9-29-2015

The Watkins Company v. Estate of Storms Clerk's Record Dckt. 43649

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE WATKINS COMPANY, LLC, an Idaho limited liability company,	)	
Plaintiff/Counterdefendant/Appellant,	)	Case No. CV-2010-5958
vs.	)	Docket No. 43649
MICHAEL STORMS, an individual, and BROWNSTONE COMPANIES, INC.,an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE,	)	
Defendant/Counterclaimants/Respondents.	)	

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CLERK'S RECORD ON APPEAL

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE DARREN B. SIMPSON, District Judge.

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B.J. Driscoll
PO Box 50731
Idaho Falls ID 83405
Attorney for Appellant

Dean C. Brandstetter
PO Box 51600
Idaho Falls, ID 83405-1600
Attorney for Respondent

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
9/29/2010	SMIS	SBARRERA	Summons Issued	Joel E. Tingey
	NCOC	SBARRERA	New Case Filed-Other Claims	Joel E. Tingey
	NOAP	SBARRERA	Plaintiff: The Watkins Company Notice Of Appearance B.J. Driscoll	Joel E. Tingey
	COMP	SBARRERA	Complaint Filed	Joel E. Tingey
		SBARRERA	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Driscoll, B.J. (attorney for The Watkins Company) Receipt number: 0045750 Dated: 9/29/2010 Amount: $88.00 (Check) For: The Watkins Company (plaintiff)	Joel E. Tingey
10/1/2010	NOAP	SOUTHWIC	Notice Of Appearance -- Defs Michael Storms and Brownstone Companies, Inc.	Joel E. Tingey
	NOAP	SOUTHWIC	Defendant: Storms, Michael Scott Notice Of Appearance Dean C. Brandstetter	Joel E. Tingey
	NOAP	SOUTHWIC	Defendant: Brownstone Companies, Inc. Notice Of Appearance Dean C. Brandstetter	Joel E. Tingey
		SOUTHWIC	Acceptance of Service	Joel E. Tingey
	MOTN	SOUTHWIC	Motion to Disqualify Without Cause	Joel E. Tingey
	ORDR	SOUTHWIC	Order for Disqualification	Joel E. Tingey
		HUNTSMAN	Order of Assignment to Honorable Darren B. Simpson	Darren B. Simpson
	MOTN	SOLIS	Motion For Temporary Restraining Order And Application For Prejudgment Writ Of Attachment	Darren B. Simpson
		SOLIS	Brief In Support Of Motion For Temporary Restraining Order And Application For Prejudgment Writ Of Attachment	Darren B. Simpson
	AFFD	SOLIS	Affidavit Of Dane Watkins	Darren B. Simpson
	AFFD	SOLIS	Affidavit Of Dane Watkins	Darren B. Simpson
10/5/2010	NOTC	SOLIS	Notice Of Filing Bond	Darren B. Simpson
10/7/2010	MINE	QUINTANA	Minute Entry	Darren B. Simpson
	ORDR	QUINTANA	Order Granting Motion for Temporary Restraining Order and Order to Show Cause	Darren B. Simpson
	NOTH	QUINTANA	Notice Of Hearing Order to Show Cause	Darren B. Simpson
10/13/2010	MOTN	SBARRERA	Motion For Prejudgment Writ Of Attachment And Preliminary Injunction	Darren B. Simpson
	AFFD	SBARRERA	Affidavit Of B.J. Driscoll	Darren B. Simpson
		SBARRERA	Brief In Support Of Motion For Prejudgment Writ Of Attachment And Preliminary Injunction	Darren B. Simpson
	NOTH	SBARRERA	Notice Of Hearing (10/14/2010 1:30PM)	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
10/14/2010	MINE	LMESSICK	Minute Entry Hearing type: Hearing Hearing date: 10/14/2010 Time: 2:33 pm Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number:	Darren B. Simpson
10/18/2010	MEMO	KBAIRD	Memorandum of defentant's storms and brownstone companies, inc	Darren B. Simpson
10/20/2010	BRIF	DOOLITTL	Reply Brief Filed in Support of Motion for Prejudgment Writ of Attachment and Preliminary Injunction	Darren B. Simpson
11/3/2010	MINE	SOUTHWIC	Minute Entry	Darren B. Simpson
11/4/2010	DEOP	SOUTHWIC	Decision Denying Pl's Motion for Prejudgment Writ of Attachment and Granting in Part Pl's Request for a Preliminary Injunction	Darren B. Simpson
11/9/2010	MOTN	SBARRERA	Motion For Reconsideration And Request For Hearing On Preliminary Injunction Restraining Order	Darren B. Simpson
	MOTN	LYKE	Motion for Reconsideration	Darren B. Simpson
	BRIF	LYKE	Brief Filed in Support of Motion for Reconsideration	Darren B. Simpson
	NOTH	LYKE	Notice Of Hearing Re: Motion for Reconsideration (12/03/10@10:30AM)	Darren B. Simpson
	ORDR	SOUTHWIC	Order Setting Aside Decision Granting in Part Pl's Request for Preliminary Injunction	Darren B. Simpson
11/10/2010	DEOP	SOUTHWIC	Decision Denying Pl's Motion for Prejudgment Writ of Attachment and Granting in Part Pl's Requesst for a Preliminary Injunction	Darren B. Simpson
11/17/2010	DCHH	SOUTHWIC	District Court Hearing Held Court Reporter: Sandra Beebe Number of Transcript Pages for this hearing estimated: under 100	Darren B. Simpson
11/26/2010	MINE	DOOLITTL	Minute Entry	Darren B. Simpson
	MINE	DOOLITTL	Minute Entry	Darren B. Simpson
	ORDR	DOOLITTL	Order Granting Prelinminary Injunction In Part	Darren B. Simpson
	ORDR	DOOLITTL	Order Denying Plaintiff's Request for a Rule 54(B) Certificate	Darren B. Simpson
12/1/2010	ANSW	LYKE	Answer (Dean C. Brandstetter for Michael Storms and Brownstone Companies, Inc)	Darren B. Simpson
12/13/2010	MINE	QUINTANA	Minute Entry	Darren B. Simpson
8/31/2011	MOTN	SBARRERA	Motion To Dismiss	Darren B. Simpson
	NOTH	SBARRERA	Notice Of Hearing RE: Defendant's Motion To Dismiss (10/05/2011 2:00PM)	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
9/6/2011	ORDR	QUINTANA	Order Vacating and Rescheduling Hearing September 30, 2011 at 2:00 p.m.	Darren B. Simpson
9/7/2011	HRSC	QUINTANA	Hearing Scheduled (Motion 09/30/2011 02:00 PM) Defendant's Motion to Dismiss	Darren B. Simpson
9/22/2011	NOTC	DOOLITTL	Notice Vacaing Hearing and Withdrawing Motion to Dismiss	Darren B. Simpson
	HRVC	QUINTANA	Hearing result for Motion scheduled on 09/30/2011 02:00 PM: Hearing Vacated Defendant's Motion to Dismiss	Darren B. Simpson
9/28/2011	NOTC	QUINTANA	Notice of Proposed Dismissal for Inactivity	Darren B. Simpson
10/26/2011	MOTN	LYKE	Motion for Retention	Darren B. Simpson
	AFFD	LYKE	Affidavit in Support of Motion for Retention	Darren B. Simpson
10/28/2011	AFFD	LYKE	Affidavit of BJ Driscoll	Darren B. Simpson
12/8/2011	AMCO	TBROWN	Amended Complaint Filed	Darren B. Simpson
12/18/2011	ORDR	LMESSICK	Order For Retention	Darren B. Simpson
12/22/2011	ORDR	LMESSICK	Order for Amended Complaint	Darren B. Simpson
12/27/2011	NTTD	DOOLITTL	Notice Of Intent To Take Default	Darren B. Simpson
1/3/2012	ANSW	DOOLITTL	Defendant's Michael Storms and Brownstone Companies, Inc. Answer	Darren B. Simpson
5/2/2012	NORT	SBARRERA	Note Of Issue/request For Trial	Darren B. Simpson
5/8/2012	RRTS	HUMPHREY	Response To Request For Trial Setting	Darren B. Simpson
7/9/2012	NOTH	LMESSICK	Notice Of Hearing	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Status Conference 07/23/2012 10:00 AM) TELEPHONIC	Darren B. Simpson
8/1/2012	NOTH	LMESSICK	Amended Notice of Hearing	Darren B. Simpson
8/7/2012	DCHH	LMESSICK	Hearing result for Status Conference scheduled on 08/07/2012 11:30 AM: District Court Hearing Held Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: TELEPHONIC 50 pages	Darren B. Simpson
8/8/2012	MEDI	LMESSICK	Order Referring Case to Mediation	Darren B. Simpson
	MINE	LMESSICK	Minute Entry: Telephonic Status and Scheduling Conference	Darren B. Simpson
	ORPT	LMESSICK	Court Trial Scheduling Order	Darren B. Simpson
8/14/2012	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 02/06/2013 01:30 PM)	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Trial 03/05/2013 09:00 AM)	Darren B. Simpson
10/25/2012	HRSC	LMESSICK	Hearing Scheduled (Motion 12/12/2012 01:30 PM) Summary Judgment	Darren B. Simpson
11/8/2012		DOOLITTL	Plaintiff's Witness Disclosures	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
11/9/2012	NTOS	BOULWARE	Notice Of Service - Defendant' Michael Storms' Interrogatories and Requests for Production to Plaintiff	Darren B. Simpson
	NTOS	BOULWARE	Notice Of Service - Defendant Brownstone Companies Inc.'s Interrogatories to Plaintiff	Darren B. Simpson
11/19/2012	NTOS	DOOLITTL	Notice Of Service {Plaintiff's 1st Set of Interrogatories to Defendants Brownstone Companies, Inc. and Michael Storms and Plaintiff's 1st Set of Requests for Production of Documents to Defendants Brownstone Companies, Inc. and Michael Storms}	Darren B. Simpson
12/10/2012	HRVC	LMESSICK	Hearing result for Motion scheduled on 12/12/2012 01:30 PM: Hearing Vacated Summary Judgment	Darren B. Simpson
12/11/2012	NOTC	DOOLITTL	Defendant's Notice of Compliance RE: Witness List	Darren B. Simpson
12/12/2012	MOTN	DOOLITTL	Plaintiff's Motion for Partial Summary Judgment	Darren B. Simpson
	AFFD	DOOLITTL	Plaintiff's Affidavit of Dane Watkins	Darren B. Simpson
	BRIF	DOOLITTL	Plaintiff's Brief Filed in Support of Motion for Partial Summary Judgment	Darren B. Simpson
	NOTH	DOOLITTL	Plaintiff's Notice Of Hearing 1-9-13 @ 1:30 p.m. {Motion for Partial Summary Judgment}	Darren B. Simpson
12/18/2012	MOTN	CEARLY	Plaintiff- Motion To Compel And To Stay Motion For Summary Judgment	Darren B. Simpson
12/19/2012	AFFD	CEARLY	Affidavit In Support Of Motion To Compel And To Stay Summary Judgment Proceedings	Darren B. Simpson
12/20/2012	NOTH	SOLIS	Notice Of Hearing 01/30/2013 @1:30 PM RE: Motion For Partial Summary Judgment	Darren B. Simpson
12/21/2012	NTOS	SOLIS	Notice Of Service - Responses To Defendant Michael Storms's Interrogatories And Requests For Production To Plaintiff and Responses To Defendant Brownstone Companies, Inc's Interrogatories To Plaintiff	Darren B. Simpson
1/3/2013	MOTN	HUMPHREY	Defendant's Motion For Order Shortening Time For Hearing	Darren B. Simpson
	MOTN	HUMPHREY	Defendant's Motion For Partial Summary Judgment	Darren B. Simpson
	NOTH	HUMPHREY	Notice Of Hearing - 01/30/2013 @ 1:30PM RE: Defendants' Motion For Partial Summary Judgment	Darren B. Simpson
1/9/2013	NTOS	DOOLITTL	Notice Of Service {Defendant Michael Storms and Brownstone Companies, Inc. Answers to Plaintiff's 1st Set of Interrogatories and Requests for Production of Documents}	Darren B. Simpson
1/16/2013	MOTN	DOOLITTL	Plaintiff's Motion to Compel	Darren B. Simpson
	BRIF	DOOLITTL	Plaintiff's Brief Filed in Opposition to Defendatns' Motion for Partial Summary Judgment	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
1/16/2013	NOTH	DOOLITTL	Plaintiff's Notice Of Hearing 1-30-13 @ 1:30 p.m. {Motion to Compel}	Darren B. Simpson
1/17/2013	MOTN	CEARLY	Motion For Order Shortening Time For Responding To Motion For Partial Summary Judgment	Darren B. Simpson
	AFFD	CEARLY	Affidavit In Support Of Motion For Order Shortening Time To Respond	Darren B. Simpson
	MOTN	DOOLITTL	Defendant's Motion to Compel and to Stay Motion for Summary Judgment	Darren B. Simpson
	MEMO	DOOLITTL	Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment	Darren B. Simpson
	AFFD	DOOLITTL	Defendant's Affidavit in Support of Motion to Compel and to Stay Summary Judgment Proceedings	Darren B. Simpson
	AFFD	DOOLITTL	Defendant's Affidavit in Opposition to Plaintiff's Motion for Summary Judgment	Darren B. Simpson
	NOTH	DOOLITTL	Defendant's Notice Of Hearing 1-30-13 @ 1:30 p.m. {Defendants' Motion to Compel and to Stay Motion for Summary Judgment}	Darren B. Simpson
1/25/2013	NTOS	CARTER	Notice Of Service - Supplemental Responses To Defendant Michael Storm's Interrogatories And Requests For Production To Plaintiff	Darren B. Simpson
	MINE	LMESSICK	Minute Entry: Telephonic Status Conference	Darren B. Simpson
1/30/2013	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 1/30/2013 Time: 1:34 pm Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
	NTOS	CARTER	Notice Of Service - Defendant's Supplemental Answers To Discovery	Darren B. Simpson
	MOTN	CARTER	Plaintiff - Motion To Amend Complaint	Darren B. Simpson
2/1/2013	HRVC	LMESSICK	Hearing result for Pretrial Conference scheduled on 02/06/2013 01:30 PM: Hearing Vacated	Darren B. Simpson
	HRVC	LMESSICK	Hearing result for Trial scheduled on 03/05/2013 09:00 AM: Hearing Vacated	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Motion 02/19/2013 10:00 AM) Summary Judgment	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
2/4/2013	AFFD	HUMPHREY	Amended Affidavit In Opposition To Plaintiff's Motion For Summary Judgment	Darren B. Simpson
2/5/2013	NOTH	CEARLY	Notice Of Hearing RE: Motion To Amend Complaint 2-19-13 @ 10:00 AM	Darren B. Simpson
2/11/2013	NTOS	DOOLITTL	Notice Of Service {Plaintiff's 2nd Suppolemental Responses to Defendant Michael Storm's Interrogatories and Requests for Production to Plaintiff}	Darren B. Simpson
2/12/2013	BRIF	DOOLITTL	Plaintiff's Reply Brief Filed in Support of Motion for Partial Summary Judgment	Darren B. Simpson
2/13/2013	AFFD	DOOLITTL	Plaintiff's Affidavit of Dane Watkins	Darren B. Simpson
2/19/2013	DCHH	LMESSICK	Hearing result for Motion scheduled on 02/19/2013 10:00 AM: District Court Hearing Hel Court Reporter: Daniel Williams Number of Transcript Pages for this hearing estimated: Summary Judgment Motion to Amend Complaint 50 pages	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 2/19/2013 Time: 10:15 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: 4 Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
2/21/2013	NTOS	DOOLITTL	Notice Of Service {3rd Supplemental Responses to Defendant Michael Storms's Interogatories and Requests for Production to Plaintiff}	Darren B. Simpson
2/27/2013	MINE	LMESSICK	Minute Entry: Telephonic Status Conference	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Status Conference 03/13/2013 01:30 PM)	Darren B. Simpson
3/14/2013	HRVC	LMESSICK	Hearing result for Status Conference scheduled on 03/13/2013 01:30 PM: Hearing Vacated	Darren B. Simpson
3/19/2013	ORDR	LMESSICK	Order Staying Decision on Plaintiff's MOtionf or Partial Summary Judgment, Plaitniff's Motion to Amend Complaint and Defendant's Motion for Summary Judgment	Darren B. Simpson
3/25/2013	NOTC	HUMPHREY	Defendant's Notice Of Settlement Failure	Darren B. Simpson
5/13/2013	ORDR	LMESSICK	Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting in Part, Defendant's Motion for Summary Judgment	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
6/4/2013	MOTN	DOOLITTL	Plaintiff's Motion to Withdraw	Darren B. Simpson
	NOTH	DOOLITTL	Plaintiff's Notice Of Hearing 6-19-13 @ 1:30 p.m. {Motion to Withdraw}	Darren B. Simpson
6/5/2013	NOTH	LMESSICK	Notice Of Hearing: Telephonic Status Conference	Darren B. Simpson
6/13/2013	MINE	LMESSICK	Minute Entry: Telephonic Status Conference	Darren B. Simpson
6/19/2013	NOTC	HUMPHREY	Plaintiff's Notice Of Withdrawal Of Motion To Withdraw	Darren B. Simpson
6/20/2013	MOTN	DOOLITTL	Plaintiff's Motion to Amend Complaint	Darren B. Simpson
	NOTH	DOOLITTL	Plaintiff's Notice Of Hearing 7-24-13 @ 1:30 p.m. {Motion to Amend Complaint}	Darren B. Simpson
7/10/2013	MOTN	SOLIS	Plaintiff - Motion For Sanctions And Motion For Attorney's Fees	Darren B. Simpson
	NOTH	SOLIS	Notice Of Hearing 07/24/2013 @1:30PM RE:Motion For Sanctions And Motion For Attorney's Fees	Darren B. Simpson
7/24/2013	HRSC	GWALTERS	Hearing Scheduled (Motion 07/24/2013 01:30 PM) for sanctions/atty fees	Darren B. Simpson
	MINE	GWALTERS	Minute Entry Hearing type: Motion Hearing date: 7/24/2013 Time: 2:02 pm Courtroom: Court reporter: Dan Williams Minutes Clerk: Grace Walters Tape Number: Doug Bowen Dean Brandstetter	Darren B. Simpson
	DCHH	GWALTERS	Hearing result for Motion scheduled on 07/24/2013 01:30 PM: District Court Hearing Hel Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: under 50 for sanctions/atty fees	Darren B. Simpson
	AFFD	GWALTERS	Affidavit in Opposition to Motion for Sanctions and for Attorney Fees obo Def.	Darren B. Simpson
8/16/2013	ORDR	LMESSICK	Order Granting Plaintiff's Motion to Amend and Denying Plaintiff's Motion for Sanctions	Darren B. Simpson
8/21/2013	NOTC	CARTER	Notice Of Available Trial Dates	Darren B. Simpson
9/6/2013	COMP	CEARLY	Second Amended Complaint Filed	Darren B. Simpson
9/9/2013	NOTC	CEARLY	Plaintiff- Notice Of Available Trial Dates	Darren B. Simpson
9/19/2013	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 01/29/2014 01:30 PM)	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Jury Trial 02/03/2014 09:00 AM)	Darren B. Simpson
	NOTC	LMESSICK	Notice of Hearing: Pretrial Conference Jury Trial	Darren B. Simpson
9/20/2013	NOTC	HUMPHREY	Defendant's Amended Notice Of Available Trial Dates	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
9/23/2013	NTOS	HUMPHREY	Notice Of Service - Defendant's Third Supplemental Answer To Discovery	Darren B. Simpson
9/24/2013	NOTC	HUMPHREY	Defendant's Notice Of Unavailable Trial Dates	Darren B. Simpson
10/2/2013	ORPT	LMESSICK	Amended Notice of Hearing: Pretrial COnference Court Trial	Darren B. Simpson
10/21/2013	NTTD	DOOLITTL	Plaintiff's Notice Of Intent To Take Default	Darren B. Simpson
10/23/2013	ANSW	DOOLITTL	Defendant's Answer to 2nd Amended Complaint and Counterclaim	Darren B. Simpson
11/4/2013	HRSC	LMESSICK	Hearing Scheduled (Motion 11/20/2013 01:30 PM) (PL) Motion to Strike	Darren B. Simpson
		CEARLY	Motion For Leave To Withdraw As Attorney Of Record	Darren B. Simpson
	NOTH	CEARLY	Notice Of Hearing RE: Motion For Leave To Withdraw As Attorney Of Record 11-20-13 @ 1:30 PM	Darren B. Simpson
11/13/2013	RESP	DOOLITTL	Defendant's Response to Motion to Strike Counterclaim of Defendants	Darren B. Simpson
11/15/2013	BRIF	CARTER	Reply Brief In Support Of Objection And Motion To Strike Counterclaim	Darren B. Simpson
11/18/2013	NTOS	CEARLY	Notice Of Service Defendant's Fourth Supplemental Answers To Discovery	Darren B. Simpson
11/20/2013	MINE	GWALTERS	Minute Entry Hearing type: Motion Hearing date: 11/20/2013 Time: 1:39 pm Courtroom: Court reporter: Dan Williams Minutes Clerk: Grace Walters Tape Number: Dean Brandstetter BJ Driscoll	Darren B. Simpson
	DCHH	GWALTERS	Hearing result for Motion scheduled on 11/20/2013 01:30 PM: District Court Hearing Hel Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: under 50 (PL) Motion to Strike	Darren B. Simpson
11/27/2013	MOTN	DOOLITTL	Plaintiff's Motion for Partial Summary Judgment	Darren B. Simpson
	BRIF	DOOLITTL	Plaintiff's Brief Filed in Support of Motion for Partial Summary Judgment	Darren B. Simpson
	NOTH	DOOLITTL	Plaintiff's Notice Of Hearing 1-8-14 @ 1:30 p.m. {Motion for Partial Summary Judgment}	Darren B. Simpson
1/7/2014	NTTD	CEARLY	Notice Of Intent To Take Default	Darren B. Simpson
1/8/2014	HRSC	LMESSICK	Hearing Scheduled (Motion 01/08/2014 01:30 PM) Summary Judgment	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
1/8/2014	DCHH	LMESSICK	Hearing result for Motion scheduled on 01/08/2014 01:30 PM: District Court Hearing Hel Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: Summary Judgment 50 pages	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 1/8/2014 Time: 1:37 pm Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
1/10/2014		DOOLITTL	Plaintiff's Reply to Counterclaim	Darren B. Simpson
1/29/2014	NOTC	LMESSICK	Notice Vacating and Rescheduling Pretrial Conference	Darren B. Simpson
2/5/2014	DCHH	LMESSICK	Hearing result for Pretrial Conference scheduled on 02/05/2014 11:00 AM: District Court Hearing Held Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: 50 pages	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Pretrial Conference Hearing date: 2/5/2014 Time: 11:09 am Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
2/12/2014	ORDR	LMESSICK	Order Denying Plaintiff's Motion for Partial Summary Judgment	Darren B. Simpson
2/28/2014	NOTC	CEARLY	Notice Of Filing Plaintiff's Trial Exhibits	Darren B. Simpson
	MOTN	CEARLY	Defendant - Motion For Enlargement Of Time To File Exhibits	Darren B. Simpson
	NOTC	QUINTANA	Notice of Compliance Re: Witness LIst (Defendant)	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
2/28/2014	NOTC	QUINTANA	Notice of Compliance Pre-Trial Order (Defendant)	Darren B. Simpson
3/3/2014	NOTC	CEARLY	Notice Of Compliance RE: Exhibits	Darren B. Simpson
3/4/2014	MEMO	CEARLY	Plaintiffs' Pretrial Memorandum	Darren B. Simpson
3/18/2014	TLST	LMESSICK	Hearing result for Trial scheduled on 03/18/2014 09:00 AM: Trial Started	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Trial - Day 1 Hearing date: 3/18/2014 Time: 9:12 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
3/19/2014	MINE	LMESSICK	Minute Entry Hearing type: Trial - Day 2 Hearing date: 3/19/2014 Time: 9:04 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
3/20/2014	MINE	LMESSICK	Minute Entry Hearing type: Trial - Day 3 Hearing date: 3/20/2014 Time: 9:10 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: 5 Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
3/21/2014	MINE	LYKE	Minute Entry Hearing type: Hearing date: 3/21/2014 Time: 8:51 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Amanda Lyke Tape Number:	Darren B. Simpson
4/1/2014	HRSC	LMESSICK	Hearing Scheduled (Trial 04/25/2014 09:00 AM)	Darren B. Simpson
	HRSC	LMESSICK	Hearing Scheduled (Trial 05/02/2014 09:00 AM)	Darren B. Simpson
4/11/2014	ORDR	LMESSICK	Order Denying Defendant Michael Storms' and Defendant Brownstone Companies, Inc.'s Motion to Dismiss	Darren B. Simpson
4/15/2014	STIP	CEARLY	Stipulation	Darren B. Simpson
4/21/2014	ORDR	LMESSICK	Order Approving Stipulation	Darren B. Simpson
4/25/2014	DCHH	LMESSICK	Hearing result for Trial scheduled on 04/25/2014 09:00 AM: District Court Hearing Held Court Reporter: Dan Williams Number of Transcript Pages for this hearing estimated: 50 pages	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Trial - Day 5 Hearing date: 4/25/2014 Time: 9:13 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
4/28/2014	HRSC	LMESSICK	Hearing Scheduled (Trial 05/15/2014 09:00 AM)	Darren B. Simpson
5/6/2014	MINE	LMESSICK	Minute Entry Hearing type: Trial - Day 6 Hearing date: 5/6/2014 Time: 9:07 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
5/6/2014	DCHH	LMESSICK	Hearing result for Trial scheduled on 05/06/2014 09:00 AM: District Court Hearing Held Court Reporter: Daniel Williams Number of Transcript Pages for this hearing estimated: 200 pages	Darren B. Simpson
5/30/2014		LMESSICK	Notice of Hearing	Darren B. Simpson
6/10/2014	MOTN	CEARLY	Plaintiff - Motion To Continue Trial Date	Darren B. Simpson
6/18/2014	NOTC	BIRCH	Defendants' Notice Of Available Trial Dates	Darren B. Simpson
6/19/2014	ORDR	LMESSICK	Order Vacating and Resetting Trial Date	Darren B. Simpson
7/29/2014	MINE	PADILLA	Minute Entry Hearing type: Trial-Day 7 Hearing date: 7/29/2014 Time: 7:47 am Courtroom: Court reporter: Daniel Williams Minutes Clerk: Maria Padilla Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
	DCHH	LMESSICK	Hearing result for Trial scheduled on 07/29/2014 09:00 AM: District Court Hearing Held Court Reporter:Number of Transcript Pages for this hearing estimated:	Darren B. Simpson
9/11/2014	MOTN	CEARLY	Defendants - Motion For Extension Of Time to File Proposed Findings Of Fact And Conclusions Of Law	Darren B. Simpson
	ORDR	LMESSICK	Order Extending Time to File Proposed Findings of Fact and Conclusions of Law	Darren B. Simpson
	ORDR	LMESSICK	Order Extending Time for Plaintiff to File Closing Argument and Proposed Findings of Fact and Conclusions of Law	Darren B. Simpson
9/19/2014		BIRCH	Plaintiff's Proposed Findings Of Fact And Conclusions Of Law	Darren B. Simpson
		BIRCH	Plaintiff's Closing Argument	Darren B. Simpson
		BIRCH	Defendants Storms And Brownstone Companies, Inc., Proposed Findings Of Fact, Conclusions Of Law And Argument	Darren B. Simpson
11/20/2014		LMESSICK	Findings of Fact and Conclusions of Law	Darren B. Simpson
	JDMT	LMESSICK	Judgment	Darren B. Simpson
11/21/2014	CDIS	LMESSICK	Civil Disposition entered for: Brownstone Companies, Inc., Defendant; Burggraf, Kathy, Defendant; Storms, Michael Scott, Defendant; The Watkins Company, Plaintiff. Filing date: 11/21/2014	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
11/21/2014	STATUS	LMESSICK	Case Status Changed: Closed	Darren B. Simpson
12/3/2014	HRSC	LMESSICK	Hearing Scheduled (Hearing 01/07/2015 10:00 AM) Objection to Memorandum of Costs	Darren B. Simpson
	STATUS	LMESSICK	Case Status Changed: Closed pending clerk action	Darren B. Simpson
	MOTN	BIRCH	Defendants' Motion For Attorney Fees And Costs	Darren B. Simpson
	MEMO	BIRCH	Memorandum Of Attorney's Fees And Costs	Darren B. Simpson
	AFFD	BIRCH	Affidavit In Support Of Memorandum Of Attorney's Fees And Costs	Darren B. Simpson
	NOTH	BIRCH	Plaintiff's Notice Of Hearing - January 7, 2015 W 10AM	Darren B. Simpson
	MOTN	HUMPHREY	Plaintiff's Motion To Alter Or Amend The Judgment	Darren B. Simpson
	BRIF	HUMPHREY	Brief Filed In Support Of Motion To Alter Or Amend The Judgment	Darren B. Simpson
		CARTER	***PLACE ALL FILINGS IN FILE 4***	Darren B. Simpson
12/17/2014	MOTN	BIRCH	Plaintiff's Motion To Disallow Costs And Attorney's Fees	Darren B. Simpson
	NOTH	BIRCH	Plaintiff's Notice Of Hearing - January 7, 2015 @ 10AM	Darren B. Simpson
12/23/2014	BRIF	BIRCH	Plaintiff's Brief In Support Of Motion To Disallow Costs And Attorney's Fees	Darren B. Simpson
12/30/2014	NOTH	CARTER	Amended Notice Of Hearing - RE: Motion To Alter Or Amend The Judgment 02/11/2015 1:30PM	Darren B. Simpson
2/11/2015	DCHH	LMESSICK	Hearing result for Hearing scheduled on 02/11/2015 01:30 PM: District Court Hearing Hel Court Reporter: Daniel Williams Number of Transcript Pages for this hearing estimated: Objection to Memorandum of Costs 50 pages	Darren B. Simpson
	MINE	LMESSICK	Minute Entry Hearing type: Hearing Hearing date: 2/11/2015 Time: 1:40 pm Courtroom: Court reporter: Daniel Williams Minutes Clerk: Lettie Messick Tape Number:	Darren B. Simpson
4/9/2015	ORDR	LMESSICK	Order Denying Plaintiff's Motion to Alter or Amend Judgment	Darren B. Simpson
6/1/2015		BIRCH	Mutual Satisfaction Of Judgments	Darren B. Simpson
8/6/2015	MOTN	BIRCH	Defendants' Motion For Substitution Of Party	Darren B. Simpson
	NOTH	BIRCH	Defendants' Notice Of Hearing - August 26, 2015 @ 1:30 PM	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
8/7/2015	HRSC	CARTER	Hearing Scheduled (Motion 08/26/2015 01:30 PM) Def. Motion for Substitution	Darren B. Simpson
8/19/2015	BRIF	BIRCH	Plaintiff's Brief In Opposition To Motion For Substitution Of Party	Darren B. Simpson
8/26/2015	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 8/26/2015 Time: 1:33 pm Courtroom: Court reporter: Daniel Williams Minutes Clerk: Cassie Carter Tape Number: Party: Brownstone Companies, Inc., Attorney: Dean Brandstetter Party: Michael Storms, Attorney: Dean Brandstetter Party: The Watkins Company, Attorney: B.J. Driscoll	Darren B. Simpson
8/27/2015	DCHH	CARTER	Hearing result for Motion scheduled on 08/26/2015 01:30 PM: District Court Hearing Hel Court Reporter: Number of Transcript Pages for this hearing estimated: Def. Motion for Substitution	Darren B. Simpson
9/15/2015	ORDR	CARTER	Order Substituting The Estate of Michael Storms and Granting Attorney Fees and Costs	Darren B. Simpson
	JDMT	CARTER	First Amended Judgment	Darren B. Simpson
	STATUS	CARTER	Case Status Changed: Closed	Darren B. Simpson
9/22/2015		BASINGER	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Cox Ohman Brandstetter Receipt number: 0040859 Dated: 9/22/2015 Amount: $1.50 (Check)	Darren B. Simpson
		BASINGER	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Cox Ohman Brandstetter Receipt number: 0040859 Dated: 9/22/2015 Amount: $1.00 (Check)	Darren B. Simpson
9/29/2015	APSC	HUMPHREY	Appealed To The Supreme Court	Darren B. Simpson
		HUMPHREY	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Smith, Driscoll & Associates Receipt number: 0041772 Dated: 9/29/2015 Amount: $129.00 (Check) For: The Watkins Company (plaintiff)	Darren B. Simpson
	NOTC	HUMPHREY	Plaintiff's Notice Of Appeal	Darren B. Simpson
10/14/2015	BNDC	PADILLA	Bond Posted - Cash (Receipt 43969 Dated 10/14/2015 for 200.00)	Darren B. Simpson
	STATUS	PADILLA	Case Status Changed: Closed pending clerk action	Darren B. Simpson

The Watkins Company vs. Michael Scott Storms, Kathy Burggraf, Brownstone Companies, Inc.

