive or mathematical correlation to either. In summary, by awarding a predetermined amount of fees unsupported by substantial or competent evidence in the record, the Magistrate Court abused its discretion.

**C. The Magistrate Court's decision to rely on settlement negotiations is an issue that was raised by Farm Supply at the trial level.**

To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal. *Whitted v. Canyon County Bd. of Comm'rs.*, 137 Idaho 118, 121–22, 44 P.3d 1173, 1176–77 (2002). See also Farm Supply's stated authority of *Garner v. Bartschi*, 139 Idaho 430, 436, 80 P. 3d 1031, 1037 (2003). In the instant case Farm Supply raised the issue of settlement negotiations and it was clearly considered by the Magistrate Court. There is a clear record that

both parties submitted written argument on all the factors listed in Rule 54(e)(3) and it is likewise clear that H2O received an adverse ruling. The Magistrate Judge then made her decision at the oral argument without accepting further argument from counsel.<sup>2</sup> Further, Rule 54(d)(5) contemplates a single motion to disallow costs and does not invoke or contemplate additional filings pursuant to Rule 7 which would tie deadlines to the hearing date as opposed to the decision of the court.


Regardless, the point raised in H2O's appellate brief is that, if it was appropriate for the Magistrate Court to consider settlement negotiations, the admissible record before the Magistrate Court clearly shows that Farm Supply was the party that engaged in a war of gamesmanship and attrition. H2O's judgment in excess of both offers of judgment would actually provide H2O with an additional basis for recovering its reasonable attorney fees and, despite never producing one shred of credible evidence disputing the value of the services, Farm Supply did not offer the amount of the claim until it had subjected H2O to months of litigation and a summary judgment motion. The Magistrate Court erred by considering settlement negotiations in determining that H2O's requested attorney fees were not reasonable. If for some reason this Court finds that it was proper to consider those negotiations, then the Magistrate Court erred in not recognizing that the substantial admissible evidence in the record required a finding that H2O was essentially provided with no choice but to walk away from its debt or to pay attorneys to try to get Farm Supply and its insurance company to pay for the services H2O provided. For these reasons, the award of attorney fees should be vacated and this Court should determine the reasonable amount of attorney fees incurred by H2O or remand this matter to the Magistrate Court for a true hearing H2O's request for fees.

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<sup>2</sup> Farm Supply again argues that H2O has incurred too much in attorney fees but should have done more pleading and filing to overcome Farm Supply's improper arguments.

DATED this 31 day of October, 2016.

FISHER RAINEY HUDSON



Vaughn Fisher

*Attorney for Plaintiff/Appellant*

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of October, 2016, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

( ) Via U.S. Mail  
( ) Via Facsimile - (208) 345-8660  
( ) Via Overnight Mail  
( ) Via Hand Delivery  
 iCourt/Email:  
adlyon@careyperkins.com  
hamitchell@careyperkins.com



Vaughn Fisher

FILED By: Martha 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

H2O ENVIRONMENTAL, INC., an  
Idaho Corporation,

Plaintiff/Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation,

Defendant/Respondent.

Case No. CV-OC-2015-00236

OPINION ON APPEAL

ATTORNEY FOR THE PLAINTIFF/APPELLANT: VAUGHN FISHER

ATTORNEY FOR THE DEFENDANT/RESPONDENT: HANS MITCHELL

**I. NATURE OF THE CASE**

This is an appeal by the plaintiff/appellant, H2O Environmental, Inc., from a decision by the magistrate, concerning the amount of an award of attorney fees.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

The plaintiff/appellant H2O Environmental, Inc. did environmental cleanup work. Defendant/Respondent Farm Supply Distributors, Inc.'s insurance company disputed the reasonableness of the rates charged by H2O Environmental, Inc. The dispute was tried as a court trial. Following trial the Magistrate Court made findings of fact and determined the testimony of

Farm Supply's rate expert, Mr. Miceli, was not credible and not probative. H2O was awarded a judgment for the total amount it sought, \$7,354.64.

