

IN THE SUPREME COURT OF THE STATE OF IDAHO

RIVER RANGE LLC, a Wyoming limited  
liability company,

Plaintiff/Appellant,

vs.

CITADEL STORAGE, LLC, an Idaho limited  
liability company,

Defendant/Respondent.

SUPREME COURT NO. 47087-2019

Ada County District Court  
Case No. CV01-18-11353

**PLAINTIFF/APPELLANTS' REPLY BRIEF**

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Appeal from the District Court of the Fourth Judicial District  
of the State of Idaho, in and for the County of Ada  
The Honorable Nancy A. Baskin

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 4

II. ARGUMENT..... 4

    A. THE TRIAL COURT ERRED IN DETERMINING THAT SECTION 12 OF THE PSA UNAMBIGUOUSLY CONFLICTS WITH PARAGRAPH 3 OF ADDENDUM NO. 2..... 4

    B. THE TRIAL COURT ERRED IN DETERMINING THAT RIVER RANGE WAIVED ITS RIGHT TO TERMINATE THE PSA AND RECOVER ITS EARNEST MONEY BY WAIVING DUE DILIGENCE. .... 7

    C. THE TRIAL COURT ERRED IN DETERMINING THAT RESPONDENT DID NOT BREACH ITS DUTY UNDER THE COVENANT OF GOOD FAITH AND FAIR DEALING. .... 8

    D. THE COURT SHOULD REVERSE THE AWARD OF ATTORNEY FEES AND CITADEL SHOULD NOT BE AWARDED ATTORNEY FEES ON APPEAL. .... 8

III. CONCLUSION ..... 9

## TABLE OF AUTHORITIES

### *Cases*

<i>Phillips v. Gomez</i> , 162 Idaho 803, 808, 405 P.3d 588, 593 (2017).....	7
<i>Steiner v. Ziegler-Tamura Ltd., Co.</i> , 138 Idaho 238, 242, 61 P.3d 595, 599 (2002).....	7

The Appellant, River Range, LLC, (“River Range”), submits the following in reply to Respondent Citadel Storage, LLC’s (“Citadel”) brief.

**I. INTRODUCTION**

The issue in this case is whether Addendum No. 2 is so inconsistent and so absolutely repugnant with Section 12 of the PSA so as to remove the Buyers ability to object to title. Citadel argues that the language in paragraph 3 of Addendum No. 2 means that the Earnest Money Deposit will not be returned to the Buyer under any circumstances if the Buyer does not terminate the contract prior to the Due Diligence date. Citadel goes so far as to make the vaguely philosophical argument that the Earnest Money ceases to exist after the Due Diligence Deadline. Both the District Court and Citadel failed to recognize that Section 12 of the PSA and Addendum No. 2 can be read together without conflict.

**II. ARGUMENT**

**A. THE TRIAL COURT ERRED IN DETERMINING THAT SECTION 12 OF THE PSA UNAMBIGUOUSLY CONFLICTS WITH PARAGRAPH 3 OF ADDENDUM NO. 2.**

Section 12 of the PSA sets out the mechanics of Buyers right to object to title. Under Section 12, the Buyers timeframe for objecting to title begins on the date that Seller provides the preliminary title commitment. The title commitment was to be provided by the Seller on or before the Sellers Disclosure Deadline of January 29, 2018. Section 12 provides fifteen (15) business days from receipt of the preliminary commitment within which to object to the condition of title provided by the Seller. In the ordinary course, this fifteen-day timeline would have occurred at the latest the 13<sup>th</sup> day of February 2018, well before the Due Diligence Deadline of February 21, 2018. The PSA simply fails to directly address the situation that occurred in this case, where Seller did not timely provide the preliminary title commitment.