Date	Code	User		Judge
10/14/2015	CERTAP	PADILLA	Clerk's Certificate of Appeal	Darren B. Simpson
	APSC	PADILLA	Appealed To The Supreme Court	Darren B. Simpson
11/25/2015	MOTN	JNICHOLS	Plaintiff/Counterdefendant/Appellant's Motion For Stay Of Execution And Notification Of Supersedeas Bond	Darren B. Simpson

Bryan D. Smith, Esq. – ISB #4411
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **COMPLAINT** Category: A.1 Fee: $88.00

COMES NOW the plaintiff, THE WATKINS COMPANY, LLC ("Plaintiff"), and as and for a cause of action against the defendants, states, alleges, and avers as follows:

PARTIES, JURISDICTION, VENUE, AND BACKGROUND

1. Plaintiff is an Idaho limited liability company with its principal place of business in Bonneville County, Idaho.

2. The defendant, Michael Storms ("Storms"), is and at all times relevant hereto was an individual residing in Bonneville County, Idaho.

3. The defendant, Kathy Burggraf (hereafter, "Burggraf"), was at all times relevant hereto an individual residing in Bonneville County, Idaho.

4. The defendant, Brownstone Companies, Inc., is an Idaho corporation with its principal place of business in Bonneville County, Idaho.

5. On or about May 30, 1997, Storms, Burggraf, and Brownstone Companies, Inc. filed a certificate of assumed business name with the Idaho Secretary of State to conduct business under the name, "Brownstone Restaurant and Brewhouse." As of the filing of this complaint, the certificate has never been amended or revoked.

6. Unless otherwise indicated, Storms, Burggraf, and Brownstone Companies, Inc. are collectively referred to herein as "Defendants."

7. At all times mentioned herein, Defendants were the partners, agents, employees, and servants of each other and at all times mentioned herein acted within the business, course, and scope of their partnership, agency, employment, service, and master-servant relationship.

8. Venue is proper in Bonneville County, Idaho pursuant to Idaho Code Section 5-401, or in the alternative, Section 5-404.

9. On July 31, 1996, Storms and Burggraf executed a "Commercial Lease and Deposit Receipt" ("Original Lease") with Watkins for the lease of real property located at 455 River Parkway, Idaho Falls, Idaho ("Premises").

10. In November 2008, Watkins filed Bonneville County Case No. 08-7258 against Storms and Burggraf for breach of the Original Lease, and other claims.

11. On April 21, 2010, following trial by the court, Watkins received a money judgment against Storms and Burggraf for past rent, and a judgment terminating the Original Lease and authorizing Watkins to evict Storms and Burggraf from the Premises.

12. Following entry of the April 21, 2010 judgment, the Defendants retained possession of the Premises and paid rent on a month-to-month basis.

13. On August 15 and 16, 2010, Watkins served Defendants with a letter and a copy of the Original Lease (the letter and Original Lease hereafter referred to as "Notice") notifying Defendants of the changes to the terms of the parties' month-to-month lease that would take effect at the end of the month of August 2010.

14. The Notice incorporated the terms of the Original Lease, plus explained that (1) Defendants would thereafter be responsible for all roof repairs, (2) the rent would be due the first day of the month, (3) Defendants would pay the annual food and drink credit of $3,000 on November 1st each year and the credits would be good for 12 months, (4) Defendants would have no right to use Space #16 or the upstairs storage or the sidewalk area, and (5) the lease would expire on October 31, 2027, which was the expiration date of the Original Lease.

15. Defendants continued in possession of the Premises on and after September 1, 2010.

16. By providing written notice to Defendants of the change in lease terms set forth in the Notice at least 15 days before the expiration of the month, and by Defendants continuing to hold the Premises after September 1, 2010, the Notice and continued possession operated and effectually created and established as a part of the lease, the terms, rent and conditions specified in the Notice ("New Lease").

17. Plaintiff has satisfied all the conditions, covenants, and promises required on its part under the New Lease as outlined herein.

COUNT ONE
(Breach of Contract)

18. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

19. Under the terms of the New Lease set forth in the Notice, rent is due the first day of each month.

20. Paragraph 2 of the New Lease provides, "In the event rent is not paid within 2 days after the due date, Tenant agrees to pay a late charge of $100 plus interest at 1% per month on the delinquent amount."

21. The rent for September 2010 came due on September 1, 2010.

22. On September 16, 2010, Defendants delivered the rent payment for September 2010 to Watkins.

23. Defendants have breached the New Lease by failing to timely deliver the September 2010 rent payment to Watkins.

24. Defendants have breached the New Lease by failing to pay the late fee required by the New Lease.

25. Defendants have breached the New Lease by failing to pay the interest on their delinquent payment as required by the New Lease.

26. Paragraph 16 of the New Lease provides in pertinent part, "Lessee shall not vacate or abandon the premises at any time during the term hereof . . ."

27. By letter dated September 15, 2010, Brownstone Companies, Inc. gave notice of its intention to vacate the Premises on October 17, 2010.

28. Defendants have breached the New Lease by notifying Watkins of the intention to vacate the Premises prior to the expiration of the term of the New Lease.

29. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

30. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

31. Paragraph 22 of the New Lease provides among other things that upon Defendants' breach of the New Lease, Watkins is entitled to recover the amount of all future rent due under the New Lease through the end of the lease term subject to the amount of the lost future rents that the Defendants prove could be reasonably avoided.

32. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Plaintiff has been damaged in the amount of $976,975.85, or such other amount as may be proven at trial.

COUNT TWO
(Injunctive Relief)

33. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

34. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

35. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

36. Watkins seeks a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Defendants from removing any item from the Premises if the removal of that item would cause injury to the Premises.

COUNT THREE
(Accounting)

37. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

38. Addendum "A" to the New Lease provides in pertinent part as follows:

> *Lessor will be entitled to 5% of the gross sales of the entire operation (on premises) for the previous month or the base rent indicated above, whichever is greater. By the 10th of each month, Lessee will provide Lessor the monthly sales figures for the previous month – if a percentage rent is due, Lessee will pay the Lessor the difference owed by the 15th of that month. This addendum will act as a power of attorney for Lessor to check sales figures with Idaho State Sales Tax Commission in Idaho Falls. In no event will the monthly rent be less than the base rent.*

39. Defendants have breached the New Lease by failing to provide Watkins with "the monthly sales figures" showing the "gross sales of the entire operation (on premises)" covered by the New Lease in order for Watkins to determine the alternative rent owed under the terms of the New Lease.

40. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Watkins seeks an order requiring Defendants to specifically perform their duty under Addendum "A" to the New Lease by providing Watkins with the gross monthly sales figures of the entire restaurant and microbrewery operation on the premises from September 1, 2010 to the present, and for an accounting of the same.

COUNT FOUR
(Eviction)

41. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

42. As a result of Defendants' breaches of the New Lease outlined herein, Watkins seeks an order authorizing eviction of the Defendants from the Premises.

COUNT FIVE
(Attorney's Fees)

43. Plaintiff realleges all previous allegations contained in the Complaint as if set forth in full.

44. Watkins has been required to seek the legal services of the firm of Smith, Driscoll & Associates, PLLC to prosecute this action and has incurred attorney's fees and costs because of Defendants' wrongful conduct as alleged herein, entitling Watkins to recover an award of reasonable attorney's fees and costs as herein alleged pursuant to the New Lease, Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For judgment against Defendants, jointly and severally, in the amount of $976,975.85, or such other amount as may be proven at trial;

2. For injunctive relief prohibiting the Defendants from removing any items of tangible personal property from the Premises if removal would cause injury to the Premises

3. For a judgment and order requiring Defendants to specifically perform their duties under the New Lease to provide Watkins with the gross monthly sales figures

of the entire operation on the Premises from September 1, 2010 to the present and for an accounting of the same;

4. For a judgment and order authorizing eviction of the Defendants from the Premises and delivering possession of the Premises to Watkins;

5. For judgment awarding Watkins prejudgment interest;

6. For judgment awarding Watkins its reasonable attorney's fees incurred herein as provided by the New Lease, Idaho Code Section 12-120 and 12-121, and Idaho Rule of Civil Procedure 54 in the amount of two thousand five hundred dollars ($2,500.00) if this matter is uncontested, and otherwise in such amounts as the court may determine;

7. For judgment awarding Watkins its costs of suit incurred herein as provided by the Lease and Idaho Rule of Civil Procedure 54; and

8. For such other and further relief as appears just and equitable in the premises.

DATED this 29 day of September, 2010.

SMITH, DRISCOLL & ASSOCIATES PLLC

By _____
B. J. Driscoll
Attorneys for Plaintiff

DEAN C. BRANDSTETTER, ESQ.
COX, OHMAN & BRANDSTETTER, CHARTERED
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(208) 522-8606
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ATTORNEYS FOR DEFENDANTS

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendant.	**Case No. CV-10-5958** **ANSWER**

Answer

COMES NOW the Defendant, Michael Storms and Brownstone Companies, Inc., by and through their attorney, Dean C. Brandstetter, Esq., and answers the Complaint of the Plaintiff by denying each and every allegation contained in said Complaint.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendants pray that the same be dismissed, that the Plaintiff take nothing by way thereof, and that Defendants recover their attorney's fees and costs incurred in defending the within matter.

DATED this 1 day of December, 2010.

DEAN C. BRANDSTETTER, ESQ.
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 1 day of December, 2010, I caused a true and correct copy of the foregoing document to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting as set forth below.

B.J. Driscoll, Esq.
Smith, Driscoll and Associates
414 Shoup
P.O. Box 50731
Idaho Falls ID 83405
Fax: 529-4166

[ ] By pre-paid post
[ ] By hand delivery
[✓] By facsimile transmission
[ ] By Courthouse Box

DEAN C. BRANDSTETTER, ESQ.

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **AMENDED COMPLAINT**

COMES NOW the plaintiff, THE WATKINS COMPANY, LLC ("Watkins"), and as and for a cause of action against the defendants, states, alleges, and avers as follows:

PARTIES, JURISDICTION, VENUE, AND BACKGROUND

1. Watkins is an Idaho limited liability company with its principal place of business in Bonneville County, Idaho.

2. The defendant, Michael Storms ("Storms"), is and at all times relevant hereto was an individual residing in Bonneville County, Idaho.

3. The defendant, Kathy Burggraf (hereafter, "Burggraf"), was at all times relevant hereto an individual residing in Bonneville County, Idaho.

4. The defendant, Brownstone Companies, Inc., is an Idaho corporation with its principal place of business in Bonneville County, Idaho.

5. On or about May 30, 1997, Storms, Burggraf, and Brownstone Companies, Inc. filed a certificate of assumed business name with the Idaho Secretary of State to conduct business under the name, "Brownstone Restaurant and Brewhouse." As of the filing of this amended complaint, the certificate is current.

6. Unless otherwise indicated, Storms, Burggraf, and Brownstone Companies, Inc. are collectively referred to herein as "Defendants."

7. At all times mentioned herein, Defendants were the partners, agents, employees, and servants of each other and at all times mentioned herein acted within the business, course, and scope of their partnership, agency, employment, service, and master-servant relationship.

8. Venue is proper in Bonneville County, Idaho pursuant to Idaho Code Section 5-401, or in the alternative, Section 5-404.

9. Watkins may seek several forms of relief in the alternative or of different types.

10. On July 31, 1996, Storms and Burggraf executed a "Commercial Lease and Deposit Receipt" ("Original Lease") with Watkins for the lease of real property located at 455 River Parkway, Idaho Falls, Idaho ("Premises").

11. In November 2008, Watkins filed Bonneville County Case No. 08-7258 against Storms and Burggraf for breach of the Original Lease, and other claims.

12. On April 21, 2010, following trial by the court and a decision holding Storms and Burggraf had breached the Original Lease, Watkins received a judgment against them for money damages for past rent, terminating the Original Lease, and authorizing Watkins to evict Storms and Burggraf from the Premises.

13. Following entry of the April 21, 2010 judgment, the Defendants retained possession of the Premises and paid rent on a month-to-month basis.

14. On August 15 and 16, 2010, Watkins served Defendants with a letter and a copy of the Original Lease (the letter and Original Lease hereafter referred to as "Notice") notifying Defendants of the changes to the terms of the parties' month-to-month lease that would take effect at the end of the month of August 2010.

15. The Notice incorporated the terms of the Original Lease, plus explained that (1) Defendants would thereafter be responsible for all roof repairs, (2) the rent would be due the first day of the month, (3) Defendants would pay the annual food and drink credit of $3,000 on November 1st each year and the credits would be good for 12 months, (4) Defendants would have no right to use Space #16 or the upstairs storage or the sidewalk area, and (5) the lease would expire on October 31, 2027, which was the expiration date of the Original Lease.

16. Defendants continued in possession of the Premises on and after September 1, 2010.

17. By providing written notice to Defendants of the change in lease terms set forth in the Notice at least 15 days before the expiration of the month, and by Defendants continuing to hold the Premises after September 1, 2010, the Notice and continued possession operated and effectually created and established as a part of the lease, the terms, rent and conditions specified in the Notice ("New Lease").

18. Watkins has satisfied all the conditions, covenants, and promises required on its part under the Original Lease and the New Lease as outlined herein.

COUNT ONE
(Breach of Contract)

19. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

20. Under the terms of the New Lease set forth in the Notice, rent is due the first day of each month.

21. Paragraph 2 of the New Lease provides, "In the event rent is not paid within 2 days after the due date, Tenant agrees to pay a late charge of $100 plus interest at 1% per month on the delinquent amount."

22. The rent for September 2010 came due on September 1, 2010.

23. On September 16, 2010, Defendants delivered the rent payment for September 2010 to Watkins.

24. Defendants have breached the New Lease by failing to timely deliver the September 2010 rent payment to Watkins.

25. Defendants have breached the New Lease by failing to pay the late fee required by the New Lease.

26. Defendants have breached the New Lease by failing to pay the interest on their delinquent payment as required by the New Lease.

27. Paragraph 16 of the New Lease provides in pertinent part, "Lessee shall not vacate or abandon the premises at any time during the term hereof . . ."

28. By letter dated September 15, 2010, Brownstone Companies, Inc. gave notice of its intention to vacate the Premises on October 17, 2010.

29. Defendants have breached the New Lease by notifying Watkins of the intention to vacate the Premises prior to the expiration of the term of the New Lease.

30. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

31. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

32. Paragraph 22 of the New Lease provides among other things that upon Defendants' breach of the New Lease, Watkins is entitled to recover the amount of all future rent due under the New Lease through the end of the lease term subject to the amount of the lost future rents that the Defendants prove could be reasonably avoided.

33. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Watkins has been damaged in the amount of $976,975.85, or such other amount as may be proven at trial.

COUNT TWO
(Injunctive Relief)

34. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

35. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

36. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

37. Watkins seeks a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Defendants from removing any item from the Premises if the removal of that item would cause injury to the Premises.

COUNT THREE
(Accounting)

38. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

39. Addendum "A" to the New Lease provides in pertinent part as follows:

> *Lessor will be entitled to 5% of the gross sales of the entire operation (on premises) for the previous month or the base rent indicated above, whichever is greater. By the 10th of each month, Lessee will provide Lessor the monthly sales figures for the previous month – if a percentage rent is*

due, Lessee will pay the Lessor the difference owed by the 15th of that month. This addendum will act as a power of attorney for Lessor to check sales figures with Idaho State Sales Tax Commission in Idaho Falls. In no event will the monthly rent be less than the base rent.

40. Defendants have breached the New Lease by failing to provide Watkins with "the monthly sales figures" showing the "gross sales of the entire operation (on premises)" covered by the New Lease in order for Watkins to determine the alternative rent owed under the terms of the New Lease.

41. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Watkins seeks an order requiring Defendants to specifically perform their duty under Addendum "A" to the New Lease by providing Watkins with the gross monthly sales figures of the entire restaurant and microbrewery operation on the premises from September 1, 2010 to the present, and for an accounting of the same.

COUNT FOUR
(Eviction)

42. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

43. As a result of Defendants' breaches of the New Lease outlined herein, Watkins seeks an order authorizing eviction of the Defendants from the Premises.

COUNT FIVE
(Attorney's Fees)

44. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

45. Watkins has been required to seek the legal services of the firm of Smith, Driscoll & Associates, PLLC to prosecute this action and has incurred attorney's fees and

costs because of Defendants' wrongful conduct as alleged herein, entitling Watkins to recover an award of reasonable attorney's fees and costs as herein alleged pursuant to the Original Lease, the New Lease, Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.

COUNT SIX
(Breach of Contract/Covenant to Repair)

46. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

47. Under Paragraph 7 and the other terms of the Original Lease and the New Lease set forth in the Notice, Defendants agreed, "at [their] own expense and at all times, [to] maintain the premises in good and safe condition, including plate class, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted," and agreed that they "shall be responsible for all repairs required."

48. Defendants have breached the Original Lease and the New Lease by failing to maintain the Premises in good and safe condition and to surrender possession of the Premises in as good condition as received, normal wear and tear excepted.

49. As a direct and proximate result of Defendants' breach as herein alleged, Watkins has been damaged in such amount as will be proven at trial.

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COUNT SEVEN
(Unjust Enrichment)

50. Plaintiff realleges all previous allegations contained in the Amended Complaint as if set forth in full.

51. Defendants received the benefit of remaining in possession of the Premises for approximately three months, or such other time as may be established at trial, during which time they paid no rent.

52. Defendants appreciated the benefit of remaining in possession of the Premises beyond the date identified in their notice of intention to vacate the Premises by continuing business operations for a time, then ceasing business operations and then slowly vacating the Premises at their leisure over the course of several weeks.

53. Under the circumstances, allowing Defendants to retain these benefits without payment to Watkins in an amount to be proven at trial would be inequitable and unjust in light of the fact that Defendants paid no rent during this time and Watkins was unable to relet the Premises while Defendants retained possession of the Premises for several weeks after the date identified in their notice of intention to vacate the Premises.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For judgment against Defendants, jointly and severally, in the amount of $976,975.85, or such other amount as may be proven at trial;

2. For injunctive relief prohibiting the Defendants from removing any items of tangible personal property from the Premises if removal would cause injury to the Premises

3. For a judgment and order requiring Defendants to specifically perform their duties under the New Lease to provide Watkins with the gross monthly sales figures of the entire operation on the Premises from September 1, 2010 to the present and for an accounting of the same;

4. For a judgment and order authorizing eviction of the Defendants from the Premises and delivering possession of the Premises to Watkins;

5. For judgment against Defendants for damages caused by Defendants' breach of contract and the covenant to repair and maintain the premises;

6. For judgment against Defendants for the amount by which they have been unjustly enriched by possession of the Premises without payment to Watkins;

7. For judgment awarding Watkins prejudgment interest;

8. For judgment awarding Watkins its reasonable attorney's fees incurred herein as provided by the New Lease, Idaho Code Section 12-120 and 12-121, and Idaho Rule of Civil Procedure 54 in the amount of two thousand five hundred dollars ($2,500.00) if this matter is uncontested, and otherwise in such amounts as the court may determine;

9. For judgment awarding Watkins its costs of suit incurred herein as provided by the Lease and Idaho Rule of Civil Procedure 54; and

10. For such other and further relief as appears just and equitable in the premises.

//

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DATED this 8 day of December, 2011.

SMITH, DRISCOLL & ASSOCIATES PLLC

By _____
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of December, 2011, I caused a true and correct copy of the foregoing **AMENDED COMPLAINT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq.
COX, OHMAN &
BRANDSTETTER, CHTD
P.O. Box 51600
510 "D" Street
Idaho Falls, ID 83405

[✓] U. S. Mail
[ ] Fax
[ ] Overnight Delivery
[ ] Hand Delivery

_____
B. J. Driscoll

Simpson
1/4

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB # 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **SECOND AMENDED COMPLAINT**

COMES NOW the plaintiff, THE WATKINS COMPANY, LLC ("Watkins"), and as and for a cause of action against the defendants, states, alleges, and avers as follows:

PARTIES, JURISDICTION, VENUE, AND BACKGROUND

1. Watkins is an Idaho limited liability company with its principal place of business in Bonneville County, Idaho.

2. The defendant, Michael Storms ("Storms"), is and at all times relevant hereto was an individual residing in Bonneville County, Idaho.

3. The defendant, Kathy Burggraf (hereafter, "Burggraf"), was at all times relevant hereto an individual residing in Bonneville County, Idaho.

4. The defendant, Brownstone Companies, Inc., is an Idaho corporation with its principal place of business in Bonneville County, Idaho.

5. On or about May 30, 1997, Storms, Burggraf, and Brownstone Companies, Inc. filed a certificate of assumed business name with the Idaho Secretary of State to conduct business under the name, "Brownstone Restaurant and Brewhouse." As of the filing of this second amended complaint, the certificate is current.

6. Unless otherwise indicated, Storms, Burggraf, and Brownstone Companies, Inc. are collectively referred to herein as "Defendants."

7. At all times mentioned herein, Defendants were the partners, agents, employees, and servants of each other and at all times mentioned herein acted within the business, course, and scope of their partnership, agency, employment, service, and master-servant relationship.

8. Venue is proper in Bonneville County, Idaho pursuant to Idaho Code Section 5-401, or in the alternative, Section 5-404.

9. Watkins may seek several forms of relief in the alternative or of different types.

10. On July 31, 1996, Storms and Burggraf executed a "Commercial Lease and Deposit Receipt" ("Original Lease") with Watkins for the lease of real property located at 455 River Parkway, Idaho Falls, Idaho ("Premises").

11. In November 2008, Watkins filed Bonneville County Case No. 08-7258 against Storms and Burggraf for breach of the Original Lease, and other claims.

12. On April 21, 2010, following trial by the court and a decision holding Storms and Burggraf had breached the Original Lease, Watkins received a judgment against them for money damages for past rent, terminating the Original Lease, and authorizing Watkins to evict Storms and Burggraf from the Premises.

13. Following entry of the April 21, 2010 judgment, the Defendants retained possession of the Premises and paid rent on a month-to-month basis.

14. On August 15 and 16, 2010, Watkins served Defendants with a letter and a copy of the Original Lease (the letter and Original Lease hereafter referred to as "Notice") notifying Defendants of the changes to the terms of the parties' month-to-month lease that would take effect at the end of the month of August 2010.

15. The Notice incorporated the terms of the Original Lease, plus explained that (1) Defendants would thereafter be responsible for all roof repairs, (2) the rent would be due the first day of the month, (3) Defendants would pay the annual food and drink credit of $3,000 on November 1st each year and the credits would be good for 12 months, (4) Defendants would have no right to use Space #16 or the upstairs storage or the sidewalk area, and (5) the lease would expire on October 31, 2027, which was the expiration date of the Original Lease.

16. Defendants continued in possession of the Premises on and after September 1, 2010.

17. By providing written notice to Defendants of the change in lease terms set forth in the Notice at least 15 days before the expiration of the month, and by Defendants continuing to hold the Premises after September 1, 2010, the Notice and continued possession operated and effectually created and established as a part of the lease, the terms, rent and conditions specified in the Notice ("New Lease").

18. Watkins has satisfied all the conditions, covenants, and promises required on its part under the Original Lease and the New Lease as outlined herein.

COUNT ONE
(Breach of Contract)

19. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

20. Under the terms of the New Lease set forth in the Notice, rent is due the first day of each month.

21. Paragraph 2 of the New Lease provides, "In the event rent is not paid within 2 days after the due date, Tenant agrees to pay a late charge of $100 plus interest at 1% per month on the delinquent amount."

22. The rent for September 2010 came due on September 1, 2010.

23. On September 16, 2010, Defendants delivered the rent payment for September 2010 to Watkins.

24. Defendants have breached the New Lease by failing to timely deliver the September 2010 rent payment to Watkins.

25. Defendants have breached the New Lease by failing to pay the late fee required by the New Lease.

26. Defendants have breached the New Lease by failing to pay the interest on their delinquent payment as required by the New Lease.

27. Defendants have breached the New Lease by failing to pay rent for each month they remained in possession of the Premises.

28. Paragraph 16 of the New Lease provides in pertinent part, "Lessee shall not vacate or abandon the premises at any time during the term hereof . . ."

29. By letter dated September 15, 2010, Brownstone Companies, Inc. gave notice of its intention to vacate the Premises on October 17, 2010.

30. Defendants have breached the New Lease by notifying Watkins of the intention to vacate the Premises prior to the expiration of the term of the New Lease.

31. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

32. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

33. Paragraph 22 of the New Lease provides among other things that upon Defendants' breach of the New Lease, Watkins is entitled to recover the amount of all future rent due under the New Lease through the end of the lease term subject to the amount of the lost future rents that the Defendants prove could be reasonably avoided.

34. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Watkins has been damaged in the amount of $976,975.85, or such other amount as may be proven at trial.

COUNT TWO
(Injunctive Relief)

35. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

36. Paragraph 18 of the New Lease provides in pertinent part as follows:

> *Any and all improvements made to the premises during the term hereof shall belong to Lessor, except trade fixtures of the Lessee. Lessee may, upon termination hereof, remove all his trade fixtures, but shall repair or pay for all repairs necessary for damages to the premises occasioned by removal.*

37. Idaho Code Section 55-308 prevents the Defendants from removing any other fixtures if such removal would cause injury to the Premises.

38. Watkins seeks a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the Defendants from removing any item from the Premises if the removal of that item would cause injury to the Premises.

COUNT THREE
(Accounting)

39. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

40. Addendum "A" to the New Lease provides in pertinent part as follows:

> *Lessor will be entitled to 5% of the gross sales of the entire operation (on premises) for the previous month or the base rent indicated above, whichever is greater. By the 10th of each month, Lessee will provide Lessor the monthly sales figures for the previous month – if a percentage rent is*

due, Lessee will pay the Lessor the difference owed by the 15th of that month. This addendum will act as a power of attorney for Lessor to check sales figures with Idaho State Sales Tax Commission in Idaho Falls. In no event will the monthly rent be less than the base rent.

41. Defendants have breached the New Lease by failing to provide Watkins with "the monthly sales figures" showing the "gross sales of the entire operation (on premises)" covered by the New Lease in order for Watkins to determine the alternative rent owed under the terms of the New Lease.

42. As a direct and proximate result of Defendants' breach of the New Lease as herein alleged, Watkins seeks an order requiring Defendants to specifically perform their duty under Addendum "A" to the New Lease by providing Watkins with the gross monthly sales figures of the entire restaurant and microbrewery operation on the premises from September 1, 2010 to the present, and for an accounting of the same.

COUNT FOUR
(Eviction)

43. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

44. As a result of Defendants' breaches of the New Lease outlined herein, Watkins seeks an order authorizing eviction of the Defendants from the Premises.

COUNT FIVE
(Attorney's Fees)

45. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

46. Watkins has been required to seek the legal services of the firm of Smith, Driscoll & Associates, PLLC to prosecute this action and has incurred attorney's fees and

costs because of Defendants' wrongful conduct as alleged herein, entitling Watkins to recover an award of reasonable attorney's fees and costs as herein alleged pursuant to the Original Lease, the New Lease, Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.

COUNT SIX
(Breach of Contract/Covenant to Repair)

47. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

48. Under Paragraph 7 and the other terms of the Original Lease and the New Lease set forth in the Notice, Defendants agreed, "at [their] own expense and at all times, [to] maintain the premises in good and safe condition, including plate class, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted," and agreed that they "shall be responsible for all repairs required."

49. Defendants' possession of the Premises imposed on them an implied contractual duty to maintain the Premises in good and safe condition.

50. Defendants have breached the Original Lease, New Lease, and implied contractual duty by failing to maintain the Premises in good and safe condition and to surrender possession of the Premises in as good condition as received, normal wear and tear excepted.

51. As a direct and proximate result of Defendants' breach as herein alleged, Watkins has been damaged in such amount as will be proven at trial.

COUNT SEVEN
(Unjust Enrichment)

52. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

53. Defendants received the benefit of remaining in possession of the Premises for approximately three months, or such other time as may be established at trial, during which time they paid no rent.

54. Defendants appreciated the benefit of remaining in possession of the Premises beyond the date identified in their notice of intention to vacate the Premises by continuing business operations for a time, then ceasing business operations and then slowly vacating the Premises at their leisure over the course of several weeks.

55. Under the circumstances, allowing Defendants to retain these benefits without payment to Watkins in an amount to be proven at trial would be inequitable and unjust in light of the fact that Defendants paid no rent during this time and Watkins was unable to relet the Premises while Defendants retained possession of the Premises for several weeks after the date identified in their notice of intention to vacate the Premises.

COUNT EIGHT
(Waste)

56. Plaintiff realleges all previous allegations contained in the Second Amended Complaint as if set forth in full.

57. While Defendants were in possession of the Premises, they were under a duty to exercise reasonable care in the use and care of the Premises and to commit no unreasonable injury or waste thereon.

58. Defendants breached this duty by failing to exercise reasonable care in the use of the Premises and by committing unreasonable injury and waste thereon.

59. As a direct and proximate result of Defendants' breach as herein alleged, Watkins has been damaged in such amount as will be proven at trial.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For judgment against Defendants, jointly and severally, in the amount of $976,975.85, or such other amount as may be proven at trial;

2. For injunctive relief prohibiting the Defendants from removing any items of tangible personal property from the Premises if removal would cause injury to the Premises

3. For a judgment and order requiring Defendants to specifically perform their duties under the New Lease to provide Watkins with the gross monthly sales figures of the entire operation on the Premises from September 1, 2010 to the present and for an accounting of the same;

4. For a judgment and order authorizing eviction of the Defendants from the Premises and delivering possession of the Premises to Watkins;

5. For judgment against Defendants for damages caused by Defendants' breach of contract and the covenant to repair and maintain the premises;

6. For judgment against Defendants for the amount by which they have been unjustly enriched by possession of the Premises without payment to Watkins;

7. For judgment against Defendants for the damages arising from the unreasonable injury to and waste committed on the Premises.

8. For judgment awarding Watkins prejudgment interest;

9. For judgment awarding Watkins its reasonable attorney's fees incurred herein as provided by the New Lease, Idaho Code Section 12-120 and 12-121, and Idaho Rule of Civil Procedure 54 in the amount of twenty thousand dollars ($20,000.00) if this matter is uncontested, and otherwise in such amounts as the court may determine;

10. For judgment awarding Watkins its costs of suit incurred herein as provided by the Lease and Idaho Rule of Civil Procedure 54; and

11. For such other and further relief as appears just and equitable in the premises.

DATED this 6 day of September, 2013.

SMITH, DRISCOLL & ASSOCIATES PLLC

By _____
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of September, 2013, I caused a true and correct copy of the foregoing **SECOND AMENDED COMPLAINT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq. COX, OHMAN & BRANDSTETTER, CHTD P.O. Box 51600 510 "D" Street Idaho Falls, ID 83405	[ ] U. S. Mail [ ] Fax [ ] Overnight Delivery [✓] Hand Delivery
Honorable Darren B. Simpson District Judge Bingham County Courthouse 501 N. Maple, #310 Blackfoot, ID 83221	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery

B. J. Driscoll

DEAN C. BRANDSTETTER, ESQ.
COX, OHMAN & BRANDSTETTER, CHARTERED
510 "D" STREET
P.O. BOX 51600
IDAHO FALLS, IDAHO 83405-1600
(208) 522-8606
Fax: (208) 522-8618
Idaho State Bar No. 2960

ATTORNEYS FOR DEFENDANTS BROWNSTONE COMPANIES, INC., AND MICHAEL STORMS

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	**Case No. CV-10-5958** **ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM**

COMES NOW the Defendant, Michael Storms (hereinafter referred to as "Storms") and Brownstone Companies, Inc., (hereinafter referred to as "Brownstone") by and through their attorney, Dean C. Brandstetter, Esq., and answers the Second Amended Complaint of the Plaintiff as follows.

FIRST AFFIRMATIVE DEFENSE

Pursuant to the equitable doctrines of waiver, laches and estoppel, Plaintiff is precluded from asserting claims contrary to those which are waived, and timely made and/or contradictory to earlier positions. Further that Plaintiff has unclean hands and is therefor not entitled to the relief requested in the Complaint. Plaintiff is guilty of inequitable conduct and comes to the Court with unclean hands. As such, Plaintiff should be equitably estopped from recovering on any equitable theory including estoppel, detrimental reliance, and/or unjust enrichment.

SECOND AFFIRMATIVE DEFENSE

As a separate further answer and defense, Defendants Storms and Brownstone allege (without waiving any liability and specifically denying liability) that Plaintiff has failed to reasonably mitigate damages and that Plaintiff may not recover for damages that could have been reasonably avoided.

THIRD AFFIRMATIVE DEFENSE

As a separate further answer and defense, Defendants Storms and Brownstone allege that the "New Lease" alleged in Plaintiff's Second Amended Complaint is barred by reason of the Statute of Frauds, particularly Idaho Code § 9-505(1) and/or Idaho Code § 9-505(4).

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to provide an effective and proper notice of changes to the claimed tenancy of Brownstone and/or Storms as required by Idaho Code § 55-307.

FIFTH AFFIRMATIVE DEFENSE

No lease from month to month existed between Plaintiff and Brownstone and/or Storms and as such Idaho Code § 55-307 does not apply to effectuate changes in the relationship

between Plaintiff and Brownstone and/or Storms.

SIXTH AFFIRMATIVE DEFENSE

Without admitting that a "New Lease" was ever created and specifically denying the same in the event a "New Lease" was created, Plaintiff breached the "New Lease" by failing to provide appropriate parking spaces in compliance with the requirements of the City of Idaho Falls and the roof of the premises was in a state of disrepair and leaked. As such, the Plaintiff is guilty of breach of contract thereby relieving the Defendants of any responsibility for the alleged "New Lease" between Plaintiff and Brownstone and/or Storms.

ANSWER

1. Answering paragraphs 1, 2, 3 and 4 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit each and every allegation contained therein.

2. Answering paragraph 5 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege that Plaintiff had specific and actual knowledge that commencing in 2005 Burggraf had no further interest in Brownstone, was no longer a shareholder, officer or agent of Brownstone and was not conducting business under the name of Brownstone Restaurant and Brewhouse. By way of further affirmative defense Storms and Brownstone assert that Plaintiff at least by April 21, 2010 had actual knowledge that Brownstone was the exclusive entity doing business as Brownstone Restaurant and Brewhouse and that neither Storms or Burggraf was doing business under such name.

3. Answering paragraph 6 of Plaintiff's Second Amended Complaint, Storms and Brownstone assert that such paragraph is not an allegation or averment but is a manner of

pleading facts and as such is not required to be admitted or denied but to the extent a response is required thereto Storms and Brownstone deny each allegation contained therein.

4. Answering paragraph 7 of Plaintiff's Second Amended Complaint, Defendant denies each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege that Plaintiff had specific and actual knowledge that commencing in 2005 Burggraf had no further interest in Brownstone, was no longer a shareholder, officer or agent of Brownstone and was not conducting business under the name of Brownstone Restaurant and Brewhouse. By way of further affirmative defense Storms and Brownstone assert that Plaintiff at least by April 21, 2010 had actual knowledge that Brownstone was the exclusive entity doing business as Brownstone Restaurant and Brewhouse and that neither Storms or Burggraf was doing business under such name. By way of further affirmative defense and/or allegation Storms was the authorized registered agent of Brownstone, was its president, and sole shareholder but after 2005 did not maintain or establish any partnership, employment, partnership, agency, service, or master-servant relationship with Brownstone or Burggraf which fact was well known to Plaintiff. By way of further affirmative defense and/or allegation Storms and Brownstone allege that on or about June 5, 2006, Storms as landlord subleased the premises located at 455 River Parkway, Idaho Falls, Idaho to Brownstone. Thereafter, Brownstone was the sole entity doing business as Brownstone Restaurant and Brewhouse.

5. Answering paragraph 8 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit each and every allegation contained therein.

6. Answering paragraph 9 of Plaintiff's Second Amended Complaint, Storms and

Brownstone assert that such paragraph is not an allegation or averment but is a manner of pleading facts and as such is not required to be admitted or denied but to the extent a response is required thereto Storms and Brownstone deny each allegation contained therein.

7. Answering paragraph 10 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege the interest and rights of Storms and Burggraf in the Commercial Lease and Deposit Receipt lease were forfeited and terminated and Storms and Burggraf were evicted from the premise located at 455 River Parkway, Idaho Falls, Idaho by order of the Court entered in Bonneville County Case No. CV-08-7258 on or about March 25, 2010.

8. Answering paragraphs 11 and 12 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit the allegations contained therein.

9. Answering paragraph 13 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege the interest and rights of Storms and Burggraf in the Commercial Lease and Deposit Receipt lease were forfeited and terminated and Storms and Burggraf were evicted from the premise located at 455 River Parkway, Idaho Falls, Idaho by order of the Court entered in Bonneville County Case No. CV-08-7258 on or about March 25, 2010. By way of affirmative defense and/or allegation Storms and Brownstone allege that Brownstone was the only entity conducting buisness and occupying the premise located at 455 River Parkway, Idaho Falls, Idaho and Brownstone paid rent to Plaintiff with Plaintiff accepting the rent paid by Brownstone for each of the months of April, May, June, July, August and

September 2010. By way of additional affirmative defense and allegation Storms and Brownstone allege that neither Storms or Burggraf paid rent to Plaintiff. By way of further affirmative defense Storms and Brownstone allege that no month to month tenancy or lease was created as result of the occupancy of the premise by Brownstone with the apparent and actual consent of Plaintiff. At no time did Brownstone or Storms come to any form of implied or actual lease or agreement to occupy the premise with Plaintiff nor did the parties come to any agreement as to any lease or occupancy terms including but not limited to the amount of any rent.

10. Answering paragraph 14 of Plaintiff's Second Amended Complaint, Storms and Brownstone denies each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. Storms and Brownstone further allege that any notice served on Burggraf was of no effect, force or consequence on Storms and Brownstone. By way of further affirmative defense and/or allegation no lease or tenancy from month to month existed between Plaintiff and Storms and/or Brownstone and/or Burggraf after March 25, 2010 and before the service (if made or effected) of the Notice alleged in such paragraph such that such Notice was of no force, effect, or consequence as to Storms and/or Brownstone. By way of further and alternative affirmative defense and/or allegation Storms and Brownstone allege that proper notice was not given or served upon Storms and/or Brownstone. By way of further affirmative defense and/or allegation Storms and Brownstone allege that Idaho Code § 55-307 does not authorize a Notice to effectuate or create a tenancy for a term of years. By way of additional and alternative affirmative defense and/or allegation Storms and Brownstone allege any claim for accelerated

rent is barred by the doctrine of res judicata and collateral estoppel by virtue of the court's findings, conclusions, and judgment entered in Bonneville County Case No. CV-08-7258.

11. Answering paragraph 15 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny that any new lease was entered into, but admits what the Notice attempted to do and what the notice said. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of additional and alternative affirmative defense and/or allegation Storms and Brownstone allege that Brownstone was not a named or contemplated party to the "New Lease", that Burggraf was not in possession and was not leasing, or occupying the premises located at 455 River Parkway, Idaho Falls, Idaho and Storms was never provided proper notice of the contemplated terms of the "New Lease" and such is of no force or effect as to Storms and Brownstone.

12. Answering paragraph 16 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit that Brownstone remained in possession of the Premise on and after September 1, 2010 by virtue of the actions of Plaintiff in serving the Defendants with orders probhibiting the removal of the property of Storms leased to Brownstone. Storms and Brownstone deny each and every other allegation contained in said paragraph. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

13. Answering paragraphs 17 and 18 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative

defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

14. Answering paragraph 19 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-18 of Plaintiff's Complaint as previously stated.

15. Answering paragraphs 20, 21, 22, 23, 24, 25, 26, 27 and 28 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

16. Answering paragraph 29 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit each and every allegation contained therein.

17. Answering paragraph 30 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

18. Answering paragraph 31 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms

and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

19. Answering paragraph 32 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege that I.C. § 55-308 is not quoted correctly.

20. Answering paragraphs 33 and 34 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone and as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

21. Answering paragraph 35 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-34 of Plaintiff's Complaint as previously stated.

22. Answering paragraph 36 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of additional affirmative defense and/or allegation Storms and Brownstone allege that Brownstone

and/or Storms vacated the premises on or about December 30, 2010 after issuance of the court's Order in this matter on November 24, 2010 in compliance therewith despite no obligation on the part of Storms or Brownstone to comply with paragraph 18 of the non-existent "New Lease".

23. Answering paragraph 37 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and Brownstone allege that the Plaintiff has failed to quote the statute correctly.

24. Answering paragraph 38 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit that Plaintiff sought a temporary restraining order and preliminary injunction but deny each and every other allegation contained in such paragraph and further denies that Plaintiff is entitled to such. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

25. Answering paragraph 39 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-38 of Plaintiff's Complaint as previously stated.

26. Answering paragraphs 40, 41 and 42 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding

paragraphs. By way of additional affirmative defense and/or allegation Storms and Brownstone allege that all business activities of Brownstone ceased on or about October 1, 2010 as a direct result of Plaintiff's initiation of the within proceedings and no sales were made after that date.

By way of additional affirmative defense and/or allegation the claimed obligation to pay rent for the month of September was genuinely disputed by the parties, Brownstone tendered payment for all rent due for the month of September, 2010 on September 15, 2010, such tender in full satisfaction was clear and conspicuous and Plaintiff negotiated and accepted such tender, by reason of such the parties reached an accord and satisfaction for such month.

27. Answering paragraph 43 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-42 of Plaintiff's Complaint as previously stated.

28. Answering paragraph 44 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of additional and alternative affirmative defense and/or allegation Storms and/or Brownstone vacated the premises on or about December 30, 2010 and have not thereafter claimed a right to possess the premises located at 455 River Parkway, Idaho Falls, Idaho.

29. Answering paragraph 45 of Plaintiff's Second Amended Complaint, Storms and

Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-44 of Plaintiff's Complaint as previously stated.

30. Answering paragraph 46 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein. Storms and Brownstone deny that there was any "New Lease" entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of affirmative defense and/or allegation, Storms and Brownstone allege that Storms and Brownstone are entitled to recover their attorney fees and costs in defending this action pursuant to Idaho Code §§ 12-120, 12-121, 12-123 and Idaho Rule of Procedure 54.

31. Answering paragraph 47 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-46 of Plaintiff's Complaint as previously stated.

32. Answering paragraph 48 of Plaintiff's Second Amended Complaint, Storms and Brownstone denies each and every allegation contained therein. By way of affirmative defense and/or allegation, Brownstone is not and never was bound by the original lease or the new lease; Storms is not bound by the provisions of the alleged "new lease". Plaintiff is collaterally estopped and barred by res judicata as a result of the proceeding in Bonneville County Case No. CV-2008-7258. Storms and Brownstone deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every

allegation which purports to allege the terms of the "New Lease". By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

33. Answering paragraph 49 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein, further Storms and Brownstone deny that possession by either created any implied contractual duty and/or that if the law implies a contractual duty by mere possession that Plaintiff has failed to set forth the correct duty. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of further affirmative defense Storms and Brownstone assert that Plaintiff at least by April 21, 2010 had actual knowledge that Brownstone was the exclusive entity doing business as Brownstone Restaurant and Brewhouse and that neither Storms or Burggraf was doing business under such name. By way of further affirmative defense and/or allegation Storms was the authorized registered agent of Brownstone, was its president, and sole shareholder but after 2005 did not maintain or establish any partnership, employment, partnership, agency, service, or master-servant relationship with Brownstone or Burggraf which fact was well known to Plaintiff. By way of further affirmative defense and/or allegation Storms and Brownstone allege that on or about June 5, 2006, Storms as landlord subleased the premises located at 455 River Parkway, Idaho Falls, Idaho to Brownstone. Thereafter, Brownstone was the sole entity doing business as Brownstone Restaurant and Brewhouse. By way of additional affirmative defense, Storms' possession of the property ended as early as June 5, 2006, but at

least by April 21, 2010. During all times of Storms' possession, Storms at all time complied with any implied contractual duty. By way of additional affirmative defense, Brownstone obtained possession of the property as early as June 5, 2006 but at least by April 21, 2010, and during all times of Brownstone's possession, Brownstone at all times complied with any implied contractual duty.

34. Answering paragraph 50 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained in such paragraph and further deny that there was any new lease entered between the Plaintiff and/or Storms and Brownstone as such Storms and Brownstone deny each and every allegation which purports to allege the terms of the "New Lease". By way of further affirmative defense and/or allegation Brownstone was never a party to the original lease, and is in no way obligated to comply with the terms thereof. By way of additional affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

35. Answering paragraph 51 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained in such paragraph. By way of additional affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs.

36. Answering paragraph 52 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-51 of Plaintiff's Complaint as previously stated.

37. Answering paragraphs 53, 54 and 55, Storms and Brownstone deny each and every allegation contained therein. By way of affirmative defense and/or allegation, Storms and/or Brownstone were prohibited from vacating the premises on or before October 15, 2010 by the Plaintiff's actions in seeking and obtaining Temporary Injunctive relief from October 1, 2010 until November 24, 2010. When Brownstone was finally able to remove its possessions from the premises, weather conditions were such that substantially greater time was necessary to effectuate the removal. Brownstone and/or Storms ceased business operations on October 1, 2010 and if anything Brownstone and/or Storms were denied the use of the equipment, and denied the ability to undertake sales and profits from the period October 15, 2010 until January 1, 2011. By way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to the preceding paragraphs. By way of additional affirmative defense and/or allegation Storms and Brownstone allege that all business activities of Brownstone ceased on or about October 1, 2010 as a direct result of Plaintiff's initiation of the within proceedings and no sales were made after that date.

38. Answering paragraph 56 of Plaintiff's Second Amended Complaint, Storms and Brownstone admit and deny such allegations by incorporating their response to paragraphs 1-55 of Plaintiff's Complaint as previously stated.

39. Answering paragraph 57, 58, and 59 of Plaintiff's Second Amended Complaint, Storms and Brownstone deny each and every allegation contained therein, and by way of affirmative defense and/or allegation, Storms and Brownstone reallege and incorporate by this reference each of the affirmative defenses and/or allegations contained in any of the answers to

the preceding paragraphs. By way of further affirmative defense Storms and Brownstone assert that Plaintiff at least by April 21, 2010 had actual knowledge that Brownstone was the exclusive entity doing business as Brownstone Restaurant and Brewhouse and that neither Storms or Burggraf was doing business under such name. By way of further affirmative defense and/or allegation Storms was the authorized registered agent of Brownstone, was its president, and sole shareholder but after 2005 did not maintain or establish any partnership, employment, agency, service, or master-servant relationship with Brownstone or Burggraf which fact was well known to Plaintiff. By way of further affirmative defense and/or allegation Storms and Brownstone allege that on or about June 5, 2006, Storms as landlord subleased the premises located at 455 River Parkway, Idaho Falls, Idaho to Brownstone. Thereafter, Brownstone was the sole entity doing business as Brownstone Restaurant and Brewhouse. By way of additional affirmative defense, Storms' possession of the property ended as early as June 5, 2006, but at least by April 21, 2010. During all times of Storms' possession, Storms at all time exercised reasonable care in the use and possession of the premises and at the end of his possession the premises had suffered no unreasonable injury or waste during his occupancy and in fact Storms substantially improved the property. By way of additional affirmative defense, Brownstone obtained possession of the property as early as June 5, 2006 but at least by April 21, 2010. During all times of Brownstone's possession, Brownstone at all time exercised reasonable care in the use and possession of the premises and at the end of its possession the premises had suffered no unreasonable injury or waste during its occupancy.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiff, Storms and Brownstone pray that the same be dismissed, that the Plaintiff take nothing by way

thereof, and that Storms and Brownstone recover their attorney's fees and costs incurred in defending the within matter and as set forth in the Counterclaim.

COUNTERCLAIM

COMES NOW the Defendant, Michael Storms (hereinafter referred to as "Storms") and Brownstone Companies, Inc., (hereinafter referred to as "Brownstone") by and through their attorney, Dean C. Brandstetter, Esq., and for a Counterclaim against Plaintiff, The Watkins Company, L.L.C. (hereinafter referred to as "Watkins") alleges as follows:

1. On or about April 21, 2010 the court in Bonneville County Case No. CV-08-7258 entered judgment terminating a lease agreement between Storms and Kathy Burgraff, and Watkins.

2. Between April 1, 2010 and September 30, 2010, Storms and/or Brownstone occupied the premises located at 455 River Parkway (hereinafter referred to as the "Premises") in Idaho Falls, Idaho.

3. On September 15, 2010 Storms and/or Brownstone through counsel, notified Watkins of Brownstone's intent to vacate the premises on October 17, 2010.

4. On September 29, 2010, Watkins filed suit against Storms and Brownstone seeking, in part, a pre-judgment writ of attachment and preliminary injunction. On October 1, 2010 the court entered a Order Granting Watkins Motion for Temporary Restraining Order and directed that Watkins post a $10,000 bond for the issuance of the Temporary Restraining Order. Such order prohibited Storms and Brownstone from removing any property from the Premises.

5. A bond was filed with the court on or about October 5, 2010 for the purpose of paying all costs and damages which Storms and Brownstone sustained by reason of the issuance

of the Temporary Restraining Order.

6. A hearing was held on Watkins' application for prejudgment writ of attachment and preliminary injunction on October 14, 2010 and the court entered a Decision Denying Plaintiff's Motion for Prejudgment Writ of Attachment and Granting in Part Plaintiff's Request for a Preliminary Injunction on November 4, 2010. Such decision determined that Watkins had failed to show a reasonable probability that it would prevail on the merits of its case pertaining to the alleged creation of a new lease and as a result denied the Motion for Prejudgment Writ of Attachment. The court did grant a Preliminary Injunction restraining Storms and Brownstone from removing from the Premises:

a. Brewing equipment and all components

b. Brick structures and divider walls

c. Staircase and suspended structures

d. Kettle, fermentation tanks, framing, piping, ventilation components, air conditioners, mills, sinks, dishwashers, boilers, ovens, stoves, coolers, freezers, signs, lighting, and racks.

7. Such Preliminary Injunction was amended by order of the court dated November 24, 2010 to prohibit the removal of a limited number of items to which the parties had stipulated and two outdoor poles and directed Watkins to post a bond for the issuance of a Preliminary Injunction in the amount of $10,500.00. No such Preliminary Injunction Bond was subsequently filed with the court by Watkins.

8. Brownstone shut down all operations of the restaurant, bar and brewing facility on October 1, 2010 in anticipation of vacating the premises pursuant to its notice of September 15,

2010 and Brownstone and Storms were prohibited from removing equipment, property, and trade fixtures from October 1, 2010 through November 24, 2010.

9. Despite Brownstone's intention to vacate the premises on October 17, 2010 and as a result of the issuance of the Temporary Restraining Order and the other actions of Watkins, Brownstone was forced to remain in possession of the premises and continued to pay insurance on the premises, and/or its contents for the months of October, November and December 2010 to the damage of Brownstone in an amount to be determined at the time of trial.

10. Despite the intention to vacate the premises on October 17, 2010 and as a result of the issuance of the Temporary Restraining Order and the other actions of Watkins, Brownstone was forced to remain in possession of the premises and continued to pay power and other utilities for the premises for the months of October, November and December 2010 to the damage of Brownstone in an amount to be determined at the time of trial.

11. Storms and Brownstone had rented storage facilities to store the equipment, property and trade fixtures which were to be moved by October 17, 2010 and had to maintain the availability of the same for the months of October, November and December 2010 to the damage of Storms and Brownstone in an amount to be determined at the time of trial.

12. As a result of the application for Prejudgment Writ of Attachment and the temporary restraining order the starting date of the move from the premises was delayed from October 1, 2010 until November 24, 2010. The delay resulted in significantly greater moving expenses than it would have cost if Brownstone and Storms would have been allowed to move and vacate in October. Further, it took 19 more days than the anticipated 17 days to vacate the

premises to the damage of Storms and Brownstone in an amount to be determined at the time of trial.

13. Storms and Brownstone incurred attorney fees and costs in an amount to be determined at the time of trial but in the sum of not less than $15,000.00 solely in defending the application for prejudgment writ of attachment and the application for a temporary and preliminary injunction pursuant to the provisions of Idaho Code § 8-803 and Rule 65(c) of the Idaho Rules of Civil Procedure and is entitled to recover such sum from Watkins or its surety.

WHEREFORE Defendants pray that judgment be entered against Watkins and in favor of Storms and/or Brownstone on their Counterclaim in an amount to be determined at the time of trial together with additional reasonable attorney fees and costs and such other relief as the court deems just.

DATED this 23rd day of October, 2013.

DEAN C. BRANDSTETTER, ESQ.
Attorney for Defendants Storms and Brownstone

MICHAEL STORMS
Defendant and Counterclaimant

STATE OF IDAHO)
:ss.
County of Bonneville)

MICHAEL STORMS, being first duly sworn on oath, deposes and says: That he is one of the Defendants and Counterclaimants in the above cause; that he has read the foregoing Answer to Second Amended Complaint and Counterclaim, knows the contents thereof; and that the same is true and correct as he verily believes.

Michael Storms
MICHAEL STORMS

SUBSCRIBED AND SWORN to before me this 23rd day of October, 2013.