The Magistrate Court determined H2O was the prevailing party, but limited H2O's recover of attorney fees to \$7,354.64, a sum significantly below the amount claimed by H2O as the prevailing party.

### **III. ISSUES ON APPEAL**

The appellant, H2O, raises the following issues in this appeal: (1) "Did the Magistrate Court abuse its discretion by limiting H2O's recovery of attorney fees to the amount in controversy, which limitation it determined before hearing the merits of the case or receiving the attorney fees request?" (2) "Did the Magistrate Court abuse its discretion by limiting H2O's recovery of attorney fees to the amount in controversy because of its perception of the parties' settlement conduct, where the Magistrate Court's perception was not based on the admissible evidence in the record?" and (3) "Did the Magistrate Court abuse its discretion by limiting H2O's recovery of attorney fees to the amount in controversy, where the Magistrate Court relied on reasoning regarding summary judgment, discovery and other pretrial behavior which is not supported by substantial and competent evidence?" Appellant's Brief, at 8.

### **IV. STANDARD OF REVIEW**

When a district judge considers an appeal from a magistrate judge (not involving a trial de novo), the district judge is acting as an appellate court, not as a trial court. *State v. Kemmer*, 121 Idaho 594, 596, 826 P.2d 1306, 1308 (1992). The interpretation of law or statute is a question of law over which the Court has free review. *State v. Miller*, 134 Idaho 458, 462, 4 P.3d 570, 574 (Ct. App. 2000).

“The calculation of reasonable attorney fees is within the discretion of the trial court.”  
“The burden is on the party opposing the award to demonstrate that the district court abused its discretion.” *Lettunich v. Lettunich*, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008) (emphasis added).

“When an exercise of discretion is involved, this Court conducts a three-step analysis: (1) whether the trial court perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the trial court reached its decision by the exercise of reason.” *Cameron v. Neal*, 130 Idaho 898, 902, 950 P.2d 1237, 1241 (1997).

## V. ANALYSIS

### 1. Predetermined Award

H2O sought an award of attorney fees pursuant to I.C. § 12-120(3)<sup>1</sup> and I.C. § 12-121.<sup>2</sup> *See* Motion for Costs and Attorney’s Fees, at 1. Both of these statutory sections allow the prevailing party to be awarded reasonable attorney fees, as determined by the court.<sup>3</sup>

H2O contends the magistrate abused her discretion in determining the attorney fee award, asserting that she predetermined and awarded an arbitrary amount based entirely on the amount

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<sup>1</sup>“In any civil action 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, the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.”

<sup>2</sup>“In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney’s fees. The term “party” or “parties” is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.”

<sup>3</sup>The appellant also cited I.R.C.P. 54(e)(1), but that rule does not provide an independent basis for an award of attorney fees. *See* I.R.C.P. 54(e)(1): “In any civil action, the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties . . . when provided for by any statute or contract.” *See also Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 324, 246 P.3d 961, 977 (2010): “The rule does not provide authority for awarding attorney fees.”

in controversy before hearing the merits of the case or receiving the attorney fees request. Appellant's Brief, at 10.

The appellant sought an award of \$47,063.00 in attorney fees, along with \$6,340.50 in paralegal fees. *See* Affidavit of Vaughn Fisher in Support of Motion for Costs and Attorney's Fees, at 4.