Citadel argues that paragraph 3 of Addendum No. 2 is wholly inconsistent with any provision in the PSA calling for the return of Buyers Earnest Money after the due diligence date of February 21, 2018. Specifically, that Addendum No. 2's language regarding the Earnest Money, "ripples through and conflicts with multiple portions of the Original RE-23 Form PSA, including most notably Sections 12 and 29, but also every other time the Earnest Money deposit was mentioned as potentially refundable to Buyer in the Original RE-23 Form PSA." Taking this argument to such an absurd level illustrates its weaknesses. Citadel is explicitly arguing that Seller could simply walk away at any time after the Due Diligence Deadline and have no further obligations to the Buyer. Section 29 provides for the return of Buyers Earnest Money upon Seller's Breach. Section 29 was explicitly modified by Addendum No. 2 Section 15 to remove any other remedy. Thus, if Citadel's argument was accepted, Buyer would be left with no remedies whatsoever after the due diligence period ended.

Neither the Court, nor the parties, need to attempt to understand the propagation of ripples from the language in paragraph 3 of Addendum No. 2. The return of the Buyers Earnest Money is only mentioned in Sections 3, 5, 12, 14, 17, and 29 of PSA. Each of these sections is either explicitly addressed in Addendum No. 2 or can be read in harmony with Addendum No. 2.

The portion of Section 3 of the PSA dealing with Earnest Money is inapplicable to the current transaction because the present transaction is an all cash offer. Section 5 of the PSA was specifically deleted in Addendum No. 2. Section 14 of the PSA states that "if Buyer timely and reasonably objects to a term of the CC&R's, this Agreement shall terminate and the Earnest Money shall be returned to Buyer." The relevant timeframe in this section is specifically limited to the

Due Diligence Deadline set forth in Section 17 of the PSA. The inspection contingencies referenced in Section 17 of the PSA are explicitly tied to the Due Diligence Deadline.

This leaves only Sections 12 and 29 of the PSA. Section 29 of the PSA states that “if Seller defaults, having approved said sale and fails to consummate the same as herein agreed, Buyers Earnest Money deposit shall be returned to him/her . . .”<sup>1</sup> By their own admission in Section D of Respondent’s brief, Citadel acknowledges that Section 29 continues to provide for the return of the Buyers Earnest Money following Sellers Breach. Specifically, Sellers state that return of Buyers Earnest Money is Buyers sole and exclusive remedy if Seller fails to consummate the sale.

As indicated in Appellant’s Opening Brief, Section 12 of the PSA can be read in harmony with Addendum No. 2 of the PSA.

Citadel argues that the Earnest Money deposit of \$50,000.00 “ceased to exist and disappeared” when it was released to Citadel.<sup>2</sup> The fact that the Earnest Money had been turned over, does not mean that it ceased to exist. It does not disappear just because it is no longer sitting with the title company. This argument contradicts Citadel’s argument in Section D of Respondent’s Brief that return of the Earnest Money is the sole and exclusive remedy for Sellers default.

There are genuine issues of material fact regarding the intent of the parties that the court erroneously failed to consider because the court determined that the Agreement was not ambiguous and the court’s granting of summary judgment on this issue should be reversed.

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<sup>1</sup> R000054, ¶ 29.

<sup>2</sup> See *Respondent’s Brief* at p. 17, ¶ 1.

**B. THE TRIAL COURT ERRED IN DETERMINING THAT RIVER RANGE WAIVED ITS RIGHT TO TERMINATE THE PSA AND RECOVER ITS EARNEST MONEY BY WAIVING DUE DILIGENCE.**

In its February 22, 2018 letter, River Range stated, “Buyer, River Range, LLC, hereby waives Due Diligence as per the Real Estate Purchase and Sale Agreement (PSA) and Addenda . . . .”<sup>3</sup> This letter does not mention title, nor does it express any intent or understanding that River Range was waiving any right to object to title. The last sentence of the February 22, 2018 letter stated, “All other terms and conditions of the PSA and subsequent Addenda shall remain in full force and effect.”<sup>4</sup> River Range specifically intended, as indicated in the affidavit of Tim Viole,<sup>5</sup> that the other Sections of the PSA would remain enforceable, including the right to object to title and right receive back the Earnest Money under Section 12. This evidence may be disputed by Citadel, but disputed evidence makes summary judgment inappropriate.