NOTARY PUBLIC FOR IDAHO
Residing at: Idaho Falls
My Commission Expires: 5/28/2015

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 23rd day of October, 2013, I caused a true and correct copy of the foregoing document to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting as set forth below.

B.J. Driscoll, Esq. Smith, Driscoll and Associates 414 Shoup P.O. Box 50731 Idaho Falls ID 83405 Fax: 529-4166	[ ] By pre-paid post [ ] By hand delivery [✓] By facsimile transmission [ ] By Courthouse Box
Hon. Darren B. Simpson District Judge Bingham County Courthouse 501 N Maple #310 Blackfoot, ID 83221 Fax: 785-8057	[ ] By pre-paid post [ ] By hand delivery [✓] By facsimile transmission [ ] By Courthouse Box

DEAN C. BRANDSTETTER, ESQ.

12/11 Watkins

B. J. Driscoll, Esq. – ISB #7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
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Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **REPLY TO COUNTERCLAIM**

COMES NOW the plaintiff, The Watkins Company, LLC ("Watkins"), and in reply to defendant's Counterclaim, admits, denies, alleges, and avers as follows:

FIRST DEFENSE

1. Defendant's Counterclaim fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

2. Plaintiff denies each and every allegation of said defendant's Counterclaim not herein specifically admitted.

THIRD DEFENSE

3. In answer to paragraph 1 of Defendant's Counterclaim, plaintiff admits the court in said case entered an Amended Judgment on April 21, 2010, but denies the remaining allegations.

4. In answer to paragraph 2 of Defendant's Counterclaim, plaintiff admits the same.

5. In answer to paragraph 3 of Defendant's Counterclaim, plaintiff admits the same.

6. In answer to paragraph 4 of Defendant's Counterclaim, plaintiff admits the same.

7. In answer to paragraph 5 of Defendant's Counterclaim, plaintiff admits that Watkins filed a bond on October 5, 2010, but denies the remaining allegations of paragraph 5.

8. In answer to paragraph 6 of Defendant's Counterclaim, plaintiff admits the same.

9. In answer to paragraph 7 of Defendant's Counterclaim, plaintiff admits the same.

10. In answer to paragraph 8 of Defendant's Counterclaim, plaintiff is without sufficient knowledge of when the defendants ceased their business operations and therefore denies the same. Plaintiff denies the balance of said paragraph 8.

11. In answer to paragraph 9 of Defendant's Counterclaim, plaintiff denies the same.

12. In answer to paragraph 10 of Defendant's Counterclaim, plaintiff denies the same.

13. In answer to paragraph 11 of Defendant's Counterclaim, plaintiff is without sufficient knowledge of defendants' alleged rental of storage facilities and therefore denies the same.

14. In answer to paragraph 12 of Defendant's Counterclaim, plaintiff denies the same.

15. In answer to paragraph 13 of Defendant's Counterclaim, plaintiff denies the same.

AFFIRMATIVE DEFENSES

1. As a separate and further defense, plaintiff alleges that Defendants/Counterclaimants failed to mitigate their damages, and that any and all damages, as alleged by the Defendants/Counterclaimants, which are expressly denied, resulted from said failure to mitigate damages.

2. As a separate and further defense, plaintiff alleges that Defendants'/Counterclaimants' claims should be reduced or discharged by the doctrine of setoff.

3. As a separate and further defense, plaintiff alleges that Defendants'/Counterclaimants' claims are barred by the statute of limitations.

4. As a separate and further defense, Plaintiff alleges that Defendants/Counterclaimants are estopped from asserting the claims herein, or have waived said claims.

5. As a separate and further defense, Plaintiff alleges that Defendants'/Counterclaimants' claims are barred by laches.

6. As a separate and further defense, Plaintiff alleges that the Counterclaim and each and every separate cause of action contained therein is barred in whole or in part by reason of Defendants'/Counterclaimants' unclean hands.

7. As a separate and further defense, Plaintiff alleges that Defendants'/Counterclaimants' claims are barred by unjust enrichment.

8. As a separate and further defense, Plaintiff alleges that Defendants'/Counterclaimants' claims are barred by force majeure.

WHEREFORE, Plaintiff prays judgment as follows:

(1) That Defendants' Counterclaim be dismissed and that he take nothing thereby;

(2) That Plaintiff recover its reasonable attorney's fees and costs incurred in defending defendant's Counterclaim, pursuant to Idaho Code § 12-120(3); and

(3) For such other and further relief as to the Court appears just and equitable in the premises.

DATED this 10 day of January, 2014.

SMITH, DRISCOLL & ASSOCIATES, PLLC

B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of January, 2014, I caused a true and correct copy of the foregoing **REPLY TO COUNTERCLAIM** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq. COX, OHMAN & BRANDSTETTER, CHTD P.O. Box 51600 510 "D" Street Idaho Falls, ID 83405	[ ] U. S. Mail [✓] Fax [ ] Overnight Delivery [ ] Hand Delivery
Honorable Darren B. Simpson District Judge Bingham County Courthouse 501 N. Maple, #310 Blackfoot, ID 83221	[ ] U. S. Mail [✓] Fax [ ] Overnight Delivery [ ] Hand Delivery

B. J. Driscoll

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
November 19, 2014
AT 9:21 a.m.
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	**CASE NO. CV-2010-5958** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. STATEMENT OF THE CASE

Plaintiff The Watkins Company, LLC, an Idaho Limited Liability Company (hereinafter "Watkins"), filed this breach of contract, breach of covenant to repair, unjust enrichment, and waste action against Defendants Michael Storms, an individual (hereinafter "Storms"); Kathy Burggraf, an individual (hereinafter "Burggraf"); Brownstone Companies, Inc., an Idaho Corporation (hereinafter the "Brownstone"); and Storms, Burggraf, and Brownstone collectively doing business as the Brownstone

Restaurant and Brewhouse (hereinafter the "Restaurant").[1] Watkins also requested injunctive relief, an accounting, eviction, and attorney's fees.[2] Storms and Brownstone asserted affirmative defenses and counterclaimed for storage rental, moving, utility, and insurance expenses, together with attorney fees.[3]

A Court Trial was held on March 18-21, April 25, May 6, and July 29 of 2014.[4] Having reviewed the record, the evidence presented at trial, and the relevant authorities, the following findings of fact and conclusions of law are appropriate.

II. ISSUES

Watkins presented evidence in support of his theories of breach of the covenant to repair (Count Six), unjust enrichment (Count Seven), and waste (Count Eight).[5] Watkins requests attorney fees pursuant to the original lease between the parties, the "New Lease," Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54.[6]

Storms and Brownstone counterclaimed that Watkins prevented Storms and Brownstone from vacating the Premises for approximately six (6) weeks, causing Storms and Brownstone to incur unnecessary storage rental expenses, "significantly greater

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[1] Second Amended Complaint, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 6, 2013) (hereinafter the **"Second Amended Complaint"**).
[2] Second Amended Complaint, at pp. 6-8.
[3] Answer to Second Amended Complaint and Counterclaim, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed October 23, 2013) (hereinafter the **"Answer and Counterclaim"**).
[4] Minute Entry [for March 18, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21, 2014); Minute Entry [for March 19, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21 2014); Minute Entry [for March 20, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21, 2014); Minute Entry [for March 21, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed May 1, 2014); Minute Entry [for April 24, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed May 1, 2014). This Court notes that the Bonneville County Clerk has not prepared a minute entry for the July 29, 2014 hearing as of the date of these findings and conclusions.
[5] See: Second Amended Complaint, at pp. 8-10.
[6] Second Amended Complaint, at pp. 7-8.

moving expenses,"[7] power and utilities for the rental property located at 455 River Parkway, Idaho Falls, Idaho (hereinafter the "Premises"), insurance expenses, and attorney fees.[8] Storms and Brownstone also claim affirmative defenses of unclean hands, and failure to mitigate damages.[9] Storms and Brownstone request attorney fees and costs under Idaho Code § 8-803, and Idaho Rule of Civil Procedure 65(c) for defending against the temporary restraining order and the requested writ of attachment.[10]

Based upon the record, the evidence presented at trial, and the relevant authorities, the following issues require adjudication:

1. Did the terms of the Lease carry over into Storms' and Brownstone's tenancy at will?

2. Did Storms and/or Brownstone breach the covenant to repair in the Lease?

3. What amount of money, if any, should be awarded to Watkins for cleaning or repairs of the Premises as a result of Storms' and/or Brownstone's breach?

4. Were Storms and Brownstone unjustly enriched by possession of the Premises from November 25, 2010 to December 30, 2010 without paying rent?

5. Have Storms and Brownstone shown themselves entitled to recover storage rental expenses, additional moving expenses, insurance expenses, utility expenses, and attorney fees as damages for the temporary restraining order entered against them?

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[7] Answer and Counterclaim, at p. 19, ¶ 12.
[8] See: Answer and Counterclaim, at pp. 17-20.
[9] Answer and Counterclaim, at p. 2.
[10] Answer and Counterclaim, at p. 20.

6. What amount of money, if any, should be awarded to Storms and Brownstone on their claims for expenses and fees incurred as a result of the temporary restraining order entered against them?

III. FINDINGS OF FACT

1. Watkins owns commercial real estate located at 455 River Parkway, Idaho Falls, Idaho (the Premises).[11] Dane Watkins, Sr. is Watkins' managing partner.[12]

2. On April 18, 1996, Brownstone was incorporated in the State of Idaho.[13] Storms is the president and registered agent for Brownstone.[14] Brownstone's address is listed on its Certificate of Incorporation as "455 River Parkway, Idaho Falls, Idaho 83402."[15] This is the address of the Premises.[16]

3. On July 31, 1996, Storms and Burggraf, as individuals, entered into a thirty (30) year commercial lease agreement with Watkins (hereinafter referred to as the "Lease") to lease the Premises for the operation of a microbrewery and restaurant.[17]

4. Paragraph 7 of the Lease reads as follows:

> **MAINTENANCE, REPAIRS, ALTERATIONS:** Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical

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[11] Defendants' Trial Exhibit P, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (admitted March 18, 2014) (hereinafter **"Trial Exhibit P"**), at p. 1. On March 18, 2014, the first day of trial, the parties stipulated to the admission of the following trial exhibits: Plaintiff's Exhibits 1-28, and 32-39; Defendants' Exhibits A - U. Defendants' Exhibit T.98A was admitted on March 19, 2014. Defendants' Exhibit V was admitted for demonstrative purposes on April 24, 2014. Defendants' Exhibits AA, AA1, AA2, AA3, V, W, X, Z, and Z1 were admitted on May 5, 2014. Each of these exhibits shall hereinafter be referred to as "Trial Exhibit" followed by the designated exhibit number.

[12] Trial Exhibit P, at p. 1.

[13] Exhibit 1, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (admitted by stipulation October 14, 2010) (hereinafter **"TRO Exhibit 1"**), at p. 1.

[14] TRO Exhibit 1, at p. 2.

[15] Id.

[16] Exhibit 14, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (admitted by stipulation October 14, 2010) (hereinafter **"TRO Exhibit 14"**), at p. 2.

[17] Trial Exhibit 1, at p. 1, ¶ 3.

wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs required, See Addendum B which shall be maintained by Lessor. Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.

No improvement or alteration of the premises shall be made without the prior written consent of the Lessor. Prior to the commencement of any substantial repair, improvement, or alteration, Lessee shall give Lessor at least two (2) days written notice in order that Lessor may post appropriate notices to avoid any liability for liens.

Lessee shall not commit any waste upon the premises, or any nuisance or act which may disturb the quiet enjoyment of any tenant in the building.[18]

5. Addendum B to the Lease details the particular maintenance responsibilities assigned to the tenant and to the landlord.[19] The tenant's maintenance responsibilities include glass breakage.[20]

6. Addendum B also sets forth the parties' agreement that:

Lessee plans to spend a minimum of $400,000.00 on remodeling of the premises and installation of the microbrewery system. Lessee will furnish checks and invoices to see the $400,000.00 has been paid.[21]

7. After executing the Lease with Watkins, Storms and Burggraf gutted the building[22] and renovated it to accommodate a microbrew pub and restaurant.[23] They tore out the drop ceilings,[24] sandblasted and stained the original beams,[25] installed new

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[18] Trial Exhibit 1, at p. 1, ¶ 7.
[19] Trial Exhibit 1, at p. 4.
[20] Id.
[21] Id.
[22] See: Trial Exhibits T.1 through T.13, T.15 through T.17.
[23] See: Trial Exhibits T.19 through T.26.
[24] See: Trial Exhibit T.16.
[25] See: Trial Exhibit T.20.

plumbing,[26] tore out the old and installed new electrical services, removed walls,[27] and reconfigured the interior of the Premises.

8. On May 30, 1997, Storms, Burggraf, and Brownstone filed a certificate of assumed business name with the Idaho Secretary of State to conduct business under the name "Brownstone Restaurant and Brewhouse."[28]

9. During the thirteen (13) year operation of the Restaurant, employees were expected to undertake routine cleaning of their stations. Furthermore, an annual cleaning day took place wherein equipment was removed and pressure washed, and the Premises, including the outside brick work, was cleaned by Restaurant employees. The kitchen hood system was maintained by a commercial service on an annual basis and inspected by the fire marshal. The Restaurant was never cited by the Health Department or the Fire Department for any violations.

10. Burggraf ceased to take part in the day-to-day operations of the Restaurant in 2002, and sold her interest in the Brownstone in 2005.[29]

11. In 2005, Storms approached Dane Watkins about the Restaurant's roof, which extended over other businesses in the Eagle Rock commercial complex. Storms wanted to replace the roof because it was old and its shingles were falling off. Storms understood that he was responsible to pay for one-half of any repairs to the roof over the Restaurant. After speaking to Mr. Watkins, Storms understood that both he and Mr. Watkins would solicit bids from roofers for the repair of the roof.

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[26] See: Trial Exhibit T.15.
[27] See: Trial Exhibit T.17.
[28] Complaint, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 29, 2010) (hereinafter the **"Complaint"**), at p. 2, ¶ 5. See also: Exhibit 3, *The Watkins*

12. In the fall of 2005, not long after speaking with Mr. Watkins about the roof, Storms arrived at the Restaurant to see a roofing contractor working on the area of the roof to the west of the Restaurant. Mr. Watkins had hired Briggs Roofing to repair the entire roof, including the portion over the Restaurant. After meeting with Mr. Watkins, Storms ultimately agreed to allow Briggs Roofing to repair the roof over the Restaurant, and paid Mr. Watkins, by December of 2005, $6,780.00 for Storms' portion of the cost. Storms never saw a bid or an invoice from Briggs Roofing.

13. In April of 2006, Briggs Roofing returned to finish the portion of the roofing over the Restaurant. A crew arrived and tore off the layers of old shingles, pushing the old shingles off the roof and into a dump truck.[30] The dump truck was moved around the Restaurant as the roofers moved around the roof. In so doing, the roofers tore the Restaurant's window awnings and popped the handicap ramp out of the cement by the north entrance.

14. One Friday afternoon, after the Briggs Roofing crew exposed the roof down to the wood on the Restaurant's south side, stacked new shingles four feet high on the roof, and left for the weekend, a heavy rain set in and continued throughout the weekend. Storms received a telephone call from the Restaurant manager, informing him that the roof leaked in numerous places, water was causing the paint on the walls to bubble, and tape was hanging down from the ceiling. Storms alerted Mr. Watkins to the problem.

Company, LLC v. Storms, Bonneville County case no. CV-2010-5958 (admitted by stipulation October 14, 2010).

[29] Trial Exhibit P.

[30] See: Defendant's Trial Exhibits T.34 and T.35.

15. The following Monday, the roofers from Briggs Roofing returned. Over the course of the next several weeks, ending in early May 2006, Briggs Roofing finished the Restaurant's new roof. In the process, one of the roofers broke through the Restaurant's ceiling, spilling debris into the Restaurant and onto a customer. Approximately one week later, Mr. Watkins approached Storms at the Restaurant and requested an additional $2,000.00 for new wood placed on the roof. Storms refused to pay additional money without proof of new wood actually being laid onto the roof. Mr. Watkins abandoned his request.

16. Storms could not get Mr. Watkins to address the water-leak repair issues inside the Restaurant. Finally, in the Fall of 2006, Storms threatened to decrease the amount of monthly rent paid for the Premises. Soon thereafter, an employee of Waters Construction appeared at the Premises and announced that he had been hired by Dane Watkins to fix the interior of the Restaurant. After assessing the interior damage, Waters Construction began making repairs. However, when a heavy rain fell in late September or early October of 2006, Waters Construction contacted Storms to say that leaks were occurring all over the Premises and, without repairs to the roof, any additional work on the interior was pointless, since the water leaks were degrading the repair-work. A Waters Construction employee took Storms up on the roof to demonstrate where the leaks were occurring. Thereafter, Waters Construction did not undertake any additional repairs to the Premises.

17. The damaged rain gutter was replaced some time in 2007.

18. In August of 2007, Waters Construction sued Watkins and Storms for failure to pay for services rendered.[31] Almost one year later, in July of 2008, judgment was entered in favor of Waters Construction as against Watkins.[32] Waters Construction's claim against Storms was denied because Storms had no contractual relationship with Waters Construction.[33]

19. On November 19, 2008, Watkins sued Storms and Burggraf, in Bonneville County case no. CV-2008-7258 (hereinafter the "2008 Lawsuit"), and alleged that Storms and Burggraf breached the Lease by failing to pay rent, and failing to provide monthly sales reports.[34] Watkins sought to evict Storms and Burggraf from the Premises.[35] Watkins further requested accelerated rent, late fees, costs of roof repair, rent for the upstairs storage space, unjust enrichment, and food and drink credits.[36]

20. On March 16, 2010 in the 2008 Lawsuit, Judge Joel Tingey held that Burggraf no longer owned an interest in the Brownstone.[37] Judge Tingey found that Storms materially breached the Lease by withholding rent (without permission for such action under the Lease) and determined that Watkins was entitled to evict Storms from the Premises.[38]

21. On April 21, 2010, Watkins received a judgment in the 2008 Lawsuit terminating the Lease.[39] Following the entry of the April 21, 2010 judgment, Storms and Brownstone retained possession of the Premises and paid rent on a month-to-month

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[31] Trial Exhibit N.
[32] Trial Exhibit N, at p. 00019.
[33] Trial Exhibit N, at pp. 00004, 00019.
[34] Trial Exhibit P, at pp. 00001 -00009.
[35] Trial Exhibit P, at p. 00009.
[36] Trial Exhibit P, at pp. 00009 – 00017.
[37] Trial Exhibit P, at p. 00002.
[38] Trial Exhibit P, at pp. 00006 – 00009.

basis.[40] Thereafter, the parties disagreed as to whether or not the Lease applied to their relationship.[41]

22. Storms became a tenant-at-will, possessing the Premises with Watkins' consent, but without fixed lease terms.[42]

23. In August of 2010, in response to encouragement from Dane Watkins, Gerald Mitchell (owner of White Water Grill and Wasabi Japanese Restaurant) inspected the Premises in consideration of opening a restaurant there.

24. On August 15, 2010, a process server delivered a letter from Watkins, dated August 13, 2010 (hereinafter the "August 13 Letter"), to Burggraf by delivering a copy of the August 13 Letter to Burggraf at her home.[43]

25. On August 16, 2010, a process server delivered the August 13 Letter to Evan Bowman, assistant manager of the Restaurant, by delivering a copy thereof to Evan Bowman at the Premises.[44]

26. The August 13 Letter, addressed to "Mike Storms, Brownstone Restaurant and Brewhouse, 999 South Lee, Idaho Falls, Idaho 83404," stated:

> I have tried to talk to you several times over the last few weeks about the rent and other responsibilities the Watkins Company, LLC expects from you and the Brownstone as tenants. I regret that we still have not been able to agree on the terms of the lease, so this letter is to notify you of the

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[39] Complaint, at p. 3, ¶ 11.
[40] Complaint, at p. 3, ¶ 12.
[41] Decision Denying Plaintiff's Motion for Prejudgment Writ of Attachment and Granting in Part Plaintiff's Request for a Preliminary Injunction, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 4, 2010) (hereinafter the ***"Partial Preliminary Injunction"***), at p. 12.
[42] *Partial Preliminary Injunction*, at p. 11; Order Granting Preliminary Injunction in Part, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010) (hereinafter the ***"Second Partial Preliminary Injunction"***), at p. 8.
[43] Affidavit of Dane Watkins, *The Watkins Company, LLC v.* Storms, Bonneville County case no. CV-2010-5958 (filed October 1, 2010) (hereinafter the **"Watkins I Affidavit"**), at Exhibit C, p. 3.
[44] Watkins I Affidavit, at Exhibit C.

changes to the lease. These changes will take effect at the end of this month.

The terms of the lease between you and Watkins Company will be the same as the old lease that I have attached to this letter, except you will now be responsible for 100% of the roof repairs, the rent will be due the 1st day of the month, you will pay the annual food and drink credit of $3,000 on November 1st of each year and the credits will be good for 12 months, and you have no right to use Space #16 or the upstairs storage or the sidewalk area. The lease will expire 10/31/20207 [sic].[45]

27. On September 13, 2010, Dane Watkins, on behalf of "Watkins & Watkins" sent a letter addressed to Storms at the Premises address (hereinafter the "September 13 Letter").[46] The September 13 Letter informed Storms that he was in default in his payment to Watkins & Watkins under the lease for the rent of the Restaurant and demanded payment within three days under penalty of eviction.[47]

28. On September 14, 2010, Dane Watkins, this time writing on behalf of Watkins, sent another demand letter, addressed to Storms (at the Premises address), Burggraf (at her home), the Restaurant (at the Premises address), and Brownstone (at the Premises address) (the "September 14 Letter").[48] The September 14 Letter noted that the recipients were in default under the Lease with Watkins, demanded payment within three days, and threatened eviction for non-payment.[49] The September 14 Letter also stated that it superseded the September 13 Letter.[50]

29. The parties stipulated that Storms had no actual notice of the August 13 Letter until September 14, 2010.

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[45] TRO Exhibit 14, at p. 1.
[46] Exhibit 15, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (admitted by stipulation October 14, 2010).
[47] Id.
[48] Exhibit 16, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (admitted by stipulation October 14, 2010).
[49] Id.

30. By letter dated September 15, 2010, counsel for Brownstone informed Watkins of its intention to vacate the Premises on October 17, 2010.[51] Storms' and Brownstone's operated the Restaurant for the last time on September 30, 2010.

31. Herbert Rockhold agreed to help Storms move everything that belonged to Storms and Brownstone out of the Premises and into storage. They discussed an approximate fee for Rockhold's services in the amount of $2,500.00 to $3,500.00. On October 1, 2010, Rockhold began moving small items out of the Premises for a few hours before being directed to stop by Storms due to the *Temporary Restraining Order*. In addition to friends and family members, employees of the Brownstone were on hand to help with the move.

32. On October 1, 2010, Watkins moved for a temporary restraining order prohibiting Storms and Brownstone from removing any property located in or on the Premises.[52] Watkins' Motion was granted and the parties were directed not to remove any property from the Premises until a decision issued on Watkins' application for a prejudgment writ of attachment.[53]

33. On November 4, 2010, Watkins' Motion for Prejudgment Writ of Attachment was denied, but his request for a preliminary injunction was partially granted.[54] Storms and Brownstone were enjoined from removing brewing equipment, brick structures and divider walls, staircases, a loft seating area, kettles, fermentation

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[50] Id.
[51] Watkins I Affidavit, at Exhibit E.
[52] Motion for Temporary Restraining Order and Application for Prejudgment Writ of Attachment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed October 1, 2010) (hereinafter **"Watkins' Motion"**).
[53] Order Granting Motion for Temporary Restraining Order and Order to Show Cause, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed October 7, 2010) (hereinafter the ***"Temporary Restraining Order"***).

tanks, framing, piping, ventilation components, air conditioners, mills, sinks, dishwashers, boilers, ovens, stoves, coolers and freezers, signs, lighting, racks physically connected to the floors, walls, and exposed trusses on the Premises.[55]

34. On November 9, 2010, Watkins moved for reconsideration of the *Partial Preliminary Injunction*, because the "New Lease" issue had not been briefed by the parties.[56] Storms and Brownstone also moved for reconsideration of the *Partial Preliminary Injunction* based upon a premature decision on the preliminary injunction issue without appropriate briefing or evidence.[57] This Court set aside the *Partial Preliminary Injunction* on the same date.[58]

35. On November 9, 2010, at 10:41 o'clock a.m., counsel for Watkins sent counsel for Storms and Brownstone the following e-mail:

> Thanks, Dean.
>
> Also, Mr. Watkins contacted me this morning and said that Mr. Storms and a few other men are over at the building this morning starting to remove property from the premises. Mr. Watkins approached them and asked what they were doing since the court entered the preliminary injunction. Mr. Storms said no one had told him of any preliminary injunction. So my client contacted me. I called your office but they said you were in court in Madison County. In the meantime, I gave Mr. Watkins a copy of the court's order issuing the preliminary injunction and I believe Mr. Watkins is going to take the copy over to Mr. Storms. I trust your client will comply with the injunction, but I wanted to keep you informed of what my client is reporting to me.[59]

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[54] See: *Partial Preliminary Injunction.*
[55] *Partial Preliminary Injunction*, at p. 14. See also: Watkins Affidavit, at p. 4, ¶ 16a.-d.
[56] Motion for Reconsideration, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 9, 2010) (hereinafter **"Watkins' Reconsideration Motion"**).
[57] Motion for Reconsideration and Request for Hearing on Preliminary Injunction/Restraining Order, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 9, 2010) (hereinafter **"Storms' and Brownstone's Reconsideration Motion"**).
[58] Order Setting Aside Decision Granting in Part Plaintiff's Request for Preliminary Injunction, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 9, 2010) (hereinafter the ***"Set Aside Order"***).
[59] Trial Exhibit A, at p. 000025.

36. On November 24, 2010, at 3:21 o'clock p.m., this Court again granted Watkins a partial preliminary injunction applicable only to the outdoor poles in the vicinity of the Premises. Storms and Brownstone were not enjoined from removing other disputed fixtures, including the wooden bar, the signs affixed to the poles, and the awnings on the east and north walls of the Premises.[60] On the same date, and at the same time, this Court denied Watkins' request for an Idaho Rule of Civil Procedure 54(b) certificate of a final judgment as to this Court's denial of Watkin's Reconsideration Motion.[61]

37. Rockhold returned to the Premises in late November or early December 2010 to move equipment out of the Restaurant. Few, if any former employees of the Brownstone were available for the disconnection and moving of goods and equipment. Snow and ice made the move difficult. Rockhold finished the move on December 30, 2010.

38. Rockhold made sure the Premises were clean as items were moved out, including sweeping and mopping the floors and cleaning dirty areas on the walls.

39. As a result of the additional time required to move out, Rockhold charged Storms and Brownstone $5,500.00 for his services.[62] Rockhold testified that had he been able to move Storms and Brownstone out of the Premises in October of 2010, the price would have been around $3,500.00.

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[60] *Second Partial Preliminary Injunction*, at p. 11.
[61] Order Denying Plaintiff's Request for a Rule 54(b) Certificate, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010).
[62] See: Trial Exhibit K, at p. 16.

40. Storms and Brownstone hired Alan Flores to deep clean the Premises. Flores finished his work in late December of 2010.

41. Upon fully vacating the Premises, Storms and Brownstone left behind a broken vestibule window pane, a broken crash bar on the north entrance door, grease in the kitchen's grease trap, and dust on the fans and beams above the brewing equipment and dining area.

42. In January of 2011, Watkins hired Blaise Kauer to go through the Premises and make it electrically safe to show potential tenants. Kauer spent seven (7) hours to assure that any loose wires were safe, repair lights, replace light bulbs

43. On or about January 31, 2011, Dan Carter, owner of Bennett's Paint and Glass, inspected the Premises to determine what issues with the doors needed to be addressed. He replaced the panic bar system on the northeast door and the closer on one of the entrance doors. Carter also installed new lock rods on the exterior French doors in the vestibule.

44. Gerald Mitchell testified that he began to seriously consider moving into the Premises "in the first part of 2011." He engaged in lease negotiations with Dane Watkins approximately three (3) months before he opened the Snow Eagle Grill and Brewery.

45. On April 4, 2011, Mitchell signed a "Commercial Lease and Deposit Receipt" with Watkins for rental of the Premises.[63]

46. After renovation and reconfiguration of the Premises, Mitchell opened the Snow Eagle Brewing and Grill in the former Restaurant Premises on July 4, 2011.

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[63] Trial Exhibit 2.

47. Watkins never served Burggraf with this lawsuit. Therefore, Watkins shall take nothing by its Second Amended Complaint, or any previous allegations, against her.

48. Watkins' Count One breach of contract claim, as it related to a document Watkins referred to as the "New Lease," was summarily adjudicated in Storms' and Brownstone's favor.[64] Watkins shall take nothing by its Count One (breach of contract) claim against the defendants.