During the hearing, the magistrate stated that "what I don't find reasonable are the attorney's fees. I really do not. And I think I indicated at some point of encouraging more settlement that it was going to be very hard for me to approve any fees more than the amount in dispute. And your fees are eight times more or so." June 22, 2016 Hearing Transcript, at 2. The magistrate stated, "[t]he trial was sufficiently clear to me and well done that you are the prevailing party. What I don't find is that it needed all that time and all the attorney's fees that you've requested." *Id.* at 3. The magistrate stated her view that this was not a hard case, legally or factually. *See id.* She said "I will award some fees. I will award the amount in dispute. And I will award the mandatory costs, but I am not going to award more." *Id.*

The respondent, Farm Supply Distributors, Inc., argued before the magistrate. "[t]he circumstances underlying this case were simple and there should have been few factual issues to be resolved. The parties agree that Plaintiff had performed the work. The parties agreed that there were no disputes regarding the quality of the work performed. The main disputes were whether the parties had a written contract and whether Plaintiff's charges were reasonable." Response in Opposition to Plaintiff's Motion for Costs and Fees, at 6-7. H2O states in its brief that "[t]his case, the discovery, and the trial were always about the reasonableness of the rates charged by H2O." Appellant's Brief, at 1. *See also* Respondent's Brief, at 1: "The underlying dispute in this case involved the value of services rendered. The facts are simple: Respondent



Farm Supply's truck leaked fuel. Plaintiff cleaned up the leak, and a disagreement arose regarding the value of the services Plaintiff performed."

The magistrate obviously agreed with Farm Supply that H2O's attorneys had not spent their time on this case efficiently (*see* June 22, 2016 Hearing Transcript, at 3: "[T]his was not a hard factual case. . . . It was not a hard legal case. . . . It was the facts and putting them on."

Idaho Rule of Civil Procedures 54(e)(3) specifically provides that the court should consider: "(A) the time and labor required; (B) the novelty and difficulty of the questions; . . . (F) . . . the circumstances of the case; [and] (G) the amount involved and the results obtained" in determining the amount of fees awarded.

The appellant contends the magistrate "fail[ed] to consider all of the [I.R.C.P. 54(e)(3)] factors." Appellant's Brief, at 12. However, the magistrate specifically stated the respondent "did a very good job" of reviewing the factors she was to consider in determining what are reasonable fees and she adopted its reasoning, in relation to the application of those factors. June 22, 2016 Hearing Transcript, at 3. The magistrate did not abuse her discretion here either. *See Elliott v. Darwin Neighbor Farms, Inc.*, 138 Idaho 774, 786, 69 P.3d 1035, 1047 (2003): "It is well settled that I.R.C.P. 54(e)(3) does not require the district court to make detailed findings on each listed factor. The rule merely provides that the district court shall consider the factors, but does not require a finding on each one, as a particular listed factor may or may not be relevant to the outcome." *See also Lee v. Nickerson*, 146 Idaho 5, 11, 189 P.3d 467, 473 (2008): "[T]he law is clearly settled that when awarding attorney fees in a civil action, the district court must consider the I.R.C.P. 54(e)(3) factors, but need not make specific written findings on the various factors: *Lake v. Purnell*, 143 Idaho 818, 820, 153 P.3d 1164, 1166 (2007) (trial court did not abuse its discretion in placing significant weight upon one I.R.C.P. 54(e)(3) factor).

The record does not support the claim that the magistrate had not “predetermined” the amount of attorney fees to be awarded, prior to the merits of the case being heard or the attorney fees request being made. The magistrate said during the hearing it would be difficult to convince her to change her mind concerning the amount of fees that should be awarded in the case, not impossible. That does not amount to a predetermination of the fees in light of the record stated by the magistrate.

## 2. Bad Faith

H2O contends, “The Magistrate Court abused its discretion by adopting Farm Supply’s argument that H2O failed to negotiate in good faith.” Appellant’s Brief, at 12. The respondent argues the appellant is improperly asserting this issue for the first time on appeal.<sup>4</sup> Even assuming this issue has been properly raised here, the appellant has not cited where in the record the magistrate specifically stated that she found that it did not negotiate in good faith and where she specified that this was a basis she utilized to diminish their attorney fee award. The magistrate said during the hearing that she was adopting the respondent’s memorandum “on terms of attorney’s fees,” but this adoption appears to have essentially been directed to the memo’s “going through all the factors that [the court is] supposed to look at in terms of determining what are reasonable fees” and, most notably its confirmation of her view that “this was not a hard factual case. . . . It was not a hard legal case. . . . It was the facts and putting them on.” June 22, 2016 Hearing Transcript, at 3.