Citadel, relies upon *Williston on Contracts* and correctly points out that “an express or “true waiver”, implied from a party’s conduct, is dependent solely on what the party charged with waiver intended to do . . . .” Buyers intent must be looked at in regard to any claims by Citadel that an express waiver other than the Due Diligence waiver was intended.

Within this same argument in Respondent’s Brief, where Citadel argues that intent must be determined, Citadel also attempts to argue that the subjective intent of a party cannot override the plain meaning of the language of the contract as held in *Phillips v. Gomez*.<sup>6</sup> However, *Phillips* is a case that involves a party’s intent and interpretation of a contract. *Phillips v. Gomez* is not applicable to Citadel’s waiver argument.

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<sup>3</sup> R000093.

<sup>4</sup> *Id.*

<sup>5</sup> R000126-145.

<sup>6</sup> *Phillips v. Gomez*, 162 Idaho 803, 808, 405 P.3d 588, 593 (2017)

With the intent of River Range as to waiver in dispute, and as intent is a question of fact, summary judgment on this matter by the lower court was inappropriate.

**C. THE TRIAL COURT ERRED IN DETERMINING THAT RESPONDENT DID NOT BREACH ITS DUTY UNDER THE COVENANT OF GOOD FAITH AND FAIR DEALING.**

Every contract contains a duty of reasonable performance. *Steiner v. Ziegler-Tamura Ltd., Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002). Additionally, the covenant of good faith and fair dealing is implied by law and “requires the parties to perform, in good faith, the obligations required by their agreement[.]” *Id.* By Citadel acting in bad faith in an attempt to shorten the time the Buyers had to review and object to title, Citadel is in effect attempting to artificially shorten the time River Range had to review any title issues.

There are genuine issues of material fact that Citadel acted in bad faith to get rid of or shorten the time for River Range to review and object to title. The actions by Citadel to not provide the Buyers with the preliminary commitment by the January 29, 2018 deadline, along with Citadel’s interpretation of Addendum No. 2 which has been asserted in this action, support River Ranges contention that Citadel did not act in good faith.

River Range does not seek specific performance in this action, but rather simply seeks the remedy provided for in the Agreement for the return of its Earnest Money, given Citadel’s election not to address title issues.

**D. THE COURT SHOULD REVERSE THE AWARD OF ATTORNEY FEES AND CITADEL SHOULD NOT BE AWARDED ATTORNEY FEES ON APPEAL.**

Should River Range prevail on appeal, the Court should reverse the award of attorney fees granted to Citadel by the lower court and River Range should be entitled to attorney fees on



appeal as provided for in Paragraph 31 of the Agreement which states “the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney’s fees, including such costs and fees on appeal.”<sup>7</sup>

### **III. CONCLUSION**

For the reasons set forth herein, River Range requests that the Court:

- a. Reverse the summary judgment dismissing the claims against Citadel Storage, LLC;
- b. Vacate the judgments entered in this matter (including the judgments for attorney fees) and remand the matter for new trial against Citadel Storage, LLC.
- c. Award costs and attorney fees to Appellant.

DATED this 8<sup>th</sup> day of November 2019.

ANGSTMAN JOHNSON

By: /s/ Branden M. Huckstep  
J. JUSTIN MAY  
BRANDEN M. HUCKSTEP  
*Attorney for Plaintiff/Appellant*

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<sup>7</sup> R.000055, ¶3.

### CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> day of November 2019 I caused to be served, a true and correct copy of the foregoing document to be the person(s) listed below by the method indicated:

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/s/ Branden M. Huckstep  
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