49. Watkins' Count Two request for injunctive relief (which addressed removal of furnishings and fixtures from the Premises) was granted in part and denied in part in prior rulings.[65] Storms and Brownstone vacated the Premises as of December 30, 2010.[66] Thus, Watkins' request is now moot.

50. Watkins' Count Three request for an accounting was summarily adjudicated in Storms' and Brownstone's favor.[67] Watkins shall take nothing from the defendants based upon its request for an accounting.

51. Watkins' Count Four request for eviction is now moot since Storms and Brownstone vacated the Premises in 2011.[68]

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[64] See: Second Amended Complaint, at pp. 4-6; Order Denying Plaintiff's Motion for Partial Summary Judgment, and Granting in Part Defendants' Motion for Partial Summary Judgment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed May 13, 2013) (hereinafter the ***"Summary Judgment Order"***), at p. 14.

[65] See: Second Amended Complaint, at p. 6; *Summary Judgment Order*, at pp. 14-15.

[66] Affidavit of Dane Watkins, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 12, 2012) (hereinafter the **"Watkins II Affidavit"**), at p. 4, § 17; *Summary Judgment Order*, at p. 14.

[67] See: *Summary Judgment Order*, at p. 14, ¶ D.1.

[68] See: Second Amended Complaint, at pp. 6-7; *Summary Judgment Order*, at pp. 15-16.

52. Storms and Brownstone were granted summary judgment as to Watkins' Count Six claim for breach of contract and the covenant to repair to the extent such claim alleged damages under the "New Lease."[69]

53. Storms' and Brownstone's third, fourth, fifth, and sixth affirmative defenses all relate to Watkins' claims under the alleged "New Lease."[70] This Court previously determined that the "New Lease" never came into effect between the parties.[71] Thus, Storms' and Brownstone's third, fourth, fifth, and sixth affirmative defenses are moot.

IV. APPLICABLE PRINCIPLES OF LAW

A. Tenancy at Will

1. When a lessee holds over after his tenancy for a fixed term of years expires, the lessor must elect to either treat the lessee as a trespasser or hold him to a new tenancy.[72] If he treats the lessee as a trespasser, the lessor may bring an action for unlawful detainer.[73] If, however, the lessor seeks, implicitly or explicitly, to hold the lessee to a new tenancy, a new lease arises by operation of law.[74] The tenant's right to possession, if any, is not based upon the original lease, but upon a new tenancy created by law.[75]

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[69] *Summary Judgment Order*, at p. 16.
[70] Answer and Counterclaim, at pp. 2-3.
[71] *Partial Preliminary Injunction*, at p. 12.
[72] *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho 640, 644-5, 718 P.2d 551, 555-6 (Ct. App. 1985) [citing: R. Schoshinski, *American Law of Landlord and Tenant* § 2:23 (1980); Annot., 45 A.L.R.2d 827 (1956)].
[73] *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho at 645, 718 P.2d at 556 [citing: Idaho Code § 6-303].
[74] *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho at 645, 718 P.2d at 556.
[75] Id.

2. A court must look to the lessor's intent, as revealed by either his words or his actions, to determine whether a new tenancy results.[76] If a lessor demands or accepts rent from the lessee, he will be presumed to have elected to hold the lessee to a new tenancy, absent a clearly expressed intention to the contrary.[77]

3. The terms of the original lease are usually carried over into the new tenancy.[78]

B. Standard of Review - Breach of Contract/Covenant to Repair.

1. The elements necessary to claim a breach of contract include:

(a) the existence of a contract;

(b) the breach of the contract;

(c) the breach caused damages; and

(d) the amount of those damages.[79]

2. A lease, like any other contract, is to be construed to give effect to the intention of the parties. In so doing, the courts generally hold that covenants for maintenance and repair and covenants to surrender in good condition are to be construed together, and, so construed, the covenant to surrender in good condition, wear and tear due to reasonable use excepted.[80]

3. The general force and effect of a covenant by the lessee to make all repairs to the leased premises during the term of the lease is restricted and limited by a surrender

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[76] Id.
[77] Id.
[78] *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho at 645, 718 P.2d at 556 [citing: *Yachts America, Inc. v. United States*, 673 F.2d 356, 230 Ct.Cl. 26 (1982)].
[79] *Mosell Equities, LLC v. Berryhill & Company, Inc.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013).
[80] *Miller v. Belknap*, 75 Idaho 46, 52-3, 266 P.2d 662, 665-6 (1954).

clause containing an exception as to ordinary wear and tear.[81] The two provisions are construed together to impose upon the lessee an obligation to make all such repairs as may be necessary for the preservation of the premises in the condition in which the lessee received them from his lessor, except repairs required by reason of ordinary wear and tear.[82] Ordinary wear and tear includes any usual deterioration from the use of the premises and by lapse of time.[83]

4. The landlord bears the burden to prove, by a preponderance of the evidence, the condition of the premises when the tenant took possession or to establish specific acts of waste or damage during the tenancy.[84]

5. The measure of damages for breach of covenant to repair when the lease term has expired is the cost of putting the premises in repair.[85]

C. Standard of Review - Unjust Enrichment.

1. The elements of unjust enrichment include:

(a) a benefit is conferred on the defendant by the plaintiff;

(b) the defendant appreciates the benefit; and

(c) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit.[86]

2. Unjust enrichment, also referred to as an implied-in-law contract, is an equitable remedy.[87]

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[81] *Miller v. Belknap*, 75 Idaho at 53, 266 P.2d at 665-6 [citing: 45 A.L.R. Annotation 70]).
[82] Id.
[83] Id.
[84] *Poesy v. Closson*, 84 Idaho 549, 553, 374 P.2d 710, 712 (1962) [citing: *Miller v. Belknap*, 75 Idaho at 51, 266 P.2d at 665].
[85] *Santillanes v. Property Management Services, Inc.*, 110 Idaho 588, 591, 716 P.2d 1360, 1363 (Ct. App. 1986).
[86] *Indian Springs, LLC v. Andersen*, 154 Idaho 708, 712, 302 P.3d 333, 337 (2012).

3. An implied-in-fact contract exists where there is no express agreement between the parties, but their conduct implies an agreement from which an obligation in contract exists.[88]

4. An award for unjust enrichment may be proper even though an agreement exists.[89] This occurs when the express agreement is found to be unenforceable.[90]

5. The application of equitable remedies is a question of fact because it requires a balancing of the parties' equities.[91]

6. The party who has conferred the benefit and who is seeking the return of the full amount thereof has the burden of proving that it would be unjust for the recipient to retain any part of the benefit.[92]

D. Standard of Review – Waste.

1. "Waste" is defined as

> [a]ction or inaction by a possessor of land causing unreasonable injury to the holders of other estates in the same land. An abuse or destructive use of property by one in rightful possession. Spoil or destruction, done or permitted, to lands, houses, gardens, trees, or other corporal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder.[93]

2. "Waste" has also been defined as "the permanent or lasting injury to the estate by one who has not an absolute or unqualified title thereto."[94]

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[87] *Clayson v. Zebe*, 153 Idaho 228, 232, 280 P.3d 731, 735 (2012).
[88] *Clayson v. Zebe*, 153 Idaho at 232, 280 P.3d at 735.
[89] *Buku Properties, LLC v. Clark*, 153 Idaho 828, 291 P.3d 1027 (2012) [citing: *Bates v. Seldin*, 146 Idaho 772, 776, 203 P.3d 702, 706 (2009)].
[90] Id.
[91] *Clayson v. Zebe*, 153 Idaho at 232, 280 P.3d at 735 [citing: *Farrell v. Whiteman*, 152 Idaho 190, 194, 268 P.3d 458, 462 (2012).
[92] *Toews v. Funk*, 129 Idaho 316, 322, 924 P.2d 217, 223 (Ct. App. 1994).
[93] Black's Law Dictionary 1589-90 (6th ed. 1990) [as cited with approval in: *Kimbrough v. Reed*, 130 Idaho 512, 514, 943 P.2d 1232, 1234 (1997)].
[94] *Consolidated AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 230, 912 P.2d 115, 117 (1996).

3. Idaho Code § 6-201 authorizes a suit for waste by a "tenant for … years." Treble damages may be awarded upon a finding that the waste was wilfully, wantonly, or maliciously committed.[95]

E. Expert Testimony.

1. The admissibility of expert testimony is governed by Idaho Rule of Evidence 702, which provides that an expert witness may testify and offer opinions regarding specialized knowledge that will "assist the trier of fact to understand the evidence or to determine a fact in issue...."[96]

2. To be admissible, "[t]he information, theory or methodology upon which the expert's opinion is based need not be commonly agreed upon by experts in the field, but it must have sufficient indicia of reliability to meet [Rule] 702 requirements."[97]

F. Standard of Review - Unclean Hands.

1. "The clean hands doctrine 'stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.'"[98]

2. The doctrine of "unclean hands" is based on the maxim that, "he who comes into equity must come with clean hands."[99]

3. The conduct must be intentional or willful, rather than merely negligent.[100]

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[95] *Pearson v. Harper*, 87 Idaho 245, 258, 392 P.2d 687, 694 (1964).
[96] *Pocatello Hospital, LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho 709, 330 P.3d 1067, 1073 (2014) [citing: Idaho Rule of Evidence 702].
[97] *Pocatello Hospital, LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho at ___, 330 P.3d at 1073 [citing: *City of McCall v. Seubert*, 142 Idaho 580, 585, 130 P.3d 1118, 1123 (2006); *State v. Konechny*, 134 Idaho 410, 417, 3 P.3d 535, 542 (Ct. App. 2000)].
[98] *Ada County Highway District v. Total Success Investments, LLC,* 145 Idaho 360, 370, 179 P.3d 323, 333 2008) [citing: *Gilbert v. Nampa School District No. 131,* 104 Idaho 137, 145, 657 P.2d 1, 9 (1983)].
[99] *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004) [citing: *Gilbert v. Nampa School District No. 131,* 104 Idaho at 145, 657 P.2d at 9].

4. The clean hands doctrine is not one of absolutes and should be applied in the court's discretion, so as to accomplish its purpose of promoting public policy and the integrity of the courts.[101] Equity will consider the conduct of the adversary, the requirements of public policy, and the relation of the misconduct to the subject matter of the suit and to the defendant.[102]

5. A proper exercise of discretion requires this Court to "(a) correctly perceived the issue as one of discretion; (b) act within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (c) reached its decision by an exercise of reason."[103]

G. Standard of Review - Failure to Mitigate Damages.

1. The doctrine of avoidable consequences, or the duty to mitigate, is an affirmative defense that provides for a reduction in damages where a defendant proves that it would have been reasonable for the plaintiff to take steps to avoid the full extent of the damages caused by the defendant's actionable conduct.[104]

2. Where an injured party takes steps to mitigate the damages caused by another, she is entitled to the costs she reasonably incurs in avoiding those damages.[105]

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[100] *Grazer v. Jones*, 154 Idaho 58, 68, 294 P.3d 184, 194 (2013).
[101] *Ada County Highway District v. Total Success Investments, LLC,* 145 Idaho at 370, 179 P.3d at 333 2008) [citing: *Gilbert v. Nampa School District No. 131,* 104 Idaho at 145-6, 657 P.2d at 9-10].
[102] Id.
[103] *Ada County Highway District v. Total Success Investments, LLC,* 145 Idaho at 370, 179 P.3d at 333 2008) [citing: *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004)].
[104] *McCormick International USA, Inc. v. Shore,* 152 Idaho 920, 924, 277 P.3d 367, 371 (2012) [citing: *Davis v. First Interstate Bank of Idaho, N.A.*, 115 Idaho 169, 170, 765 P.2d 680, 681 (1988)].
[105] *McCormick International USA, Inc. v. Shore,* 152 Idaho at 924, 277 P.3d at 371 [citing: *Casey v. Nampa & Meridian Irrigation District,* 85 Idaho 299, 305, 379 P.2d 409, 412 (1963)].

3. The doctrine of avoidable consequences seeks to "discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts...."[106]

4. Whether it is reasonable to expect a plaintiff to perform specific acts of mitigation is a question of fact.[107]

5. The defendant bears the burden of proving that the proposed means of mitigation were reasonable under the circumstances, could be accomplished at a reasonable cost, and were within the plaintiff's ability.[108] Proof of the latter of these three requires more than a mere suggestion that a means of mitigation exists.[109]

H. Temporary Restraining Order/Preliminary Injunction – Damages.

1. The plaintiff to an action upon a contract for the direct payment of money may, at the time of issuing the summons, or any time afterwards, make application to have the property of the defendant attached in accordance with Title 8, Chapter 5 of the Idaho Code.[110]

2. In lieu of an immediate issuance of a writ of attachment, a court may issue such temporary restraining orders, directed to the defendant, prohibiting acts with respect to the property at issue, as may appear to be necessary for the preservation of the rights of the parties and the status of the property.[111]

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[106] *McCormick International USA, Inc. v. Shore,* 152 Idaho at 924, 277 P.3d at 371 [citing: *Industrial Leasing Corporation v. Thomason*, 96 Idaho 574, 577, 532 P.2d 916, 919 (1974)].
[107] *McCormick International USA, Inc. v. Shore,* 152 Idaho at 924, 277 P.3d at 371 [citing: *Casey v. Nampa & Meridian Irrigation District,* 85 Idaho at 307, 379 P.2d at 413].
[108] Id.
[109] *McCormick International USA, Inc. v. Shore,* 152 Idaho at 924, 277 P.3d at 371 [citing: *Clark v. International Harvester Company,* 99 Idaho 326, 347, 581 P.2d 784, 805 (1978)].
[110] Idaho Code § 8-501.
[111] Idaho Code § 8-502(d).

3. If the defendant recovers judgment, or if the attachment was wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the bond.[112] And if the attachment is discharged on the ground that the plaintiff was not entitled thereto under Idaho Code § 8-501, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking.[113]

I. Temporary Restraining Order

1. Idaho Rule of Civil Procedure 65(c) reads, in pertinent part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

2. Rule 65(c) allows the trial court to award costs and reasonable attorney fees to any party who is found to have been wrongfully enjoined or restrained.[114]

3. If a party requesting a temporary restraining order ultimately fails on the merits of the basis for the restraining order, then the "wrongfully enjoined or restrained party" may recover its damages.[115]

4. The recoverable attorney fees under Rule 65(c) are those incurred in a proceeding to dissolve a temporary restraining order or a preliminary injunction, rather than those earned through defending the merits of the action.[116]

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[112] Idaho Code § 8-503(a).
[113] Id.
[114] *Durrant v. Christensen*, 117 Idaho 70, 73785 P.2d 634, 637 (1990).
[115] See: *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 395-6, 744 P.2d 121, 123-4 (Ct. App. 1987).

5. Recovery of damages, costs and attorney fees occasioned by the temporary restraining order is limited to the amount of the bond.[117]

J. Standard of Review – Reasonableness of Attorney Fees and Costs.

1. The factors to be considered in determining an award of attorney fees, as set forth in Idaho Rule of Civil Procedure Rule 54(e)(3), include:

(a) the time and labor required;

(b) the novelty and difficulty of the questions;

(c) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(d) the prevailing charges for like work;

(e) whether the fee is fixed or contingent;

(f) the time limitations imposed by the client or the circumstances of the case;

(g) the amount involved and the results obtained;

(h) the undesirability of the case;

(i) the nature and length of the professional relationship with the client;

(j) awards in similar cases;

(k) the reasonable cost of automated legal research, if the court finds it was reasonably necessary in preparing a party's case; and

(l) any other factor which the court deems appropriate in the particular case.[118]

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[116] *Devine v. Cluff*, 110 Idaho 1, 3, 713 P.2d 437, 439 (Ct. App. 1985)

2. Although a court must consider the factors listed in Rule 54(e)(3) of the Idaho Rules of Civil Procedure when determining the amount to award in attorney fees, the court need not demonstrate how it employed any of the factors in reaching an award amount.[119] The court need not specifically address each of the factors, as long as the record indicates that it considered them all.[120]

V. ANALYSES

A. Leasehold Tenancy at Will.

Watkins continued to accept rental payments from Brownstone following Judge Tingey's April 2010 judicial termination of the Lease in the 2008 Lawsuit.[121] Dane Watkins affied that Storms paid rent of $4,000.00 per month for May, June, July, August, and September of 2010.[122] From Watkins' Affidavit, it can be inferred that Mr. Watkins accepted Storms' rent payments for May, June, July, August, and September of 2010.

However, the parties could not agree as to the terms of their relationship after April of 2010. They continued to do business with each other as "Lessor-Lessee," without formulating the precise terms of their agreement. Thus, despite termination of the Lease, the relationship between Watkins, as lessor, and Storms and Brownstone, as lessee, continued. This Court previously determined that Storms and Brownstone became tenants at will after April of 2010.[123]

At trial, both parties relied upon terms of the Lease in arguing their relative positions with regard to Watkins' claims and Storms and Brownstone's defenses and

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[117] *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho at 402, 744 P.2d at 130.
[118] I.R.C.P. 54(e)(3).
[119] *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 544, 199 P.3d 102, 119 (2008).
[120] Id.
[121] Watkins II Affidavit, at p. 3, ¶ 9.

counterclaims. The parties' conduct suggests that the terms of the Lease carried over to Storms and Brownstone's tenancy at will. Therefore, this Court shall apply the terms of the Lease to determine the merits of Watkins' claims and Storms and Brownstone's defenses.

B. Breach of the Covenant to Repair.

At trial, Dane Watkins presented evidence of specific areas within the Premises which he found dirty or in disrepair. In its written closing argument, Watkins clarified the specific repairs or cleaning it sought as damages for Storms' and Brownstone's alleged breach of the covenant to repair, found in paragraph 7 and Addendum B of the Lease.[124] Each of Watkins' claims for damages shall be analyzed seriatim.

1. Cracked Vestibule Glass.[125]

Upon surrender of the Premises, one of the arched glass windows in the vestibule of the Restaurant's main entrance was cracked.[126] Watkins seeks damages in the amount of $440.00 from Storms and Brownstone for the replacement of the cracked glass.[127]

Storms and Brownstone admitted that the window was cracked at some point during the defendants' occupancy of the Premises.[128] Storms and Brownstone did not deny that the covenant to repair under the Lease required the tenant to repair broken glass

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[122] Id.
[123] *Partial Preliminary Injunction*, at p. 12; *Second Partial Preliminary Injunction*, at p. 8.
[124] See: Plaintiff's Closing Argument, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 19, 2014) (hereinafter **"Watkins' Closing Argument"**).
[125] See: Trial Exhibits 3.23 and 3.25.
[126] See: Trial Exhibits 3.23, 3.25, and 38.10.
[127] Watkins' Closing Argument, at p. 11; Trial Exhibit 21.
[128] Defendants Storms and Brownstone Companies, Inc., Proposed Findings of Fact, Conclusions of Law and Argument, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 19, 2014) (hereinafter **"Storms' and Brownstone's Argument"**), at p. 31, ¶ 134.

on the Premises. However, Storms and Brownstone argued they should not pay for tempered glass, when the broken glass was non-tempered.

Storms testified that Watkins or its hired contractor installed the window, depicted in Trial Exhibit 3.23, on the Premises. The window was in existence when Storms took possession of the Premises. Storms understood that, at the time the window was installed, tempered glass was required by the requisite building codes. Dane Watkins testified that the broken glass in Trial Exhibit 3.23 was not tempered glass. Mr. Watkins explained that he was required by the 2011 building code to replace the vestibule window with tempered glass. Whether or not tempered glass was ever required by the contemporaneous building codes was never proved at trial by either party. The evidence did show, however, that Watkins replaced untampered glass in the vestibule with more costly tempered glass.

The only proof of the cost of repair submitted by Watkins was Trial Exhibit 21, an invoice from Cherry Glass and Aluminum, Inc.[129] Trial Exhibit 21 shows a charge for the removal of two, arched vestibule windows, and the installation of new, tempered glass windows.[130] Nothing in the evidence shows the cost of replacing one tempered glass, arched window with non-tempered glass.

Thus, the evidence supports a finding that Storms and Brownstone breached their at-will relationship with Watkins, as exemplified by the former Lease, by failing to replace the cracked vestibule window. In the alternative, the record reflects that Storms and Brownstone committed waste on the Premises by failing to replace the broken window pane. The cost of repairing the broken window glass is not properly established

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[129] Trial Exhibit 21.

in the evidence, however. Therefore, Watkins shall take nothing by its claim for replacement of the cracked, vestibule window.

2. Broken Mezzanine Window.[131]

Watkins seeks damages in the amount of $1,100.00 for a broken window in the mezzanine.[132] Dane Watkins testified that the sign in the mezzanine window, which read: "Do NOT attempt to open this window. It is broken." existed when he retook possession of the Premises. Mr. Watkins did not know what was wrong with the window, only that it would not close. Storms testified that after Briggs Roofing finished replacing the roof shingles, and during periods of rain or snow melt, leaks occurred at or around the outside wall and windows of the mezzanine.

The evidence infers that the window depicted in Trial Exhibit 3.47 was exposed to water. The mezzanine was mentioned as one of the areas requiring paint and drywall repair in the Small Claims lawsuit between Waters Construction and Watkins/Storms.[133] The wood frame around the window in Trial Exhibit 3.47 became swollen from the water leaking into the Premises from the faulty 2006 roof repair.

For these reasons, Watkins' mezzanine window repair claim shall be denied. The dysfunctional frame around the window resulted from water leaking from the roof. Watkins hired Briggs Roofing, without input or agreement by Storms. Watkins did not address the roof leak issues after Briggs Roofing finished the roof, despite notice and complaints by Storms. Therefore, Watkins shall recover nothing for the broken window depicted in Trial Exhibit 3.47.

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[130] Trial Exhibit 21.
[131] See: Trial Exhibits 3.45, 3.46, and 3.47.
[132] Watkins' Closing Argument, at p. 12; Trial Exhibits 3.47 and 23.

In addition, the invoice for the repair of the window, shown in Trial Exhibit 3.47, states:

> Brownstone: Repair drywall, fix nail holes, water damage to drywall, install drywall up stairs and tape. Repair broken windows. Framed wall in back hallway for door, installed door and drywall. Replace door knob on back door, installed new emergency exit latch on garage door, installed new door closure and tumbler for lock on front door. Replace panic bar on side door.
>
> Labor only $1100.00[134]

The labor cost for the repair of the broken windows is not separated from the labor costs of the other repair work described in Exhibit 23. Mr. Watkins did not know the amounts charged for each of the repair items. Even if the broken window, illustrated by Trial Exhibit 3.47, was the responsibility of Storms and Brownstone, Watkins' claim for repair damages fails for lack of specificity.

3. Drywall Damage.[135]

Watkins complains that Storms and Brownstone left significant drywall damage to the Premises.[136] Watkins complains of holes filled in the drywall without repainting, and unfilled holes in the unpainted drywall.[137] Watkins argues that "[u]sual deterioration from use and lapse of time would not cause the damage illustrated in the photographs or require repainting the walls."[138]

Under the former Lease, Storms agreed to "at his own expense and at all times, maintain the premises in good and safe condition … and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted.

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[133] Trial Exhibit N, at p. 00008.
[134] Trial Exhibit 23.
[135] See: Trial Exhibits 3.11 through 3.17, 3.57 through 3.62, 3.67 through 3.72, 3.94, 3.107, and 3.132.
[136] Watkins' Closing Argument, at p. 13.
[137] Id.

Lessee shall be responsible for all repairs required [which included Storms' responsibility for interior walls] which shall be maintained by Lessor."[139] Ordinary wear and tear includes any usual deterioration from the use of the premises and by lapse of time.

The question raised by the parties became whether the drywall highlighted by Watkins resulted from normal wear and tear or from damage by Storms and Brownstone, which should have been repaired. Unfortunately, Watkins offered no expert testimony as to what kind of normal wear and tear can be expected from a commercial tenant who has used a building for thirteen (13) years as a restaurant. Although specialized knowledge might not be necessary in determining normal wear and tear in a residential lease, commercial leases and particularly the wear and tear expected in a building used as a restaurant over a thirteen year period, are not within a factfinder's common knowledge.

Watkins points to Trial Exhibits 3.11 through 3.17, and 3.57 through 3.64 as examples of holes in the drywall which Storms and Brownstone filled without repainting the wall. All of these exhibits show what appear to be nail or hanger holes in the drywall which have been filled. The holes do not appear to be anything other than use of the walls to hang pictures or other decorations. The former Lease did not require Storms to return the Premises in like-new condition. Herbert Rockhold testified that the paint on the walls was old and could not be easily matched.

Requiring Storms and Brownstone to repaint walls subjected to ordinary use does not comport with the terms of the former Lease. Neither do nail holes in a wall, without evidence that such holes are not normal wear and tear in a commercial leasehold, support

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[138] Id.
[139] Trial Exhibit 1, at pp. 1, 4.

a finding of a breach of Storms' and Brownstone's at-will tenancy with Watkins or committed waste upon the Premises.

In the alternative, if expert testimony is not necessary to establish abuse versus normal wear and tear to the walls, or if Mr. Watkins' testimony equates to expertise given his experience as a commercial lessor, the holes in the walls exhibited in Trial Exhibits 3.11 through 3.17, and 3.57 through 3.64 show normal wear and tear rather than abuse.

Watkins also underscores Trial Exhibits 3.68, 3.92, 3.94, 3.107, 3.111, and 3.132 as examples of walls with unfilled holes. Trial Exhibit 3.68 depicts round holes that apparently anchored a towel dispenser. The new lessee, Gerald Mitchell, testified that Trial Exhibit 3.68 depicted the men's bathroom. Witness Herbert Rockhold, who assisted Storms' move from the Premises, observed a towel dispenser sitting on the floor of the men's bathroom, and a working towel dispenser, seen on the right-hand side of Exhibit 3.68, on the wall. Rockhold testified that the holes in the wall shown in Exhibit 3.68 resulted from the removal of the towel dispenser found on the floor. If expert testimony is not required to establish abuse versus normal wear and tear to the walls, or if Mr. Watkins' testimony satisfies the expert witness requirement, the holes in the wall shown in Trial Exhibits 3.68 are the product of show normal wear and tear rather than abuse.

Trial Exhibit 3.92 reveals a nail head surrounded by the torn surface of drywall. No testimony was offered identifying Trial Exhibit 3.92. Trial Exhibit 3.92 fails to support Watkins' allegations of breach of the covenant to repair or waste for lack of identification.

Trial Exhibit 3.94 shows a round hole in drywall. Dane Watkins could not identify the location of the wall in the picture. Trial Exhibit 3.94 also fails to support Watkins' allegations of breach of the covenant to repair under the former Lease or waste for lack of identification.

Trial Exhibit 3.107 appears to be gashes in the surface of drywall. Dane Watkins identified the wall depicted in Trial Exhibit 3.107 as an upstairs storage area (referred to by Jared Hatfield, who painted the wall, as an upstairs office).[140] Other than Jared Hatfield's invoice for painting the walls (Trial Exhibit 25), no other evidence of the cost of repair to the storage area wall was admitted.

As noted above, the former Lease did not require Storms to leave the Premises like new. Instead, Storms and Brownstone were required to make repairs necessary to keep the Premises in a good and safe condition. Furthermore, Storms agreed under the former Lease to leave the Premises in as good condition as received, normal wear and tear excepted. All of the trial exhibits underscored by Watkins as evidence of damage, save for Trial Exhibit 3.107, do not prove that the condition of the walls went beyond what might be expected from the use of the Premises over a thirteen-year period. Without expert testimony to suggest that old paint is not normal wear and tear to a commercial building, Watkins has not shown that repainting old walls amounts to repair work. In the alternative, this Court finds that old paint in a commercial building typifies normal wear and tear.

Although the gashes shown in Trial Exhibit 3.107 are not normal wear and tear, nothing in the record identifies the cost to repair the drywall shown in the picture, other

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[140] See: Trial Exhibit 25.

than Jared Hatfield's fee to paint the drywall. Repainting walls does not hint of repair work, but of aesthetic appeal. Without a specific showing of the costs incurred to repair the drywall in Trial Exhibit 3.107, Watkins claim for damages to that wall fail for lack of specificity.

Trial Exhibit 3.111 illustrates a light fixture hanging from, rather than attached to, a ceiling. Electrical contractor Blaise Kauer could not identify the location of the light fixture seen in Trial Exhibit 3.111. He testified, however that for a light fixture in the condition seen in Trial Exhibit 3.111, he would have simply reattached the light fixture to the ceiling. Herbert Rockhold testified he did not see or observe a light fixture hanging in the condition depicted in Trial Exhibit 3.111. Storms did not recognize the light fixture and testified it did not exist on the Premises when he and Brownstone vacated the building. The foundation of the evidence being too vague, Watkins has not shown a breach of the covenant to repair, exemplified by the former Lease, in its Trial Exhibit 3.111. Neither has Watkins shown waste to the Premises.