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<sup>4</sup>See *Fernandez v. Aevermann*, 2008 WL 9468649, \*2-3 (Id. Ct. App.) noting: “The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). The rationale for this rule was first stated by the Supreme Court of the Territory of Idaho in 1867. ‘It is for the protection of inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance.’”

As previously noted, the primary reason the magistrate awarded the amount of fees that she did was the amount in controversy and the low degree of factual and legal complexity present in the case. At no time during the hearing, or otherwise, did the magistrate state that H2O negotiated with Farm Supply in bad faith. The magistrate was somewhat complimentary to the attorneys of both parties, during the hearing. *See* June 22, 2016 Hearing Transcript, at 2-5. H2O has failed to show the magistrate abused her discretion in this regard.

### **3. Erroneous Factual Findings**

H2O's final contention is "the Court's award of an amount of fees equal to the amount in controversy was an abuse of discretion because it was based upon the adoption of factual findings that are clearly erroneous." Appellant's Brief, at 14. The respondent also contends this issue is also improperly raised by the appellant for the first time on appeal. H2O has not cited to the portions of the record where the magistrate set forth these "clearly erroneous" factual findings. H2O is imputing the respondent's recitations in its memorandum upon the magistrate, which she said she adopted, during the hearing.

A review of the hearing transcript makes it clear that the magistrate based the attorney fee award upon the assessment of the low factual and legal complexity of the case, as well as the amount in controversy. The magistrate obviously concurred, as demonstrated by her hearing statements, with the respondent's I.R.C.P. 54(e)(3) factors assessments that "[t]he circumstances underlying this case were simple and there should have been few factual issues to be resolved," "the questions involved were of the most basic nature," "[t]he fundamental nature of Plaintiff's claims in this matter required neither specialized skill nor significant experience," "there is nothing unique about the circumstances of the case which would justify an attorney fee award so out of proportion to the amount Plaintiff sought in recovery," and "the amounts expended by

Plaintiff were so disproportionate to the amounts at issue.” *See* Response in Opposition to Plaintiff’s Motion for Costs and Fees, at 6, 9 & 10.

Even assuming this issue is properly raised, H2O has not demonstrated that the magistrate abused her discretion.

#### VI. Attorney Fees

H2O seeks an award of attorney fees on appeal, but it is not the prevailing party on appeal.

Farm Supply seeks attorney fees on appeal pursuant to I.C. §§ 12-120(3) and 12-121. The Court finds it is not necessary to consider I.C. § 12-121, since an award of attorney fees pursuant to I.C. § 12-120(3) is not discretionary, though the amount of the fees awarded is. *See, e.g., Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585, 591 (2016).

#### VII. CONCLUSION

The magistrate’s attorney fee award determination is affirmed. Farm Supply is awarded attorney fees on appeal.

Dated this 4 day of April 2017.



Gerald F. Schroeder  
Senior District Judge

## CERTIFICATE OF MAILING

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

VAUGHN FISHER  
[vaughn@frtriallawyers.com](mailto:vaughn@frtriallawyers.com)

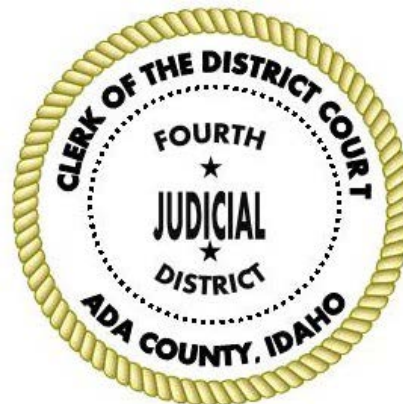
HANS MITCHELL-  
[hamitchell@careyperkins.com](mailto:hamitchell@careyperkins.com)