Trial Exhibit 3.132 shows two holes in brown drywall. Dane Watkins thought the photograph was taken in the upstairs area of the Premises. Without a solid identification of the location of the wall in Trial Exhibit 3.132, a finding of a breach of the covenant to repair, carried over from the former Lease, cannot be made. Neither can a finding of waste be supported. Furthermore, nothing in the evidence suggests whether or not such holes, if they existed on the Premises when Storms and Brownstone vacated the building, were normal wear and tear. In the alternative, this Court finds such holes are normal wear and tear to commercial walls over the period of thirteen years. For these reasons, Watkins has not shown a breach of the covenant to repair or waste by Trial Exhibit 3.132.

In his closing argument, Watkins identified Trial Exhibit 17 as evidence of costs for damage repair to the drywall on the Premises. Trial Exhibit 17 consists of two receipts from The Home Depot, dated January 12 and 13 of 2011, for tape, ready mix, knives, a sander head, and drywall. Other items on the receipts are unidentifiable. Dane Watkins testified that he bought the items listed on the receipts, and gave them to his handyman Jared Hatfield. Mr. Watkins further testified that he could see that Jared Hatfield was using the tape, the texture, and all of the items Mr. Watkins purchased.

Jared Hatfield did not testify at trial. Nothing in the evidence shows that Hatfield or anybody else actually repaired the damage shown in Trial Exhibit 3.107, the only photograph showing recognizable damage (as opposed to normal wear and tear) to drywall. Even if an inference could be made that the wall in Trial Exhibit 3.07 was repaired, no evidence was presented to indicate the cost of repair to the wall shown in Trial Exhibit 3.07. The purchase of supplies which were apparently used throughout the Premises cannot be charged to Storms and Brownstone, since the specific uses of the supplies were never identified.

Dane Watkins also identified Trial Exhibit 34 as what he believed to be painting supplies provided to Jared Hatfield. Watkins has not shown that painting old walls is a necessary repair or that walls in need of painting after thirteen years of business are not expected normal wear and tear to a building. Indeed, this Court finds that repainting interior walls in a commercial structure used as a restaurant for thirteen years is expected wear and tear. Furthermore, Gerald Mitchell testified that he did not like the wall colors used by Burggraf and Storms and painted the walls with colors to suit his tastes. For these reasons, Watkins shall not recover the expenses charged in Trial Exhibit 34.

Watkins argues that "some of Jared Hatfield's labor charges are on Ex. 23 mentioned above, plus additional charges for $350.00. *See* Ex. 25."[141] Trial Exhibit 23, cited above, consists of the $1,100.00 "labor only" invoice from Hatfield Construction for numerous tasks. The invoice does not break down the charges or time spent on the various efforts undertaken by Hatfield. Without more detail as to the amounts charged for Hatfield's labors, Trial Exhibit 23 cannot be attributed to repairs necessitated by failures of Storms and Brownstone. Trial Exhibit 25 applies to paint work, which Watkins has not shown to be a recoverable repair item.

Watkins then adds Trial Exhibit 3.8 as evidence of alleged damage to drywall caused by Storms and Brownstone. Trial Exhibit 3.8 reveals what appear to be filled nail holes in a wall. Dane Watkins testified that Jared Hatfield did not paint the wall shown in Trial Exhibit 3.8. Mr. Watkins later testified that repairs to the wall in Trial Exhibit 3.8 would have been part of Simon Gisin's invoice, Trial Exhibits 12 and 13. Once again, however, nothing in the evidence showed what part of Trial Exhibits 12 or 13 contributed to repair work, if any, to the wall depicted in Trial Exhibit 3.8. Watkins' claim for damages to the wall in Trial Exhibit 3.8 fails for lack of specificity.

4. Broken Doors

Watkins alleges that Storms and Brownstone left a broken door in the northeast corner of the Premises because the door was missing the crash bar and closer.[142] Watkins submitted evidence that Dan Carter, the owner of Bennetts Eastside Paint, sold a crash

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[141] Watkins' Closing Argument, at p. 13.
[142] Watkins' Closing Argument, at p. 14. See also: Trial Exhibits 3.1, 3.2, 3.3, and 38.12.

bar and closer to Snake River Equipment Company.[143] Carter testified that the crash bar and closer were used to repair the doors located on the Premises.

a. Crash Bar on the North Public Entrance[144]

Restaurant employee Katie Williams testified that the crash bar (alternately referred to as a panic bar) on the northeast door was in operation when she became employed at the Restaurant in 2006. Williams did not know when the crash bar went missing. Restaurant employee Ryan Getsinger recalled that some screws on one side of the crasg bar had come loose, causing the bar to sag. In order to keep the crash bar from breaking or pinching patrons, employees removed the sagging bar. This occurred approximately one month prior to closing of the Restaurant. Getsinger recalled that the screws had probably been stripped and required repair.

Storms acknowledged that on the date he and Brownstone vacated the Premises, the crash bar had come off the northeast door. Storms testified that he found a replacement part on the internet which was less expensive than replacement of the entire system, but he provided no proof of his findings, no evidence that the crash bar he discovered was the same make or model as the device on the northeast door, and no testimony that the crash bar system on the northeast door was capable of repair rather than replacement.

Dan Carter testified that replacement of the crash bar alone (as opposed to the entire system), might cost $35.00 to $40.00. However, nothing in the evidence suggested that the existing crash bar system could be repaired with a replacement crash bar alone.

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[143] See: Trial Exhibit 33.
[144] See: Trial Exhibits 3.1 and 3.2.

Thus, Storms failed to prove his claim that Watkins did not mitigate its damages with a cheaper crash bar replacement.

Since the former Lease provided that the tenant was responsible for maintenance of doors on the Premises,[145] and since the evidence suggests the crash bar on the northeast door was missing at the time Storms and Brownstone vacated the Premises, Watkins has shown that Storms breached his at-will tenancy, exemplified in the terms of the former Lease, by failing to maintain the crash bar system on the northeast door. In the alternative, Watkins has shown that Storms and Brownstone committed waste by failing to leave the crash bar in working condition. Watkins shall recover the cost to replace the crash bar system, $259.09, plus six percent (6%) interest of $15.55, for a total recovery of $274.64.

b. Closer on the Inside Doors to the Main Entrance[146]

The closer at issue was identified by Dan Carter as attached to one of the main entrance doors to the Premises, not the northeast door (where Dane Watkins placed it). Although Carter testified that the closer was not functioning, he did not personally inspect the door or the mechanism. Employee Tamara Metcalf clarified that the closer existed on the inside main entrance door. She testified that the closer was functional throughout the time she worked at the Restaurant, from 2002 until April of 2010. Storms recalled that the closer was fully functional when he and Brownstone vacated the Premises.

Given the lack of foundation for Dan Carter's observation about the inside main entrance door, Watkins has not shown that Storms and Brownstone breached its at-will

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[145] Trial Exhibit 1, at p. 4.

tenancy, premised upon the former Lease, by failing to maintain the door closer on the inside main entrance door. Neither has Watkins shown waste to the Premises by its evidence regarding the door closer on the main entrance door.

c. Lock Rods on the Outside Main Entrance Doors[147]

Watkins further alleges that Storms and Brownstone surrendered the Premises without a functional locking front door.[148] Instead, Storms and Brownstone used a chain and padlock to secure the front entrance doors.[149]

Dane Watkins testified that the front entrance doors would not work properly and needed repairs. Dan Carter testified that the lock rods were worn out. He stated that the area where the lock rods entered the threshold and the header was full of dirt and debris.

Restaurant employee Katie Williams recalled that the front entrance doors were chained and padlocked every night for security during her entire tenure as an employee for Storms and Brownstone, from January to May, 2006 and again from May 2007 until the Restaurant closed in September of 2010. Storms testified that there were no issues with the lock rods when he and Brownstone vacated the Premises. He recalled that the lock rod secured into the top of the door jamb (referred to by Carter as the "header"), but not into the bottom threshold. He explained that from the outset of his occupancy of the Premises, the door had "play" in it of two to three inches, even after the lock rod had been secured into the door jamb (or header). Although Storms saw no issue with the lock rod other than instability, Storms secured the front doors with chain and lock each night for added safety. He further testified that he received no photographs depicting problems

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[146] See: Trial Exhibit 3.19.
[147] See: Trial Exhibit 3.20.
[148] Watkins' Closing Argument, at p. 15.

with the lock rods from Watkins. Storms added that he has returned to the Premises since Gerald Mitchell opened the Snow Eagle Brewery and Grill, and the front entrance doors still sway if pulled upon, even with the new lock rods engaged in the door jamb.

The evidence does not infer that the lock rods were broken or non-functioning merely because Storms added a chain and lock to secure the front doors at night. Assuming that Carter's testimony regarding dirt and debris in the threshold and door jamb or header holes is true, nothing in the record aids the determination of whether or not such dirt and debris is normal wear and tear versus abuse. In the alternative, this Court finds that dirt and debris in the threshold and door jamb constitute normal wear and tear to a commercial leasehold over a thirteen year period. Therefore, Watkins has not shown that Storms and Brownstone breached their at-will tenancy or committed waste by failing to maintain or repair the lock rods.

In the alternative, Watkins seeks $151.46 for repairing the front entrance door lock by replacing the lock rods.[150] Trial Exhibit 4 is an invoice from Bennetts Paint & Glass dated June 29, 2011 which details "new lock rods" at a cost of $48.55 and "on site labor check panic hardware and install new lock rods on front door" at a cost of $100.00.[151] The panic hardware had been installed by Bennetts Paint and Glass on or about January 31, 2011.[152] The labor costs for checking the panic hardware and installing the new lock rods are not separated. Storms and Brownstone were not in possession of the Premises during any of the intervening days between January 31, 2011 and June 29, 2011. Mr. Mitchell took possession of the Premises in April of 2011. Storms and

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[149] Id. See also: Trial Exhibits 3.19, 3.20, and 3.22.
[150] See: Trial Exhibit 4.
[151] Id., at p. 1.

Brownstone are not responsible for labor to recheck a panic system installed one month after they vacated the Premises.

In addition, since Mr. Mitchell had been in possession of the Premises for three months before Carter replaced the lock rods, and since Watkins did not identify the alleged non-functioning of the lock rods within a reasonable time after Storms and Brownstone vacated the Premises, any damages for an alleged breach of Storms' and Brownstone's at-will tenancy or alleged waste based upon the lock rods fails for lack of a causal connection between the alleged damage and Storms/Brownstone.

5. Cleaning Expenses

Next, Watkins alleges that Storms and Brownstone left a majority of the Premises "very dirty" after they vacated the Restaurant.[153] Watkins requests $9,065.00 for fees incurred to clean the Premises.[154]

Restaurant employee Katie Williams, who worked at the Brownstone for five months in 2006 and then from May 2007 until September of 2010 when the Restaurant closed, testified about routine cleaning during the Restaurant's operation. She explained that day-hostesses at the Restaurant were expected to dust the tops of the wood on the walls and windows depicted in Trial Exhibit 3.10. Servers and managers dusted the grey beams shown in Trial Exhibit 3.10 on a daily basis, or as necessary when they were dusty, including in-between each of the lines within the grid on the ceiling. Day-servers and bar-servers scrubbed the floors daily with bleach water. Night-hostesses would clean

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[152] Trial Exhibit 33.
[153] Watkins' Closing Argument, at pp. 15-18.
[154] Id.

the doors with Windex. Night-servers, at the end of their shifts, were expected to wipe down the window sills.

Employee Ryan Getsinger testified that he boiled a three to four gallon pot of water every night, to which was added bleach and degreaser, to clean the floors. The hot water was poured on the floor and then the floor was scrubbed with a stiff-bristled deck brush. The water was then "squeegeed" into the floor drain. The damp floor was then dry-mopped.

Tamara Metcalf created a list of what employees were supposed to do at each of the various stations in the Restaurant. Williams helped prepare punch lists for the daily chores required of hostesses and servers. Williams testified that the Brownstone was a very busy restaurant.

According Metcalf, the kitchen hood system was maintained by a company hired by Storms. Getsinger testified that kitchen staff cleaned the exhaust filters approximately every two weeks by running them through the dishwasher.

Storms and the beer-brewer were responsible for cleaning the brewery area because a certain kind of cleaning chemical was required and because the brewing equipment was expensive. With regard to the brewery area, Metcalf testified: "we don't want very many people back there responsible for that."

Every year, Storms conducted an "annual cleaning day" at which time he closed the Restaurant. It was a mandatory day for all employees. Approximately forty (40) employees came to work early in the morning and conducted extensive cleaning throughout the day, until late in the afternoon. The General Manager was responsible for the supervision of the annual cleaning.

Kitchen equipment was taken outside and scrubbed, pressure-washed and hosed down. Tamara Metcalf testified that the kitchen equipment would sparkle "like brand new" following these annual cleanings. The kitchen area where equipment had been removed was cleaned, and then the kitchen equipment was re-installed. Chairs and tables were removed and the floor was cleaned with bleach water, a hard scrub-brush, and sometimes with a butter knife.[155] The grease, dust, and black grime on the brick walls were scrubbed down. The walls and windowsill of the bathrooms were scrubbed. The large window in the ladies' bathroom was scrubbed. Sinks were cleaned with Lysol or Clorox. Employees got down on the bathroom floors and cleaned around the toilets and scrubbed the floors. Tiles on the walls in each stall were cleaned and washed down, the doors and doorknobs were cleaned, and the pictures were dusted. The large rafters in the open ceiling were dusted using hydraulic lifts or ladders and large fluffy dusters.[156] Beams and ceiling fans were cleaned. The brewery area was cleaned. The exterior brick was cleaned.[157] The final annual cleaning took place in September of 2009.

Storms hired Alan Flores to deep clean the Premises after the Brownstone ceased operation in September of 2010. Flores began his work in October of 2010, but ceased for a number of weeks. He then removed the contents and fixtures within the Premises and cleaned the entire Premises save for the ceiling area, ceiling fans, and upstairs storage rooms. Flores described his method of deep cleaning by using degreaser and hot water so as not to damage the drains. Flores finished his work after Christmas of 2010.

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[155] See: Defendants' Trial Exhibits T.27 and T.28.
[156] See: Defendants' Trial Exhibit T.30.
[157] See: Defendants' Trial Exhibit T.29.

New tenant Gerald Mitchell, who testified that he became serious about renting the Premises "in the first part of 2011," was asked about the condition of the Premises when he first inspected it. Although Mitchell did not specify whether his testimony related to his inspection in August of 2010 (at which time the Restaurant was still in operation) or after Storms and Brownstone moved out, the evidence infers that Mitchell looked at the Premises some time after the building became vacant because Mitchell described the kitchen as "stripped out."

At his inspection, Gerald Mitchell commented to Dane Watkins that the Restaurant "wasn't usable." Mitchell specified leaks in the roof, the stripped kitchen, and all of the plumbing, which Mitchell described as "in pretty bad shape." He noticed grease build-up that required cleaning before he could do basic things like choosing a paint color. Mitchell contracted with S & R Carpet Upholstery Cleaning to clean the ceilings in the kitchen, the walls, and the bathrooms.[158]

Mitchell testified that the Premises were "pretty dirty" with a lot of grease buildup and dirt, requiring a lot of clean up before he could prepare to reopen the Premises as the Snow Eagle Brewery and Grill. In Addendum A to the April 4, 2011 Commercial Lease and Deposit Receipt between Snow Eagle Brewery and Watkins, Mitchell received a $6,000.00 "cleaning credit" in acknowledgement of the fact that "the Premises are not in a clean condition."[159]

Mitchell hired Simon Gisin to conduct a thorough cleaning because the build-up of dirt prevented any painting. Mitchell testified that Gisin was to clean walls, beams, exterior ductwork, the mezzanine floor and trim board, and brick and to paint the

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[158] See: Trial Exhibit 16.

Premises in the color(s) Mitchell wanted.[160] Watkins argued that he paid for the cleaning with the $6,000.00 cleaning credit to Snow Eagle Brewery and Grill.[161] Gisin's invoices (Trial Exhibits 12 and 13) were charges in addition to his $6,000.00 cleaning, painting, and texturing contract with Mitchell.

Gisin testified that Mitchell hired him to clean and paint the ceilings and "pretty much everything in there." He stated that the general condition of the Premises was "pretty dirty, pretty bad." Gisin explained that he "pretty much wiped everything down and vacuumed everything pretty good." Gisin cleaned the bathrooms and the mezzanine, painted the ceilings and the walls, including texturing, at a contracted rate of $6,000.00.

Gisin acknowledged that restaurant grime can be difficult to clean. He stated, "when you've got a restaurant, that kind of like a grease-dust stuff just is murder." Gisin recommended that the ceiling and walls should be repainted, rather than scrubbed down, because "No one is going to come in here and scrub them down. It would be just a little bit faster to dust them off and repaint them." Gisin charged an amount for painting the ceilings and walls in addition to the $6,000.00 contract already in place.

Prior to opening the Snow Eagle Brewery and Grill, Gerald Mitchell hired Rusty Kappel, a professional carpet cleaner, to clean the Premises to allow Mitchell to finish renovating the Restaurant. Kappel was hired to clean the floors throughout the Premises. Kappel testified that when he entered, the Premises appeared to have been vacant for a while.

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[159] Trial Exhibit 2, at p. 5.
[160] See: Trial Exhibits 12 and 13.
[161] Watkins' Closing Argument, at p. 16.

a. Exposed Beams, Vaulted Ceiling and High Ceiling Fans[162]

Initially, Watkins points to the exposed beams, vaulted ceiling, and high ceiling fans which were "covered with grease and dust" as objects requiring cleaning.[163] Watkins identifies Trial Exhibits 3.40, 3.41, 3.42, 3.43, 3.48, 3.132, 3.133, 3.134, 3.135, 3.136, 3.137, and 3.138 as examples of dirty beams, ceilings, and ceiling fans.[164]

Storms identified Trial Exhibits 3.40 and 3.41 as depicting rafters in the Restaurant directly above the brewery. Trial Exhibit 3.40 shows a slanting beam with a fair amount of dust covering the surface. Trial Exhibit 3.41 also displays a beam with a lighter coating of dust on the surface. Mr. Watkins testified that the beams had not, to his knowledge, been cleaned in the thirteen (13) years that Storms and Brownstone occupied the Premises. Alan Flores did not clean the large, wooden beams. Simon Gisin testified that he vacuumed off the beam shown in Trial Exhibit 3.40.

Dane Watkins identified Trial Exhibit 3.42 as the ceiling fan above the dining area. Trial Exhibit 3.42 shows a ceiling fan with dust on the upper sides of the blades and the motor housing. Storms conceded that Trial Exhibit 3.42 displays the condition of the fan when he and Brownstone vacated the Premises. Simon Gisin cleaned the ceiling fan depicted in Trial Exhibit 3.42.

Trial Exhibit 3.43 was identified by Mr. Watkins as "what could have been a swamp cooler" with dust and dirt on top of it. Gisin testified that the duct work shown in Trial Exhibit 3.43 was removed when the Restaurant was remodeled for Gerald Mitchell and the ceiling was patched. Gisin did not clean the ducts shown in Trial Exhibit 3.43.

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[162] See: Trial Exhibits 3.42, 3.136, 3.137, and 38.16.
[163] Watkins' Closing Argument, at p. 15.
[164] Watkins' Closing Argument, at pp. 15-16.

Alan Flores identified Trial Exhibit 3.48 as the second floor area (or mezzanine). Flores testified that he only cleaned the floor area shown in Trial Exhibit 3.48.

Dane Watkins recognized Trial Exhibit 3.132 as an area of drywall damage in need of repair. He did not testify about Trial Exhibit 3.132 in terms of cleaning expectations.

Trial Exhibit 3.133 showed what Mr. Watkins described as dust and grime on the trim board. Flores identified the area depicted in Trial Exhibit 3.133 as the second floor (the mezzanine). Flores cleaned the walls and the floor in that area, including the use of hot water on the floor. Simon Gisin identified the area depicted in Trial Exhibit 3.133 as "in the back up above where the tanks were." Gisin vacuumed, and mopped the floor and wiped down the trim board. He testified that the "light colored stuff" on the trim board in Trial Exhibit 3.133 was "a dust-greasy thing that was hard to get off."

Trial Exhibit 3.134 was identified by Storms as the second ceiling directly above the kitchen. Storms identified areas of leakage in the photograph. Otherwise, dust can be seen on the top of the ductwork in Trial Exhibit 3.134. Alan Flores testified that he did not clean the "vents or where the AC goes."

Trial Exhibit 3.135 was identified by Storms as a photograph taken when Storms and Brownstone vacated the Premises. Trial Exhibit 3.135 reveals a pinkish-red colored wall with pipes extruding above the trim board and with two, round holes in the wall. None of the witnesses testified about the cleanliness of the area depicted in Trial Exhibit 3.135, although some dust is visible on the trim board.

Mr. Watkins identified Trial Exhibits 3.136 and 3.137 as dirty ceiling fans, which he observed when he re-entered the Premises after Storms' and Brownstone's departure.

Storms likewise identified Trial Exhibits 3.136 and 3.137 as ceiling fans in the Restaurant directly over the brewery. He admitted they were not cleaned because the brewing equipment was the last thing moved off the Premises and the ceiling above the brewing area was not cleaned.

Storms identified Trial Exhibit 3.138 as an auger-hole directly above the brewery in the Restaurant. He conceded that the part of the wall depicted in Trial Exhibit 3.138 was not cleaned before he and Brownstone vacated the Premises.

Nothing in the record informs the Court whether or not some dust and dirt are to be expected on the ceilings and upper beams of vacated commercial premises. Simon Gisin's testimony seemed to infer that greasy dust is not uncommon in restaurants and is very difficult to remove. Without expert guidance regarding normal wear and tear in circumstances such as the Restaurant, the record does not support a finding that the dusty beams, vaulted ceiling, and high ceiling fans breached Storm's and Brownstone's at-will tenancy with Watkins or amounted to waste upon the Premises.

In the alternative, this Court finds that the dust on the beams, vaulted ceiling, and high ceiling fans, as seen in Trial Exhibits 3.42, 3.136, and 3.137, is excessive and represents a breach of the expectations of Storms' and Brownstone's tenancy at will with Watkins. But Watkins' evidence does not specify the costs incurred to clean the beams, high ceiling fans, and vaulted ceiling. Instead, Watkins offers the fact that he gave Gerald Mitchell a $6,000.00 cleaning credit on Mitchell's lease as evidence of such costs.[165] Such evidence offers no information from which an award for cleaning the

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[165] Watkins' Closing Argument, at p. 16. See also: Trial Exhibit 2, at Addendum A.

ceiling, beams, and fans can be fashioned. Therefore, Watkins' claim for damages to clean these high areas of the Premises fails for lack of specificity.

b. Stained Brickwork[166]

The next area identified by Watkins as problematic was the stained brickwork, which Watkins identified as Trial Exhibits 3.52, 38.6, 38.10, 38.12, 38.17, 38.18, 38.20, and 38.24.[167]

Dane Watkins identified Trial Exhibit 3.52 as the floor and brick wall in the brewery area that needed heavy cleaning. He identified the dark material on the brick as mold. Alan Flores testified that Trial Exhibit 3.52 did not depict mold, but dirty brick and grout, which he cleaned in December of 2010. In fact, Flores testified that Trial Exhibit 3.52 was taken after he cleaned the wall and floor. Simon Gisin testified that the bottom two bricks shown in Trial Exhibit 3.52 were "pretty dirty." He explained that the dark coloration was hard to remove. In fact, he testified that he did not remove all of the dark coloration, but that he brightened the brick up. Gisin's work was done in May and June of 2011, some five to six months after Flores' work.[168]

Burggaf testified that when the cement floors were completed in the course of the Brownstone Restaurant remodel, she and Storms had a concrete stain applied to the floors. Burggraf was very unhappy with the end result of the concrete stain because, among other things, the bricks at the base of the walls were oversprayed with the stain. Burggraf testified that Trial Exhibit 38.6 illustrated the overspray problem. Alan Flores cleaned the brick shown in Trial Exhibit 38.6 in December of 2010. He testified that the

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[166] See: Trial Exhibits 3.52, 38.6, 38.10, 38.12, 38.17, 38.20, and 38.24.
[167] Watkins' Closing Argument, at pp. 16, 17
[168] See: Trial Exhibits 12 and 13.

photograph was taken after he cleaned. Rusty Kappel testified that he also cleaned the brick shown in Trial Exhibit 38.6. Kappel's work was done in June of 2011.[169]

Burggraf also identified the brick in Trial Exhibit 38.10 as an example of the overspray issue. Alan Flores testified that he cleaned the brick shown in Trial Exhibit 38.10 in December of 2010. Flores stated that the photograph was taken after he had cleaned. He explained that he could not restore the brick to its natural color.

Burggraf was the only witness to address Trial Exhibit 38.12. She could not positively identify whether overspray was depicted in Trial Exhibit 38.12.

Trial Exhibit 38.17 was never identified at trial.

The only testimony related to Trial Exhibit 38.18 came from Alan Flores, who observed that the floor shown in Trial Exhibit 38.18 was clean.

Alan Flores identified Trial Exhibit 38.20 as the area in which the walk-in cooler had been located during Storms' and Brownstone's tenancy of the Premises. Flores cleaned the walls, degreased the floor, and cleaned the posts in December of 2010. He stated that the Premises, as shown in Exhibit 38.20, were clean.

Storms identified Trial Exhibit 38.24 as the food preparation area in the restaurant. No testimony was given as to the condition of the bricks shown in Trial Exhibit 38.24.

The reason for the black staining on the bottom bricks was not proved, by a preponderance of the evidence, as mold. Only Dane Watkins identified the black discoloration on the bottom rows of bricks as mold.[170] Watkins did not lay any foundation as to Dane Watkins' ability to distinguish mold from cement overspray. Trial

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[169] See: Trial Exhibit 16.

Exhibit 3.52, which shows a close-up view of the bricks on the bottom of the wall, reveals signs of scrubbing.

Instead, the evidence supports a finding that the black staining on the lower bricks of the walls was caused by concrete overspray, which was part of the renovation of the Premises by Burggraf and Storms. Assuming the black staining was overspray, such condition did not result from lack of maintenance or abuse by Storms and Brownstone. Burggraf and Storms began operation of the Restaurant with the overspray in place.

Other staining visible on the higher levels of brick, as particularly seen in Trial Exhibits 38.6 and 38.20, were not specifically identified as to the cause of the discoloration. Alan Flores cleaned the brick walls as Storms and Brownstone vacated the Premises in December of 2010. Simon Gisin cleaned the walls of the Premises in May and June of 2011. Rusty Kappel apparently cleaned the same surfaces again, in June of 2011.

Watkins offered no expert testimony as to normal wear and tear to the walls of a rental building which was used to operate a restaurant for some thirteen (13) years. Neither was expert testimony offered as to the level of cleaning required when a tenant moves out of a leasehold building. The evidence inferred that Storms and Brownstone hired Alan Flores, who had experience deep cleaning restaurants in the Yellowstone Park area, to deep clean the Premises prior to completely vacating the building. That additional cleaning was necessary after the building sat vacant for some five months is to be expected, and should not be charged to Storms and Brownstone.

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[170] See: Trial Exhibit 3.52.

In the alternative, this Court finds no evidence, other than concrete overspray and normal wear and tear, of abuse to the interior brick walls of the Premises.

For these reasons, Watkins has not shown that Storms and Brownstone breached their at-will tenancy with Watkins or committed waste by failing to maintain the brickwork.

c. Walls and Floors.[171]

Next, Watkins points to Trial Exhibits 3.101, 3.102, 3.103, 3.117, 3.118, 3.119, 3.120, 3.121, 3.122, 3.123, 38.1, and 38.2 as evidence of the lack of cleaning to the kitchen walls, floors, ceiling and concrete back room.[172] Watkins argued that Rusty Kappel of S & R Carpet Upholstery Cleaning charged $1,470.00 to clean the "problem areas."[173]

Trial Exhibits 3.101, 3.102, and 3.103 depict a concrete floor (with evidence of scrubbing), and green, tan, and white drywall. Dane Watkins placed the area shown in Trial Exhibits 3.101, 3.102, and 3.103 as the outside walls of the kitchen. He complained that damage was done to the sheetrock. Mr. Watkins testified, with regard to Trial Exhibit 3.102, that when Storms and Brownstone vacated the Premises, they replaced some of the sheetrock where equipment was removed. The green-colored wall in Exhibit 3.102 was an example of the material put in by Storms and Brownstone as they left the building. Mr. Watkins complained that Storms and Brownstone did not complete any taping or texturing on the replaced sheetrock.

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[171] See: Trial Exhibits 3.101, 3.117 through 3.123, 38.1 and 38.2.
[172] Watkins' Closing Argument, at p. 17.
[173] Watkins' Closing Argument, at p. 17. See also: Trial Exhibit 16.

Mr. Watkins also observed water continuously running from a piece of equipment formerly located in or around the area shown in Trial Exhibit 3.102. On cross-examination, Mr. Watkins was not sure whether the leak was located in the area shown in Trial Exhibit 3.102 or behind it.

Employee Ryan Getsinger testified that Trial Exhibits 3.101 and 3.102 show the same wall on opposite sides. He observed a leak in the area whenever a heavy rain fell or when the snow melted in the spring. He also testified that snow from the parking lot, which was plowed up against the north side of the building, would melt in the spring and come through the garage door on the north side. Melted snow water would pool in the preparation area depicted in Trial Exhibits 3.101 and 3.102.

Trial Exhibits 3.117, 3.118, and 3.119 reveal a corner in what Dane Watkins and Tamara Metcalf identified as the dishwasher area of the former kitchen in the Restaurant. Green and white paneling, with visible stains, is evident, as is a portion of the concrete flooring. Herbert Rockhold identified the white paneling as a Masonite-type hard board with a slick coating on the outside surface. Rockhold explained that the green paneling was moisture-resistant sheetrock.

Tamara Metcalf identified that a waist-high counter had been located on the right-hand wall shown in Trial Exhibit 3.118, as well as a heavy-duty dishwasher. The dishwasher reached over Tamara's head (and Tamara described her height as 5'7"). The corner depicted in Trial Exhibit 3.118 was covered by equipment.

Mr. Watkins argued that the white hardboard needed to be repaired and changed because it was rotted out. The green material was new sheetrock put in by Rockhold at the request of Storms and Brownstone, but was neither taped nor textured. Rockhold

replaced those sections because the wall was damaged. The sheetrock near the floor was "substantially busted up" according to Rockhold. Both Storms and Rockhold observed water damage to the sheetrock near the floor, which was the reason why Rockhold replaced the sheetrock, as seen in Trial Exhibits 3.117, 3.118, and 3.119. Tamara Metcalf noted that the floor shown in Trial Exhibits 3.117, 3,118, and 3.119 was usually wet because of all the washing.

Mr. Watkins testified he thought the valve depicted in Trial Exhibit 3.119 was continuously leaking, although he was unsure. Gerald Mitchell testified that the leak was shown in Trial Exhibit 3.118, coming from a piece of plumbing sticking out of the wall. Metcalf testified that a water leak came from the backside of Exhibit 3.118 (she identified Trial Exhibit 3.101 as the backside of Trial Exhibit 3.118) off and on, usually in the spring or when heavy rain occurred. Metcalf testified that the only water leaks in the plumbing depicted in Trial Exhibits 3.117 and 3.118 would have come from the sinks, which were then taken care of immediately.

Metcalf identified the markings on the wall in Trial Exhibit 3.117 as rust from the stainless steel shelves formerly located there. Metcalf differentiated between dirt or grease and stains and testified that the walls had been clean to the point that paint was rubbed off. Alan Flores deep-cleaned the white walls depicted in Trial Exhibits 3.117, 3.118, and 3.119 but could not erase the stains.

Both Flores and Rockhold testified that the green sheetrock shown in Trial Exhibits 3.117, 3.118, and 3.119 was covered in stainless steel when they worked in the building. Storms testified that the stainless steel sheathing, which glued to the wall, was removed when the dishwasher was taken out of the building.

Mitchell replaced the sheetrock shown in Trial Exhibits 3.117, 3.118, and 3.119 with tile because, in his experience, the sheetrock did not hold up and the existing studs in the area were spaced in such a way that the sheetrock would do exactly what was shown in the pictures. Mitchell admitted that tile installation was a significant upgrade from the white board used by Storms and Brownstone. Mitchell tore out the right-hand side wall shown in Trial Exhibit 3.118 in his renovations, and replaced it with a stub-wall.

Trial Exhibit 3.120 shows another corner in what was the kitchen area of the Restaurant with visible grease staining on the wall. Tamara Metcalf identified the white wall area as the location of the fryer. Dane Watkins complained of the "discoloration of the rot" and the need for repairs. He thought the brownish/orangish/yellowish coloration of the wall in Trial Exhibit 3.120 was the result of dirt and grease. Metcalf testified that the discoloration was the result of staining from heat and hot fryer oil. She identified areas where the white board on the right-hand wall had actually been scrubbed off when the wall was cleaned.

Metcalf also testified that the dark, straight line under the light switches on the left-hand wall as where a table had been located which wore off the paint. She informed the Court that the Health Department had inspected the building on numerous occasions and never cited the Brownstone for the conditions shown in Trial Exhibit 3.120. Alan Flores deep-cleaned the wall with degreaser to the point of exposing some of the wood from underneath the finish. Flores testified that when you work in a kitchen and have heat "of course, you're going to see discoloration." Gerald Mitchell testified that the

walled area shown in Trial Exhibit 3.120 was removed during his renovations in order to enlarge the kitchen.

Trial Exhibit 3.121 illustrates a wall area, with white patching and some brownish staining. Dane Watkins identified the area as part of the kitchen hood system going out to the outside. He testified that "[t]here was an attempt I think made to do some drywall work that doesn't look like it worked or did the job." Alan Flores testified that the picture was taken after he had cleaned the area. He stated: "I'm pretty sure if you go to a restaurant, I mean, there's stuff that gets stains after that many years and the grease you kind of, I mean, you try to clean it and it stays." Gerald Mitchell testified that the pattern of staining in Trial Exhibit 3.121 resulted from grease going through the cold air return. Storms explained that the white patches on the ceiling and the peeling paint on the black duct work resulted from Waters Constructions' attempts to repair the inside walls following the roof leaks in 2006.

Trial Exhibit 3.122 depicts a white wall with greenish-brown markings around what had been a square-shaped structure. Dane Watkins testified that the markings were dirt.[174] Tamara Metcalf identified the picture as the outside wall of the kitchen facing the bar. A chalk board hung inside the square-shaped markings on the wall. Metcalf testified that the wall was cleaned as part of the "3:30 side work" as well as the annual cleaning. She identified the dark mark in the center of the wall as wear, because a counter had been located at that position. The square marking surrounding the spot where the chalkboard hung was, she believed, dirt from the chalkboard. Metcalf testified

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[174] With regard to his testimony, Dane Watkins misidentified Trial Exhibit 3.122 as Trial Exhibit 3.121 when he testified about square or rectangular markings on a wall. Since Trial Exhibit 3.122 clearly shows

that the chalkboard was taken down daily, and the wall was wiped down. Alan Flores testified that Trial Exhibit 3.122 was taken after he cleaned the wall.

Trial Exhibit 3.123 reveals another corner with drywall and a small patch of the floor visible. The wall on the left-hand side is the back of the wall depicted in Trial Exhibit 3.122. Tamara Metcalf testified that the metal plate shown at the base of the wall in Trial Exhibit 3.123 was installed during her tenure at the Brownstone in order to stabilize the wall.

Trial Exhibit 38.1 shows the dining area of the Restaurant, looking empty and clean. The picture was taken from the front door. Alan Flores testified that Trial Exhibit 38.1 shows the Restaurant in a clean state. The last thing Flores deep-cleaned was the floor in the Restaurant. He used hot water and degreaser and scrubbed the floor with a brush. He then sprayed the floor with hot water and used large squeegees and a mop.

Trial Exhibit 38.2 illustrates the ladder to the mezzanine over the brewing area. Alan Flores testified that the same ladder in Trial Exhibit 38.2 can be seen in the left-hand corner of Trial Exhibit 38.20. Flores deep-cleaned the area just as he had other areas in the Restaurant.

Rusty Kappel charged Gerald Mitchell $1,470.00 to pull down kitchen wall(s), clean and degrease the kitchen floors, walls, and ceiling, and to clean the concrete back room.[175] Kappel performed the work on or about April 6, 2011.[176] Kappel testified that when he entered the Premises "you could tell that somebody had moved out and it seemed vacated for a while."

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square or rectangular markings on a wall (and Trial Exhibit 3.121 does not), Mr. Watkins' testimony regarding square or rectangular markings shall be attributed to Trial Exhibit 3.122.

[175] Trial Exhibit 16.

Kappel's testimony was unclear whether he tore down walls in the kitchen because they needed to be replaced, or because Mitchell determined to reconfigure the kitchen area for the White Eagle Brewery and Grill. Furthermore, without expert testimony as to expected wear and tear to walls, floors, and ceilings in a restaurant operated over a period of thirteen years, no determination can be made as to whether the marks and staining to the walls, visible Trial Exhibits 3.101, 3.102, 3.117, 3.118, 3.119, 3.120, 3.121, 3.122, 3.123, 38.1 and 38.2, were to be expected or was unusual. In the alternative, this Court finds that the marks and staining shown in Trial Exhibits 3.101, 3.102, 3.117, 3.118, 3.119, 3.120, 3.121, 3.122, 3.123, 38.1 and 38.2 were within the reasonable bounds of normal wear and tear.

Storms and Brownstone hired Herbert Rockhold to replace some of the damaged sheetrock in the kitchen area. Storms and Brownstone also hired Alan Flores to deep-clean the entire Premises after the equipment had been removed. Several months after Flores completed his cleaning, Kappel came in and cleaned the same areas again.

Although Watkins was unhappy that Storms and Brownstone did not tape or texture the replaced sheetrock, the former Lease did not require Storms and Brownstone to return a building in new condition to Watkins. Storms and Brownstone repaired walls they believed had been damaged. And, in fact, Gerald Mitchell not only reconfigured the Premises to his tastes, but also repainted because he did not like colors originally selected by Storms and Burggraf. Thus, Mitchell took out some of the new sheetrock installed by Storms and Brownstone. His use of tile was a significant upgrade from the white hardboard installed by Storms and Burggraf.

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[176] Id.

The attempt to repair drywall work, identified by Dane Watkins in Trial Exhibit 3.121, was undertaken by Waters Construction after Storms complained to Mr. Watkins about internal damages from water leaks. Waters Construction never completed its work because the leaking roof was not repaired and because of a payment dispute with Watkins. The dark areas emanating from the cold air return may have been grease or dust related. Flores testified that such staining was both expected in a restaurant operating for many years and not the sort of stain that could be removed. Whether or not such staining could be considered abuse versus normal wear and tear was not proved by Watkins. This Court finds the testimony of Alan Flores credible that the staining was normal wear and tear to a building operated as a restaurant over the course of thirteen years.

The greenish-brown markings on the wall in Trial Exhibit 3.122 were stains or dirt from the chalkboard that formerly hung on the wall. Flores cleaned the wall depicted in Trial Exhibit 3.122. Whether or not such stains or dirt could be considered abuse rather than normal wear and tear were not shown by Watkins. In the alternative, this Court finds the stains represented normal wear and tear to the wall.

Nothing in the evidence revealed what complaints Watkins had with regard to Trial Exhibits 3.123, 38.1 and 38.2.

Based upon the lack of evidence that the staining identified by Watkins in Trial Exhibits 3.101, 3.102, 3.117, 3.118, 3.119, 3.120, 3.121, and 3.122 was abuse, the evidence does not support a finding that Storms and Brownstone breached their at-will tenancy with Watkins or committed wasted by failing to maintain the walls and floors. Furthermore, without testimony identifying the alleged abuse in Trial Exhibits 3.123,

38.1, and 38.2, Watkins has not shown that Storms and Brownstone breached their at-will status with Watkins or committed waste upon the Premises with regard to those exhibits.

d. Upstairs Storage Room Floor.[177]

Next, Watkins complains that Storms and Brownstone left the floor of the upstairs storage room "very unclean."[178] Watkins points to Trial Exhibits 3.108 and 27 in support of its allegation, and argues that $110.00 was spent to strip, refinish, and clean the existing storage room flooring.[179]

Trial Exhibit 3.108 shows a portion of a black-and-white formica floor and a portion of the adjoining wall with what appears to be an empty space where a piece of equipment was removed. Dane Watkins identified the removed equipment as a heater. He identified the exhibit as the upstairs area because of the "checkered floor."

Kathy Burggraf testified that Trial Exhibit 3.108 was upstairs storage room on the west side of the building. The same type of flooring is seen in Trial Exhibits T.75, T.77, and T.78, which Burggraf also identified as the upstairs storage rooms. Burggraf testified that the black and white flooring shown in Trial Exhibits 3.108, T.75, T.77, and T.78 was the same in 2010 as it had been in 1997 when Storms and Burggraf received possession of the Premises.

Watkins testified that he ordered the floors depicted in Trial Exhibits 3.108, T.75, T.77, and T.78 stripped and refinished because they were "just a disaster." The floors appear to be dirty in Trial Exhibits 3.108, T.75, T.77, and T.78. Nothing in the record discusses what is actually visible in Trial Exhibits 3.108, T.75, T.77, and T.78, however.

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[177] See: Trial Exhibits T.75, T.77, and T.78.
[178] Watkins' Closing Argument, at p. 17.
[179] Id. See also: Trial Exhibit 27.

The Court cannot discern if it is in fact viewing dirt, or staining, or wear and tear over years of use.

Watkins did not submit pictures of the condition of the floors when Storms and Burggraf took possession of the Premises. No pictures showing how the floors appeared after Watkins had them stripped and refinished were offered in evidence.

Tamara Metcalf related that the General Manager was tasked with cleaning the area, including cleaning the floor and dusting. Alan Flores did not specify the upstairs storage rooms as areas he deep-cleaned after Storms and Brownstone vacated the Premises.

Based upon the lack of evidence of precisely what is depicted in Trial Exhibits 3.108, T.75, T.77, and T.78, how the floors appeared when Storms and Burggraf took possession of the Premises, and the result of the stripping and refinishing to which Dane Watkins testified, the record does not support a finding that Storms and Brownstone breached their at-will tenancy with Watkins or committed waste by failing to maintain the upstairs storage room floors. Watkins shall not recover the $110.00 charged by Pioneer Janitorial Services, Inc., shown in Trial Exhibit 27, as damages for Storms' and Brownstone's alleged failure to maintain the upstairs storage room floors.

e. Bathrooms.[180]

Watkins also seeks damages for cleaning the bathrooms.[181] Gerald Mitchell hired Rusty Kappel to clean the tile and walls of the bathroom to get rid of what Mitchell testified to be "layers of filth that was in there." Kappel cleaned the bathrooms

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[180] See: Trial Exhibits 3.61, 3.67 – 3.71, 38.22, and 38.23.
[181] Watkins' Closing Argument, at p. 18.

in June of 2011. Kappel charged Mitchell $1,485.00 to "clean bathrooms" and "stairs on main floor."[182]

In terms of general maintenance, Katie Williams testified that the Brownstone employee hired as the dishwasher was responsible for cleaning the bathrooms on a daily basis, including the sinks and the toilets. Tamara Metcalf testified that she (as the General Manager) or the dishwasher cleaned the bathrooms every day. She specified that the day-dishwasher would do a deep-clean in the mornings by scrubbing the floor, washing the stalls down, taking out the garbage, wiping off the door, sanitizing the sinks, cleaning the mirrors, cleaning the toilet, wiping the window down, and cleaning the pictures in the bathrooms. The night-dishwasher, who relieved the day-dishwasher, would do the same thing when he came in around 5 o'clock p.m. Metcalf would check the bathrooms throughout her shift and clean again if necessary.

Restaurant employee Allison Noble, who worked at the Brownstone from 2002 to 2008, remembered that the bathrooms were remodeled in either 2003 or 2005, including new tile, paint and grout. The bathroom fixtures all looked brand new.

Alan Flores testified that he deep-cleaned the bathrooms in December of 2010. He used a toothbrush to scrub the grout on the tiles. He used a toothbrush and degreaser to clean the sinks. The floors were sprayed with degreaser and scrubbed. He identified Trial Exhibits 38.22, T.91, and T.92 as photographs of the bathrooms after they had been cleaned. He also pointed out that oxidation on the toilets was not dirt or grime. He explained that the discoloration on the toilet seats, seen in Trial Exhibits T.91 and T.92,

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[182] Plaintiff's Trial Exhibit 16.

was a function of time rather than uncleanliness. He also explained that the stains shown in Trial Exhibit T.90 occurred with age.

Kappel testified that he completely cleaned the bathrooms: the walls, fixtures, urinals, sinks, mirrors, toilets, and the floors; from the tile down.[183] He recalled that the grout throughout the bathrooms was dirty. He found hard water deposits. He compared the toilet seat shown in Trial Exhibit T.91 to the toilet seat shown in Trial Exhibit T.92 and observed that the seat in Trial Exhibit T.91 looked more yellow than the seat in Trial Exhibit T.92. He testified that he observed "Just a normal wear and tear and use in there."

Kappel's invoice for cleaning the bathrooms and stairs on the main floor was dated June 18, 2011.[184] Gerald Mitchell opened the Snow Eagle Grill and Brewery on July 4, 2011. This infers that the remodeling of the Premises was on-going when Kappel entered the Premises to deep-clean the bathrooms.

Trial Exhibit 37.10 appears to show dirty floors in one of the bathrooms. That photograph was taken in January of 2013, however, two years after Storms and Brownstone vacated the Premises and approximately eighteen (18) months after the Snow Eagle Brewery and Grill had been in operation. Trial Exhibits 37.14 and 37.25 were also taken in January of 2013. Trial Exhibits 38.22, 38.23, T.90, T.91, and T.992, taken by Storms prior to vacating the Premises, do not show abnormal dirt or grime in the bathrooms.

Given the facts that Alan Flores cleaned the bathrooms in December of 2010, and that Kappel's cleaning services were undertaken in a period that involved, more likely

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[183] See: Trial Exhibits 37.10, 37.14, 37.25, 38.22 and 38.23.

than not, traffic from various construction workers undertaking the remodeling project, the evidence does not support a finding that the bathrooms were left in an abnormally dirty condition. Furthermore, without expert testimony about normal wear and tear to bathrooms used by the public over a thirteen-year period, without more specific terms as to the parties' agreement regarding final cleaning before the tenant quitted the Premises, and without expert guidance as to the depth of cleaning expected of commercial tenants, Watkins has not shown that Storms and Brownstone left the bathrooms in a state beyond normal expectations.

In the alternative, the evidence submitted by the parties convinces this Court that the bathrooms exhibited nothing more than normal wear and tear for a commercial restaurant operated over the course of thirteen years. For these reasons, Watkins shall not recover for Kappel's bathroom cleaning services.

6. North Rain Gutter.[185]

Watkins argues that Storms and Brownstone left the north rain gutter "nonfunctional" when they vacated the Premises.[186] Watkins obtained an estimate from Green Acres Home Improvement, dated September 29, 2011, to replace the rain gutter, at a cost of $580.00.[187] No evidence was presented as to what Watkins actually paid to replace the north rain gutter.

Gerald Mitchell testified that the rain gutter on the north side was impacted with grease. He observed from below the water coming over the rain gutter, down the wall, and into the bottom left-hand side of the framing of the window depicted on the left side

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[184] Trial Exhibit 16.
[185] See: Trial Exhibit T.94.
[186] Watkins' Closing Argument, at p. 18.

of the bar in Trial Exhibit T.98. Mitchell believed that the hood vent fans were impacted with grease and that the grease would follow along the roof and end up in the rain gutter.

Mitchell did not know if the gutter could have been cleaned out with a hot-water pressure washer. He testified that the window framing was not sealed to control the leak. Mitchell also testified that because of the porous nature of the walls, being cinder block with a brick façade, he did not believe the walls could be sealed from water leakage. He admitted that he insisted upon replacement of the rain gutter because he did not believe sealing the outside of the building was a viable option.

Mitchell never observed the replacement of the rain gutters, but he testified the replacement would have occurred before he opened the Snow Eagle Brewery and Grill on July 4, 2011. Mitchell testified that since the gutters were replaced, he had not observed the phenomenon of water coming off the roof and then coming back into the building as before. He noted, however, that leaks are still occurring in the building, including a leak on the ceiling close to the north wall, in the bar area.

Storms identified the window and wall between the kitchen and bar as one of the leaking areas after Briggs Roofing completed the new roof. Storms also identified the north rain gutter as the gutter damaged by Briggs Roofing when old roofing material was dumped from the roof into a dump truck. The damaged gutter was replaced in 2007. Storms identified on-going leaks in the kitchen area in 2013.[188]

Employee Ryan Getsinger, who worked for Storms and Brownstone from April of 2007 until the Restaurant closed in 2010 (save for a one year period from June of 2008 until June of 2009), and who worked for the Snow Eagle Brewery and Grill from July 4,

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[187] Trial Exhibit 6.

2011 until March of 2012 and again from October of 2012 until March of 2013, testified that he never observed rain coming out of the gutters other than through the downspouts. Getsinger never saw the rain gutters actually replaced during the time he worked for Snow Eagle. Herbert Rockhold testified that when he worked on the Premises in the fall and winter of 2010, he never saw the rain gutters dysfunctional or overflowing.

The Restaurant's hood and vent system was inspected by the Bonneville County fire marshal on a regularly-scheduled basis. Brownstone never failed an inspection. Storms and Brownstone also hired contractors to clean and maintain the exhaust system.[189] The last cleaning took place on August 15, 2010.[190] After September 30, 2010, Brownstone did not operate the grill or the cook line.

The original building, prior to Storms' and Burggraf's renovations, was a cinder block structure with a brick façade. Watkins tendered no exhibits showing grease in the rain gutters. At the time of Green Acres Home Improvements estimate, Snow Eagle Brewery and Grill had been in possession of the Premises approximately five months, and in operation over two and one-half months.

The evidence infers that Storms did not leave the north-side rain gutter in an unusable state. Whether the leaks that Mitchell noticed came from the compromised roof (which continued to leak after the Snow Eagle Brewery and Grill opened), or from operations of the Snow Eagle Brewery and Grill, Watkins has not shown that Storms should be responsible for replacing the north-side rain gutter. The evidence does not suggest that Storms and Brownstone breached their at-will relationship with Watkins or

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[188] See: Trial Exhibits T.124, and T.142.
[189] See: Trial Exhibit R. The Restaurant's exhaust system is shown on Trial Exhibit T.93.
[190] Id.

committed waste upon the Premises. Therefore, Watkins shall not recover damages for the replacement of the north-side rain gutter.

7. Kitchen Walls and Floors.[191]

Next, Watkins seeks $3,200.00 for repair or replacement of damaged kitchen walls and floors.[192] Watkins specifically mentions the east wall of the kitchen, the white walls in the kitchen, and the concrete floor of the kitchen.[193] Watkins specified Trial Exhibits 3.117 through 3.123, 38.7, 38.13, 38.25 through 38.30, 39.09, 39.10, and Trial Exhibit V as illustrative of the alleged damages at issue.

Gerald Mitchell hired American Commercial Services to wash and prepare the floor (for tiling), set up the tile pattern, and install durock (a substance placed under tile for levelling), at a cost of $800.00.[194] American Commercial Services finished tiling the floor at a cost of $200.00, and tiled the wall for $2,200.00.[195]

In addition, Watkins requested damages for costs to clean the walls depicted in Trial Exhibits 3.117, 3.118, 3.119, 3.120, 3.121, 3.122, and 3.123. Included in the walls necessitating cleaning was the east wall in the kitchen, shown in Trial Exhibits 3.122, 3.123, 38.25, and 38.30. However, Watkins maintains that the east wall in the kitchen had to be removed because of rotted wood framing.[196] Incurring costs to clean a wall infers that the wall was in a useable condition. This inference, coupled with the lack of expert testimony regarding expected wear and tear to restaurant walls, particularly in the kitchen area, exposes a record devoid of evidence supporting a finding that Storms and

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[191] See: Trial Exhibits 3.117 through 3.120, 3.122, and 3.123.
[192] Watkins' Closing argument, at pp. 19-22.
[193] Id.
[194] Trial Exhibit 7.
[195] See: Trial Exhibit 8.

Brownstone breached their at-will relationship with Watkins by failing to maintain and repair the walls in the kitchen. Indeed, the evidence showed that Storms and Brownstone replaced some of the green, moisture-resistant sheetrock in the kitchen prior to vacating the Premises.[197]

Trial Exhibits 38.7 and 38.25 reveal a north and east view of the kitchen area. Trial Exhibit 38.7 shows stainless-steel sheeting hung on the north wall and what appears to be new or very white Abitibi board (or Masonite-type hard board with a slick coating on the outside surface). Restaurant employee Ryan Getsinger identified the white board in Trial Exhibit 38.7 as the east wall in the kitchen. Herbert Rockhold testified that the same wall (the east wall of the kitchen) shown in Trial Exhibit 38.25 was new Abitibi board, installed by Storms and Brownstone prior to vacating the Premises. Storms clarified that the new wall was white, fiberglass panel. Storms testified that this new wall was taken out by Gerald Mitchell when he reconfigured the kitchen.

Trial Exhibit 38.13 was never identified or discussed by any witness during the trial.

Trial Exhibit 38.26 shows a wall of the kitchen, partially replaced with new green sheetrock. Ryan Getsinger identified a black strip along the bottom of the wall as plastic or rubber stripping to keep moisture from reaching the wall. Herbert Rockhold testified that Trial Exhibit 38.26 shows the wash area of the Restaurant.

Getsinger testified that Trial Exhibit 38.27 shows the west wall of the kitchen. Getsinger identified the black stripping along the bottom of the wall as the same rubber or plastic used to keep moisture off the wall. He noted that the stripping appears to stop

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[196] Watkins' Closing Argument, at p. 19.

at one point on the wall. Getsinger explained that the wall in the photograph stood behind forty (40) to fifty (50) racks of glasses. No stripping appears on the north wall, which frames a portion of what Getsinger described as a broom closet.

Despite the staining that appears on the left side of the wall and along the bottom, Storms testified that those areas were inspected by the Health Department. Storms and Brownstone never received a citation by the Health Department when the Restaurant was in operation. Furthermore, Brad Simonson testified that whereas the whiteboard used in the kitchen was inherently problematic because of moisture leakage allowed at the seams, he had seen the same whiteboard used in kitchens elsewhere. Gerald Mitchell tiled the kitchen walls in the area where no stainless steel previously existed.

Trial Exhibit 38.28, which shows the north wall of the kitchen covered with stainless steel sheets, is where the grills and oven were located during the operation of the Restaurant, according to Alan Flores. This was also known as the cook line, according to Flores. Flores identified the discolored wall area above the stainless steel. He testified that the discoloration resulted from the heat from the cook line.

Trial Exhibit 38.29, according to Ryan Getsinger, shows the west side of the garage. Part of the north wall of the kitchen, covered in stainless steel, is also visible in the photograph. Getsinger testified that no black stripping is visible on the portion of the broom-closet wall on the west side of the photograph, underneath the light switches. The staining above the stainless steel did not merit citation by the Health Department during the operation of the Restaurant. Storms testified that Gerald Mitchell removed the west wall and the broom closet when he reconfigured the kitchen.

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[197] See: Trial Exhibits 3.101, 3.102, 3.103, 3.117, 3.118, 3.119, 38.26, and 39.07.

Trial Exhibit 38.30 reveals the north and west walls of the bar area, the west wall being steadied by a large metal sheet along the floor. The west wall of the bar area was the same as the east wall of the kitchen area. Storms testified that the west wall was removed by Gerald Mitchell when he reconfigured the Premises.

Trial Exhibits 39.09 and 39.10 were identified by Storms as the west side of the kitchen. Storms testified only that Trial Exhibits 39.09 and 39.10 did not show pitting or cracks in the floors. Nothing in the record offered any other explanation of the walls shown in Trial Exhibits 39.09 or 39.10.

Storms and Brownstone used Trial Exhibit V to demonstrate leaks into the Premises from the faulty roof. Storms testified that Trial Exhibit V also showed the kitchen walls removed by Gerald Mitchell during his reconfiguration of the kitchen.

In summary, the evidence does not support a finding that Storms and Brownstone breached their at-will relationship with Watkins or committed waste upon the Premises by failing to maintain or repair the kitchen walls. Storms replaced some of the green sheetrock in the kitchen. Other walls, including the brand new east wall of the kitchen, were torn out by Gerald Mitchell when he remodeled the Premises. Nothing in the evidence reveals what would be considered normal wear and tear to kitchen walls in a restaurant over a thirteen year period. Mitchell's tiling upgrade is not an expense that should be borne by a former tenant who used a lesser, but commonly used, method to install walls in a commercial kitchen.

As for the floors, Watkins alleged the concrete was cracked or pitted.[198] Again, no evidence guided the Court regarding normal wear and tear expected of concrete floors used in a commercial restaurant over a thirteen-year period of operation.

The trial evidence revealed the following: restaurant employee Ryan Getsinger testified that he never observed cracks or pitting in the concrete floor of the kitchen. He did not observe water pooling in holes or depressions in the concrete when the floor was cleaned with hot water.