HON. PATRICIA YOUNG  
VIA INTERDEPARTMENTAL MAIL

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

Date: April 4, 2017

By *Shaitha Lyke*  
Deputy Clerk



**MAY 16 2017**

CHRISTOPHER D. RICH, Clerk  
By SANTIAGO BARRIOS  
DEPUTY

Vaughn Fisher, ISB No. 7624  
Nicholas A. Warden, ISB No. 9179  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: vaughn@frhtriallawyers.com  
Email: naw@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Attorneys for Plaintiff

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

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff

v.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

**NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, Farm Supply Distributors, Inc., AND THE PARTY'S ATTORNEYS Hans A. Mitchell, Carey Perkins, LLP., 300 N. 6<sup>th</sup> St., Ste. 200, Boise, ID 83702, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant H2O Environmental, Inc., appeals against the above named respondent Farm Supply Distributors, Inc. to the Idaho Supreme Court from the District Court for the Fourth Judicial District of the State of Idaho.

2. Appellant appeals from the Order on Plaintiff's Motion for Costs and Fees (entered on July 5, 2016), by the Magistrate Division of the District Court for the Fourth Judicial District of the State of Idaho, Honorable Judge Patricia G. Young presiding, subsequently affirmed in the Opinion on Appeal (entered on April 4, 2017), by the District Court for the Fourth Judicial District of the State of Idaho, Honorable Senior District Judge Gerald Schroeder presiding.

3. This appeal is taken on matters of law and fact.

4. A preliminary statement of the issues which the appellant intends to assert in the appeal:

a. Whether the District Court erred in affirming the decision of the magistrate court regarding the amount of the award of attorneys fees to the prevailing party.

b. Whether the District Court erred in awarding attorneys fees to the respondent on appeal of an issue involving only attorney fees.

5. That the party has a right to appeal to the Supreme Court of the State of Idaho and the order described in Paragraph 2 above is appealable under and pursuant to Rule 11(a)(2) and (7) of the Idaho Appellate Rules.

6. The testimony and proceeding of the original trial were recorded by audiotape at the time of the trial, February 3, 2016. The audiotape was subsequently transcribed by Dianne E. Cromwell and the transcript was submitted to the District Court for the Fourth Judicial District of the State of Idaho as part of the record on appeal on February 24, 2016.

7. The proceeding on the Motion for Costs and Fees was recorded by audiotape at the time of the hearing, June 22, 2016. The audiotape was subsequently transcribed by Vanessa M. Starr and the transcript was submitted to the District Court for the Fourth Judicial District of the State of Idaho as part of the record on appeal on July 25, 2016.

8. The proceeding on the Appeal to the Fourth Judicial District of the State of Idaho was recorded by audiotape at the time of the hearing, December 8, 2016. Appellant requests a standard transcript of that hearing in electronic format.

9. The Appellant requests the following documents be included in the clerk's record in addition to those documents automatically included under Idaho Appellate Rule 28:

- a. Defendant's Offer of Judgment (April 6, 2015);
- b. Order Governing Proceedings and Setting Jury Trial (June 18, 2015);
- c. Defendant's Motion for Summary Judgment (July 9, 2015), Memorandum in Support of Defendant's Motion for Summary Judgment, Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment;
- d. Plaintiff's Response to Defendant's Motion for Summary Judgment (July 28, 2015), Affidavit of Nicholas Warden in Support of Motion for Summary Judgment and exhibits 1 and 2 attached thereto;
- e. Defendant's Reply in Support of Motion for Summary Judgment (August 4, 2015);



- f. Plaintiff's Motion in Limine (August 25, 2015), Affidavit of Nicholas A. Warden in Support of Motion in Limine;
- g. Defendant's Expert Witness Disclosure (September 9, 2015);
- h. Defendant's Offer of Judgment (October 23, 2015);
- i. Plaintiff's Motion to File Supplemental Affidavit in Support of Plaintiff's Motion in Limine (November 10, 2015), Affidavit of Vaughn Fisher in Support of Plaintiff's Motion in Limine;
- j. Defendant's Response in Opposition to Plaintiff's Motion in Limine (November 17, 2015), Affidavit of Aubrey Lyon in Opposition to Plaintiff's Motion in Limine;
- k. Plaintiff's Reply in Support of Motion in Limine (November 20, 2015);
- l. Order Re: Motions in Limine (December 3, 2015);
- m. Defendant's Motion to Exclude Experts;
- n. Plaintiff's Response in Opposition to Defendant's Motion to Exclude Experts;
- o. Defendant's Reply in Support of Motion to Exclude Experts;
- p. Order Granting Defendant's Motion to Exclude Plaintiff's Expert Witnesses;
- q. Plaintiff's Motion to Exclude the Testimony of Christopher Micelli or to Reconsider Order Granting Motion to Exclude Plaintiff's Expert Witnesses;
- r. Plaintiff's Proposed Findings of Fact and Conclusions of Law;

s. Defendant's Response to Proposed Findings of Fact and Conclusions of Law;

t. Plaintiff's Motion for Costs and Attorney's Fees, Memorandum in Support of Motion for Costs and Attorney's Fees, Affidavit of Vaughn Fisher in Support of Motion for Costs and Attorney's Fees;

u. Response in Opposition to Plaintiff's Motion for Costs and Attorney's Fees, Affidavit of Hans Mitchell in Opposition to Motion for Costs and Attorney's Fees;

v. Order on Plaintiff's Motion for Costs and Fees;

w. Appellant's Brief;

x. Defendant/Respondent's Motion to Dismiss Appeal as Moot, Memorandum in Support of Motion to Dismiss Appeal as Moot, Affidavit of Hans Mitchell in Support of Motion to Dismiss Appeal as Moot;

y. Respondent's Brief;

z. Brief in Opposition to Motion to Dismiss Appeal as Moot, Affidavit of Vaughn Fisher in Opposition to Motion to Dismiss Appeal as Moot;

aa. Respondent's Reply in Support of Motion to Dismiss Appeal as Moot;

bb. Appellant's Reply Brief;

cc. Opinion on Appeal;

dd. The transcript of the February 3, 2016 trial in this matter, prepared by Dianne E. Cromwell and submitted to the District Court for the Fourth Judicial District of the State of Idaho as part of the record on appeal on February 24, 2016.

ee. The transcript of the June 22, 2016 hearing on Plaintiff's Motion for Costs and Fees, prepared by Vanessa M. Starr and submitted to the District Court for the Fourth Judicial District of the State of Idaho as part of the record on appeal on July 25, 2016.

10. No order has been entered sealing all or any part of the record or transcript.

11. Nicholas Warden, the undersigned attorney for Appellant, hereby certifies that:

a. A copy of the Notice of Appeal has been served upon the court reporter of the appellate proceeding before the District Court on December 8, 2016.

b. The fee for the reporter's transcript of the December 8, 2016 hearing has been paid;

c. The estimated fee for preparation of the clerk's record has been paid;

d. All appellate filing fees have been paid; and

e. Service has been made upon all other parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 16 day of May, 2017.

FISHER RAINEY HUDSON



Nicholas Warden

*Attorney for Plaintiff*

**CERTIFICATE OF SERVICE**

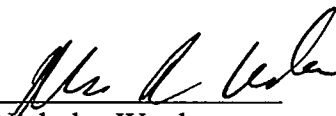
I HEREBY CERTIFY that on the 10 day of May, 2017, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon the following individuals in the manner indicated below:

Hans A. Mitchell  
Aubrey Lyon  
CAREY PERKINS LLP  
300 N. 6<sup>th</sup> St., Ste. 200  
PO Box 519  
Boise, Idaho 83701

- Via U.S. Mail
- Via Facsimile - (208) 345-8660
- Via Overnight Mail
- Via Hand Delivery
- Email

Diane Cromwell  
Tucker & Associates  
605 W. Fort St.  
Boise, ID 83702

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Email

  
\_\_\_\_\_  
Nicholas Warden

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 1:17

**JUL 11 2017**  
CHRISTOPHER D. RICH, Clerk  
By KELLE WEGENER  
DEPUTY

Stephen W. Kenyon  
Clerk of Supreme Court  
451 W State Street  
Boise, Idaho 83720

In re: H2O Environmental, Inc. v. Farm Supply Distributors, Inc.,  
Docket No. 45116

Notice is hereby given that on Friday, July 7, 2017, I lodged a transcript of 59 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 12/08/2016

David Cromwell  
Tucker & Associates

cc: [sctfilings@idcourts.net](mailto:sctfilings@idcourts.net)  
PDF format of completed files emailed to Supreme Court

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

H2O ENVIRONMENTAL, INC., an Idaho  
corporation,

Plaintiff-Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation,

Defendant-Respondent.

Supreme Court Case No. 45116

CERTIFICATE OF EXHIBITS

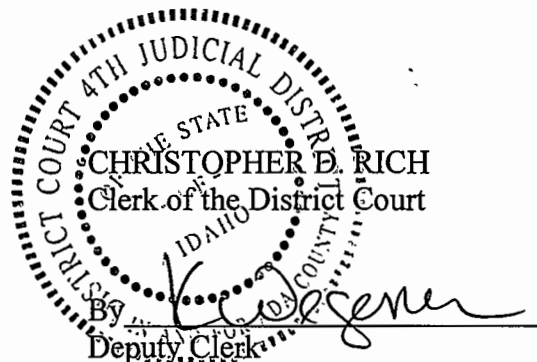
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

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

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Transcript of proceedings held February 3, 2016, Boise, Idaho, filed February 24, 2016.
2. Transcript of proceedings held June 22, 2016, Boise, Idaho, filed July 25, 2016.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 12th day of July, 2017.



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

JUDGE PATRICIA G. YOUNG

COURT TRIAL

Deputy Clerk: Deirdre Price

February 3, 2016

H2O ENVIRONMENTAL, INC., an Idaho  
Corporation,

Plaintiff,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation

Defendant.

Case No. CV OC 1500236

STIPULATED EXHIBIT LIST

ATTORNEY FOR THE PLAINTIFF: VAUGHN FISHER

ATTORNEY FOR THE DEFENDANT: HANS A. MITCHELL

| No. | Description                                                      | Status   | Date             |
|-----|------------------------------------------------------------------|----------|------------------|
| 1   | Facsimile from Farm Supply to H2O dated 7/14/2014 (H2O 091)      | Admitted | February 3, 2016 |
| 2   | E-mail from Johnsen to King dated 7/16/2014                      | Admitted | February 3, 2016 |
| 3   | E-mail from Simmons to Johnsen dated 7/18/2014 with attachment   | Admitted | February 3, 2016 |
| 4   | E-mail from Simmons to King dated 7/22/2014 (H2O 098)            | Admitted | February 3, 2016 |
| 5   | E-mail from King to Farm Supply dated 7/24/2014 with attachments | Admitted | February 3, 2016 |
| 6   | E-mail from King to Farm Supply dated 7/25/2014 with attachments | Admitted | February 3, 2016 |

|    |                                                                                                                         |          |                  |
|----|-------------------------------------------------------------------------------------------------------------------------|----------|------------------|
| 7  | E-mail from Wickenden to Johnsen dated 7/30/2014 with attachments                                                       | Admitted | February 3, 2016 |
| 8  | E-mail from Johnsen to Wickenden dated 7/30/2014 with attachments                                                       | Admitted | February 3, 2016 |
| 9  | E-mail from King to Johnsen dated 8/4/2014 with attachment                                                              | Admitted | February 3, 2016 |
| 10 | E-mail from Simmons to Johnsen dated 8/11/2014 with attachment                                                          | Admitted | February 3, 2016 |
| 11 | E-mail from Johnsen to King dated 8/11/2014                                                                             | Admitted | February 3, 2016 |
| 12 | E-mail from King to Johnsen dated 8/13/2014 2:12 p.m. with attachments                                                  | Admitted | February 3, 2016 |
| 13 | E-mail from King to Johnsen dated 8/13/2014 4:52 p.m. with attachments                                                  | Admitted | February 3, 2016 |
| 14 | E-mail from King to Johnsen dated 8/14/2014 with attachment                                                             | Admitted | February 3, 2016 |
| 15 | E-mail from Savre to Johnsen dated 9/26/2014 with attachments                                                           | Admitted | February 3, 2016 |
| 16 | E-mail from Fisher to Johnsen dated 10/22/2014 with attachment                                                          | Admitted | February 3, 2016 |
| 17 | E-mail from Miceli to Fisher dated 10/23/2014 with attachments                                                          | Admitted | February 3, 2016 |
| 18 | E-mail from Fisher to Miceli dated 10/24/2014                                                                           | Admitted | February 3, 2016 |
| 19 | 3501 and 3741 invoices with strikeouts (H2O 072 to 078)                                                                 | Admitted | February 3, 2016 |
| 20 | Zurich check (H2O 089 to 090)                                                                                           | Admitted | February 3, 2016 |
| 21 | Chris Miceli curriculum vitae (Exhibit 1 to Defendant's Expert Witness Disclosure)                                      | Admitted | February 3, 2016 |
| 22 | Chris Miceli report spreadsheet of reasonable and disputed charges (Exhibit 2 to Defendant's Expert Witness Disclosure) | Admitted | February 3, 2016 |



|    |                                                      |           |                  |
|----|------------------------------------------------------|-----------|------------------|
| 23 | Aerial photograph of site of spill                   | Admitted  | February 3, 2016 |
| 24 | Photographs of scene of accident<br>(11 photographs) | Admitted  | February 3, 2016 |
|    | Deposition of Joe Wickenden                          | Published | February 3, 2016 |

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

H2O ENVIRONMENTAL, INC., an Idaho  
corporation,

Plaintiff-Appellant,

vs.

FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation,

Defendant-Respondent.

Supreme Court Case No. 45116

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 AND REPORTER'S TRANSCRIPT

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

VAUGHN FISHER

ATTORNEY FOR APPELLANT

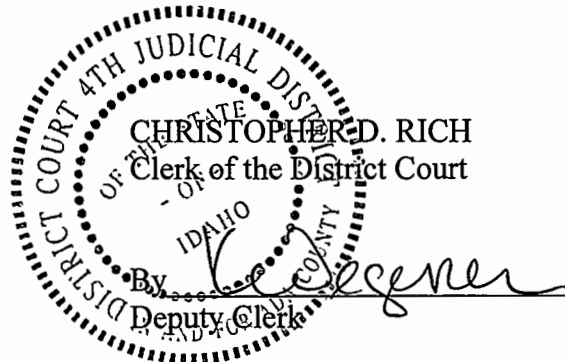
BOISE, IDAHO

HANS A. MITCHELL

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service:       JUL 12 2017      



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


H2O ENVIRONMENTAL, INC., an Idaho  
corporation,  
  
Plaintiff-Appellant,  
  
vs.  
  
FARM SUPPLY DISTRIBUTORS, INC.,  
an Oregon corporation,  
  
Defendant-Respondent.

Supreme Court Case No. 45116

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 16th day of May 2017.

CHRISTOPHER D. RICH  
Clerk of the District Court  
By   
Deputy Clerk