Storms pointed to the floor of the Restaurant, as depicted in Trial Exhibits T.27 and T.28. He explained that the cement floors were not designed to have a uniform look, but a variegated, mottled appearance with darker and lighter spots or areas throughout the floor. Storms testified there were no cracks in the kitchen floor when he vacated the Premises, other than the texturing built into the concrete in 1996. Storms stated there was no pitting in the floor that would have been a source of contamination. He affirmed that the floors met the criteria of the Health Department inspections, since the Restaurant never received a citation. Storms never received a notation on any health inspection notice indicating that the floors were a problem.

Alan Flores testified that the concrete floor was not pitted when he cleaned just prior to handing the Premises over to Watkins. Brad Simonson testified that the "traffic pattern in the kitchen was such heavy traffic that the concrete had abraded where that pattern was." Whether a traffic pattern in concrete flooring is normal wear and tear or abuse was not clarified by any expert testimony. In the alternative, this Court finds that a

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[198] Watkins' Closing Argument, at p. 21.

traffic pattern a concrete floor, used continuously over a thirteen year period, represente normal wear and tear to the floor.

Simonson also testified to "grease impregnation" of the floor. Nothing in the evidence instructed the Court as to whether or not grease impregnation is normal wear and tear in a commercial restaurant over a thirteen year period. Neither was grease impregnation shown in photographs or mentioned by other witnesses. This Court is unable to determine whether grease impregnation existed, particularly in light of the fact that the Brownstone was never cited for health or safety violations by the Health Department or the Fire Department during the course of its operations.

Gerald Mitchell testified that although concrete is an acceptable flooring for a commercial kitchen, the integrity of the floor on the Premises had been degraded to the point it would no longer function. He clarified that the kitchen floor was pitted and cracked. After investigating a number of options, Mitchell decided to tile the kitchen floor.[199]

In summary, the evidence failed to convince the Court that pitting or cracks, necessitating floor replacement, existed when Storms vacated the Premises. Expert testimony might have enlightened the Court as to how concrete floors wear over time, particularly in commercial restaurants. Without such evidence, and without visual proof of the cracking and pitting, the record does not support a finding that Storms and Brownstone abrogated their responsibilities under their at-will tenancy with Watkins or committed waste upon the Premises by failing to maintain or repair the kitchen floor.

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[199] See: Trial Exhibit 8.

Furthermore, this Court finds that some pitting and cracking of concrete in high traffic areas ought to be expected in the normal wear and tear of the building.

For the reasons set forth, Watkins shall not recover costs associated with repairing or replacing the kitchen walls or floor.

8. Electrical Repairs.[200]

Watkins then asks for $661.00 in electrical repairs, required by "unresolved electrical issues" allegedly left behind by Storms and Brownstone.[201] Watkins specified exposed and unknown wires, broken light fixtures, unresolved electrical connections, and lack of functional lighting in a back room.[202]

Kathy Burggraf testified that she and Storms removed the former electrical wiring in the building when they renovated it in 1996. Storms and Burggraf installed all new electrical wiring in the Restaurant.

Blaise Kauer, an electrical contractor, entered the Premises in January of 2011 at Dane Watkins' request. Kauer understood that Mr. Watkins wanted to show the building and needed the electrical connections to be safe. Kauer noticed wires hanging out and exposed pipes from machines that had been removed by Storms and Brownstone. He testified that "a lot of times in a commercial area, that can happen. It depends on who takes out the equipment whether an electrician takes it and covered it up."

Kauer checked electrical boxes, such as those seen in Trial Exhibits 39.05 and 39.06. Kauer fixed a couple of broken light fixtures, and replaced burnt-out light bulbs. He found wires coming out of the conduits, but could not remember if the breaker had

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[200] See: Trial Exhibits 3.34 through 3.36, 3.52, 3.111, and 38.6.
[201] Watkins' Closing Argument, at pp. 22, 23.
[202] Id.

been shut off or not. Kauer stated that his work for Watkins was "just a temporary fix until the next tenant gets there and decides what they're going to do with it." He testified that a lot of the work he did for Watkins was "common sense by my trade. You look around for things that are electrically unsafe." Kauer charged and received $661.00 for his services.[203]

Kauer identified a decorative light fixture, shown in Trial Exhibits 3.34, 3.35, and 3.36, which he "would have just hauled off and then capped the top." He did not have any specific recollection as to what he did regarding the broken light fixture shown in the pictures. Dane Watkins testified that the light fixture that lies broken on the floor in Trial Exhibits 3.34, 3.35, and 3.36 was found in that condition when Mr. Watkins re-entered the Premises in January of 2011. Herbert Rockhold explained that the fixture was broken before Storms and Brownstone moved out of the Premises and that he installed the simple light socket and bulb, seen in Trial Exhibits 3.33, 3.34, and 3.35, to replace the decorative light fixture that was lying broken on the floor. Rockhold did not know how the decorative light fixture was broken.

Kauer identified Trial Exhibit 3.52 as a broken cover that he "probably capped." He testified that he most likely found another way to cover the outlet, rather than to buy a new part, but he could not remember.

Kauer described Trial Exhibit 3.70 as a junction box which he typically would have covered. Rockhold testified that he did not remove any light fixtures in the area depicted in Trial Exhibit 3.70. The wires in the junction box in Trial Exhibit 3.70 appear to be capped.

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[203] Plaintiff's Trial Exhibit 19.

The light fixture hanging from the ceiling in Trial Exhibit 3.111 was identified by Kauer as needing only screws to mount it back into the ceiling. He did not remember the location of the fixture, however. Herbert Rockhold did not observe a light fixture hanging in the condition depicted in Trial Exhibit 3.111. Rockhold testified that he never observed that light particular fixture on the Premises. Storms did not recognize the light fixture in Trial Exhibit 3.111. Storms testified that the fixture did not exist on the Premises when he and Brownstone vacated the building.

Trial Exhibits 3.125 and 3.128 show several electrical wires that required removal, unhooking, or placing in a box for safety, according to Kauer. He noted that the wires had wire nuts on them, but testified that a person could be shocked if the wire nuts fell off. The white wire in Trial Exhibit 3.128 did not have a wire nut. Rockhold testified that the white wire was a common wire and that he did not test its voltage. Kauer did not elaborate whether he tested the white wire to see if it carried electricity. Kauer did nothing with the grey wire shown in Trial Exhibit 3.128. Rockhold testified that the grey wire was computer wire or telephone wire which carried a very low voltage.

Kauer explained that "most people hire an electrician to leave [a building] in a safe way." Storms and Brownstone hired Herbert Rockhold, who is not a licensed electrician, to remove equipment from the Premises. Rockhold supported his expertise with testimony that he built his home in Idaho Falls and wired the entire house himself. Rockhold sealed open wires with wire nuts and turned off the breakers supplying the wires. He used a multimeter to determine that none of the wires were hot.

Kauer's testimony was disturbingly imprecise and general. He gave a description of why Watkins hired him to check over the Premises. When asked about the specific

tasks he undertook, however, his testimony became much more vague and indefinite. He could not remember if the Premises had dark areas because lights were burnt out or because bulbs were gone. He could not recall if wires coming out of conduits were energized or not. He was not sure what he had done to address broken fixtures. Often he testified about what he "would have done," but could not remember what he actually did with a particular fixture. He was not sure if wires were simply removed from the electrical panel or boxed. He could not recall where light fixtures or electrical outlets were located on the Premises and therefore could not testify what he had done with the fixtures or outlets. Kauer recalled that he was asked to do "something with the switches," but he did not recall what he did. Although he was hired to check for safety issues, Kauer did not check each one of the outlets. He could not recollect the condition of the Premises in January of 2011.

In addition to the vague nature of Kauer's testimony, the record does not support a finding that Storms and Brownstone breached their at-will tenancy with Watkins by failing to ask a certified electrician to cap off loose wires or shut down breaker boxes. The former Lease did not specifically require such services, nor was an expert called to testify as to a particular expectation or level of care which should be exercised after electrical equipment is removed from a commercial building. This Court does not find that Storms and Brownstone were required to hire a certified electrician to ascertain the safety of the electrical connections left behind when the Premises were returned to Watkins. Furthermore, this Court finds that Herbert Rockhold had sufficient knowledge of electrical outlets and wiring to leave the building in a reasonably safe condition.

For these reasons, Watkins has not shown that Storms and Brownstone breached their at-will relationship with Watkins or committed waste upon the Premises by leaving the Premises in an unsafe condition. Watkins shall not recover his fee to Kauer, represented in Trial Exhibit 19.

9. Grease Trap.[204]

Watkins seeks $2,025.00 from Storms and Brownstone for services rendered to empty the grease trap on the Premises, to restore its functionality, and to equip Gerald Mitchell with a new grease trap system.[205]

Ryan Getsinger testified that the grease trap was located on the floor of the kitchen near the sink trap depicted in Trial Exhibit 3.117. It was covered by a heavy metal cover. Storms explained that the metal lid was at floor level, and below that was located the actual lid to the grease trap. Restaurant employee Tamara Metcalf testified that the kitchen manager was responsible for cleaning the grease trap and, on a rare occasion, the Brownstone hired a professional cleaning service as well. The grease trap was cleaned every two months or when it began to smell. Getsinger testified that cleaning the grease trap required two (2) to three (3) hours.

Storms did not know the condition of the grease trap when he quitted the Premises at the end of December 2010.

Dane Watkins did not inspect the grease trap when he first took repossession of the Premises in January of 2011. The grease trap, shown in Trial Exhibits 39.01 and 39.02, was located under the concrete floor in the kitchen, accessible by a steel lid at the floor level and another steel lid over the trap itself. Trial Exhibit Z depicts the floor level

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[204] See: Trial Exhibits 39.01 and 39.02.

grease trap lid with the handle visible. The lid does not appear to be broken or unusable and the handle is clearly visible. Gerald Mitchell testified that the grease trap was not useable, and that he spent time and money trying to open it. Mitchell hired two different services, the second of which was successful in prying off the lid. Mitchell testified that the grease trap was totally encased in grease and had not been maintained for some time. Mitchell related that once the grease was removed he discovered that the inside metal was completely rotted and the grease trap was not salvageable.

Parkers Septic Tanks Service, LLC charged Mitchell $425.00 to pump the grease out of the grease trap.[206] Parkers rendered its services on or about April 11, 2011.[207] Mitchell testified that he also paid Idahosteel $100.70 to fabricate a new lid for the grease trap before he discovered that the metal walls were rotted.[208] The Idahosteel invoice, which describes new angles mounted to an aluminum plate, is dated April 12, 2011.[209]

Storms testified that the original grease trap cover was made of steel, not aluminum. Storms also testified that he saw an aluminum plate in the Snow Eagle Brewery and Grill which was positioned on the floor underneath the brew kettle.

Mitchell recounted that he ultimately filled the old grease trap full of cement and bought an aboveground grease trap for use in the White Eagle Brewery and Grill. Mitchell paid American Commercial Services Corporation $100.00 to backfill the old grease trap.[210]

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[205] Watkins' Closing Argument, at pp. 23-24.
[206] Trial Exhibit 15.
[207] Id.
[208] Trial Exhibit 14.
[209] Id.
[210] Watkins' Closing Argument, at p. 25; Trial Exhibit 9.

Mitchell described the capacity of the original grease trap as "a fraction" of the aboveground system he now employs. He later estimated the capacity of the old grease trap to be one-hundred (100) gallons. He estimated his new system holds between seven-hundred and thirty-five (735) and one-thousand five-hundred (1,500) gallons of grease.

Storms' testimony that he did not check the grease trap or have it emptied prior to moving out of the Premises infers that the grease trap was left with grease in it. Regardless of what grease may have been added by cleaning procedures which took place at Watkins' behest, standard cleaning of the Premises and maintenance of the building would infer that a tenant should empty an underground grease trap before vacating the leasehold. Therefore, Storms and Brownstone breached their at-will relationship with Watkins, by failing to empty the grease trap before they returned the Premises to the lessor. Watkins shall recover $425.00 for costs incurred to empty the grease trap.

As for the lid and the walls of the grease trap, Watkins offered no testimony whether or not such underground grease traps deteriorate from normal wear and tear. Neither was testimony offered as to what kind of maintenance, other than periodically emptying the trap, might be required for underground grease traps. Instead, the evidence infers that the grease trap deteriorated from contact with grease. The Court has no expertise as to whether such deterioration is typical or unusual. Therefore, Watkins has not shown that Storms and Brownstone breached their at-will tenancy, or committed wasted, by returning the Premises to Watkins with an unusable grease trap.

Furthermore, Watkins shall not recover costs incurred to manufacture a new grease trap lid (assuming, without finding, that the Idahosteel invoice applied to the grease trap lid and not the plate under the brew kettle), to backfill the old grease trap, or

to purchase a new grease trap system for the White Eagle Brewery and Grill. Such charges have not been connected to a duty breached by Storms and Brownstone.

10. Investigation and Repair of Plumbing Mainlines.

Watkins seeks to recover $220.00 that J & R Plumbing paid AAA Sewer Services to send a camera down the plumbing mainlines.[211] Watkins specifies Trial Exhibits 3.95 through 3.102, 3.125 through 3.127, and 36 as evidence of his claims.[212]

In its closing argument, Watkins contends that

> … when Storms and Brownstone vacated, they left a number of exposed plumbing lines and fixtures without any indication of their purpose. *See* Exs. 3.95-.102, 3.125-127. Storms had been using one of the drainage lines, but the other drainage line was from the original restroom in the northeast corner that Storms had not used. Mr. Mitchel did not know which one Storms used and when Mr. Mitchell tried to use them, he found they had a bunch of stuff in the lines. Mr. Watkins was not involved or consulted in the remodel process, so he could not identify the lines either. Mitchell had to determine which of the two lines was functional, and to clear the line. To accomplish this, Mr. Mitchell hired AAA Sewer Service to camera and clean out the lines at a cost of $220.00. *See* Ex. 36.[213]

Trial Exhibits 3.95 through 3.99 and Trial Exhibits 3.125 through 3.127 appear to relate to the beverage lines between the brew tank and the bar. Trial Exhibits 3.101 and 3.102 show hook-ups and floor pipes in the kitchen. None of these exhibits appear to relate to Trial Exhibit 36, which is an invoice from AAA Sewer Services to J & R Plumbing regarding a camera used on the "mainline."

a. Costs to "Camera" the Mainline.

The only evidence Mr. Watkins offered at trial regarding the plumbing and Trial Exhibit 36 did not refer to cameras used to explore the mainline. During his

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[211] See: Trial Exhibit 36.
[212] Watkins' Closing Argument, at p. 25.
[213] Id.

testimony, Dane Watkins alluded to "a lot of problems with the septic tank." Mr. Watkins testified that he knew there were some problems in the bathrooms. When asked for specifics, Mr. Watkins said the sink in the bathroom leaked. He thought it was in the men's bathroom. He also mentioned leaks in the kitchen where the equipment was removed.

Mr. Watkins pointed to Trial Exhibit 3.102 as evidence of leaks in the kitchen. Trial Exhibit 3.102 shows a hose connection and a pipe into the floor of the kitchen. Mr. Watkins stated that it was continuously running. Nothing in the Trial Exhibit 3.102 photograph depicts a water leak. Mr. Watkins was not sure which piece of equipment was tied to the leak. He then waivered as to where the leak was located within the kitchen.

Gerald Mitchell testified that the plumbing was in bad shape. He added, however, "maybe I shouldn't say this, but it probably wouldn't make any difference because the plumbing had to be replaced anyway." Mitchell testified that because of the reconfiguration of the kitchen, he would have replaced the plumbing regardless of its condition.

Despite Watkins' reference to Trial Exhibits 3.101 and 3.102 in regard to Trial Exhibit 36, the leaky plumbing described by Dane Watkins appears to have nothing whatsoever to do with Trial Exhibit 36.

Kathy Burggraf recalled that when she and Storms first obtained possession of the Premises, there was one bathroom on the north corner of the building. Storms and Burggraf completely reconfigured the plumbing in the building. Mr. Mitchell testified that there were two sewer lines that ran out of the building. Mitchell did not know if both

of them were functional. As for Trial Exhibit 36, Mitchell did not know if the invoice was connected to the main line sewer. He testified, "I only know that they camera'd the brew lines or the access lines, and whether this is part of that -- or whether the $75 charge is part of that or the $145 is the other part of that I don't know." Nothing in the evidence linked Trial Exhibit 36 with any payment made to AAA Sewer Service by Watkins or Gerald Mitchell. Instead, Trial Exhibit 36 shows that AAA Sewer Service invoiced J & R Plumbing for its work, not Watkins or Mitchell.

The foundation for Trial Exhibit 36 was not properly laid at trial. Neither Mitchell nor Dane Watkins could identify whether or not the services performed in Trial Exhibit 36 went to the brew lines or the sewer line. Trial Exhibit 36 makes no indication of "clearing" the lines, only of using a camera. Nothing in the evidence linked a payment by Watkins or by Mr. Mitchell with Trial Exhibit 36. Furthermore, if Watkins was unsure which sewer line was used by Storms and Brownstone, a telephone call or two between the attorneys representing the parties was a quick and inexpensive answer.

With regard to Trial Exhibit 36 and Watkins' claim that it did not know which sewer lines were used by Storms and Brownstone, Watkins has not shown that Storms and Brownstone breached their at-will tenancy with Watkins or committed waste upon the Premises. Watkins shall take nothing by its claim for the $220.00 charge shown in Trial Exhibit 36.

b. Costs to Clean and Extend the Brew Lines.[214]

As for the brew lines, Mr. Watkins testified that "some of the plumbing had to be changed over that wasn't working and it was just a major, major overhaul what

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[214] See: Trial Exhibits 3.95 through 3.99, 3.125 through 3.127, and AA-3.

we had to repair and fix." When asked to specify the problems with the plumbing, Watkins merely stated that he was referring to "the underground plumbing" which was "over by the bar section and that was underneath." He then clarified that "it's my understanding they couldn't use that." Mr. Watkins conceded that all of his knowledge about the underground plumbing came from Gerald Mitchell.

Mr. Watkins identified the conduits coming up through the floor, shown in Trial Exhibits 3.96, 3.97, 3.98, and 3.99, as part of the housing for the underground tubing used in Storms' and Brownstone's brewery system. Herbert Rockhold testified that the tubing connected the walk-in cooler and beer serving tanks to the bar spigots. Rockhold testified that Trial Exhibits 3.126, and 3.127 showed conduit located in the bar area. Trial Exhibit 3.127 is a photograph looking down into the conduit shown in Trial Exhibit 3.126. Rockhold testified that expanding foam was sprayed around the tubes where they entered or exited the conduit to keep foreign matter out of the conduit. When Rockhold pulled the tubes, he noted that some of that expanding foam could have broken and fallen into the conduit.

Watkins references Trial Exhibit 11 with regard to the "obstructed and unusable" supply lines.[215] At trial, however, Dane Watkins testified that he was not seeking reimbursement for the charges reflected in Trial Exhibit 11. Therefore, Watkins shall not recover the charges shown therein.

Watkins also seeks $1,675.00 to "cut and remove the concrete and run new conduit pipe for the beverage supply lines" because the lines were "plugged and

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[215] Watkins' Closing Argument, at p. 25.

unusable."[216] Trial Exhibit 9 includes two charges: "Scheduling and oversight of concrete cutting and plumbing installation. Meeting with James, Andy, Ivan and J&R" for which $200.00 was charged; and "Concrete saw cutting and removal. 16" slab and partial 4" original slab" at a fee of $1,475.00.

Gerald Mitchell testified that the saw cutting and removal was part repair and part remodel of the Premises. The evidence reflects that Mitchell moved the bar from its previous position back toward the north wall. Trial Exhibit AA-3 shows the outline of the bar when Storms and Brownstone operated the Restaurant, drawn in blue ink with cross-hatches. Mitchell moved the bar north of its previous position. The new bar is shown in Trial Exhibit AA-3 as it was being installed.

The water line used by Storms and Brownstone is depicted in Trial Exhibit AA-3 as two black squares. The beverage lines came out of the floor at a black square which is filled in, next to the left foot of the man wearing suspenders. All of those lines were moved by Mitchell behind the new bar he installed, depicted in Trial Exhibit AA-3. Nothing in the invoices shows that the brew lines were cleaned or emptied. Instead, the charges infer that the brew lines were moved to accommodate the reconfiguration of the bar desired by Mitchell.

The evidence reflects that the charges incurred in Trial Exhibit 9 were not repair, but remodeling costs. Watkins has not shown that Storms and Brownstone breached their at-will relationship or committed waste upon the Premises with regard to the brewery supply lines. Watkins shall not recover the $1,675.00 he requests under Trial Exhibit 9.

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[216] Id. See also: Trial Exhibit 9.

11. Repainting Expense.

Finally, Watkins seeks $1,149.00 for repainting the walls.[217] It declares that "this is not a result of deterioration from normal use and the passage of time. The new tenant had no option to use the existing paint due to the condition it was in."[218]

Watkins points to the fact that Storms and Brownstone left some of the walls spackled, but not painted.[219] Herbert Rockhold testified that the paint on the walls was so old, it would be difficult to match. Furthermore, as noted above, Storms and Brownstone originally agreed under the Lease to maintain and repair the Premises, normal wear and tear excluded. Without expert testimony to guide the Court as to whether holes in walls (which appear predominantly to be nail holes) constitute abuse as opposed to normal wear and tear to a commercial building, Watkins has not shown the breach of a duty by Storms and Brownstone. Conversely, old paint that requires updating seems very much in line with normal wear and tear to a commercial building, particularly one that houses a restaurant. Nothing in the former Lease required Storms and Brownstone to leave the walls in a like-new condition.

In summary, Watkins has shown that Storms and Brownstone breached certain expectations under their at-will tenancy, or, in the alternative, committed waste upon the Premises in several instances. Watkins proved damages of $274.64 for the unusable crash bar system on the north-side entrance, and $425.00 for the uncleaned grease trap in

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[217] Watkins' Closing Argument, at pp. 26-27.
[218] Watkins' Closing Argument, at p. 26.
[219] Id. See also: Trial Exhibits 3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.26, 3.27, 3.28, 3.29, 3.30, 3.31, 3.32, 3.57, 3.58, 3.59, 3.60, 3.61, 3.62, 3.63, 3.64, 3.67, 3.69, 3.71, 3.72, 3.77, 38.3, 38.10, 38.20, and 38.22 (those trial exhibits to which no witness testified were excluded from the list).

the kitchen. Therefore, Watkins shall recover a total amount of $699.64 from Storms and Brownstone for damages beyond normal wear and tear to the Premises.

C. Unjust Enrichment – Rent.

Watkins argues that Storms and Brownstone were unjustly enriched by remaining in possession of the Premises without paying rent after September 30, 2010.[220] Taking into consideration the temporary restraining order issued by this Court (at Watkins' behest), the follow-up motions surrounding Watkins' request for a writ of attachment, the time requested by Storms and Brownstone to move out of the building, and the number of days Storms and Brownstone necessitated for the move, Watkins requests rent for forty-two (42) days, in the amount of $133.33 per day or $5,600.00.[221]

In their closing Argument, Storms and Brownstone point to the first page, first unnumbered paragraph of the former Lease between the parties, which shows that Storms' and Burggraf's initial $23,750.00 deposit to Watkins included $5,000.00 for "Last month's rent."[222] Nothing in the record supports a finding that Watkins credited the $5,000.00 prepaid rent toward the last month the parties operated under the Lease, to the at-will tenancy period, or to period of time Storms' and Brownstone remained in possession of the Premises after September 30, 2010.

Based upon the temporary restraining order issued on October 1, 2010, the partial preliminary injunction announced (but not issued) on November 4, 2010 and withdrawn on November 9, 2010, the partial preliminary injunction announced (but not issued) on November 24, 2010, and the Court's denial of Watkins' request for a Rule 54(b)

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[220] Watkins' Closing Argument, at pp. 27-31.
[221] Watkins' Closing Argument, at p. 30.
[222] Trial Exhibit 1, at p. 1.

certificate (in order to appeal the November 9, 2010 *Partial Preliminary Injunction*), Storms and Brownstone could not reasonably begin to remove items from the Premises until after 3:21 o'clock p.m. on November 24, 2010.

While Storms and Brownstone were responsible for paying rent for the move-out period, that period was extended by weather conditions which existed in late November and December of 2010. Herbert Rockhold testified that when he resumed his efforts to empty the Premises, the north side of the building (the primary location for moving the equipment out of the building) was covered in ice. Rockhold recalled snow virtually every morning. Such conditions slowed the efforts to move heavy equipment, back the trailers into the loading zones, carry heavy loads, and operate a fork lift.

In addition, on November 19, 2010, Dane Watkins asked Storms and Brownstone to consider selling the signs, poles, awnings, bar, and bike racks on the Premises to Watkins before removing them.[223] On November 23, 2010 (one day before the order issued allowing Storms and Brownstone to remove everything except the poles), Watkins again asked Storms and Brownstone not to remove the awnings, bar, bike racks, signs, and poles until Dane Watkins discussed the purchase of the items.[224]

On December 1, 2010, counsel for Watkins e-mailed counsel for Storms and Brownstone to say that he not received authorization from Watkins to make an offer on any items removable by Storms and Brownstone.[225] On the same date, Dean Brandstetter, counsel for Storms and Brownstone, responded that time was of the essence

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[223] Trial Exhibit A, at p. 000029.
[224] Id.
[225] Trial Exhibit A, at p. 000014.

regarding any offers from Watkins and that he (Brandstetter) did not expect Storms and Brownstone to wait for Watkins to make a decision.[226]

On December 10, 2010, Mr. Brandstetter e-mailed B.J. Driscoll, counsel for Watkins, to inform Driscoll that Dane Watkins personally asked Storms for a price on the bar, signs, and awnings. Mr. Brandstetter reminded Mr. Driscoll that Storms was not offering the bar, signs, and awnings for sale, and therefore did not have an asking price.[227] Mr. Brandstetter requested that any offer from Mr. Watkins to Storms and Brownstone be submitted via counsel.[228]

Storms testified that he did not remove the bar, the signs, or the awnings pending an offer from Mr. Watkins to purchase those items. Storms recounted that on December 23, 2010, Mr. Watkins finally did make an offer for the bar, the signs, and the awnings. Apparently the offer was rejected. However, Storms had left those items in place while waiting for the promised offer. The removal of the bar was necessary before the brewing system, the largest pieces of equipment in the building, could be removed.

Storms and Brownstone required thirty-six (36) days to move out of the Premises, from November 25 until December 30, 2010. Since Storms and Brownstone waited, as requested by Mr. Watkins, from November 19, 2010 until December 23, 2010, for an offer on some of the remaining equipment, the evidence shows that Storms and Brownstone had only seven (7) days of unhampered time to move the final pieces of equipment from the Premises.

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[226] Id.
[227] Trial Exhibit A, at p. 000012.
[228] Id.

Storms and Brownstone have not requested a return of any portion of the $5,000.00 prepaid rent for their final month in possession of the Premises. That amount amply covers the seven days Storms and Brownstone utilized, after accommodating Dane Watkins' request to leave the bar and other items in place pending a purchase offer, to move out of the building.

Therefore, Watkins has not shown that Storms and Brownstone were unjustly enriched by the thirty-six (36) days they used to vacate the Premises, only seven (7) of which were without encumbrance by Mr. Watkins.

D. Other Trial Issues.

Finally, a number of other disputed issues arose at trial which Watkins did not argue in closing. Whether or not Watkins intended to include those issues is unknown, but the Court shall address them briefly.

1. Auger Holes.[229]

Watkins submitted photographs of holes drilled through the ceiling of the Restaurant. Storms identified these holes as auger holes through which barley, milled by Storms,[230] was transferred to the brewery. Snow Eagle Brewery and Grill also installed an auger for its brewing process.[231] Storms testified that Gerald Mitchell used the same auger holes, originally drilled by Storms and Burggraf, for his restaurant.

Watkins shall not recover for any alleged damages caused by the auger holes.

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[229] See: Trial Exhibits 3.78, 3.114, 3.136
[230] See: Trial Exhibit T.97.
[231] See: Trial Exhibits T.168 and T.169.

2. Upstairs Door.[232]

Dane Watkins complained that Trial Exhibits 3.79 and 3.80 depicted "door damage." He thought the duct tape was being used just to shut the door. He testified repairs were necessary to "secure the location." Watkins could not say whether the door in Trial Exhibit 3.79 and 3.80 was the same door as was in place in 1996 when the Premises were turned over to Storms and Burggraf.

Tamara Metcalf testified that the door shown in Trial Exhibits 3.79 and 3.80, which lacks a deadbolt and has duct tape over the sliding latch, was the door "into the room where the manager's office is." The duct tape was installed so that when employees carried heavy items out of the storage room, they could open the door without putting down their burden.

Watkins failed to carry his burden as to any damage to the upstairs door attributable to Storms and Brownstone.

3. Office Door.[233]

Watkins testified that Storms and Brownstone left the office door without a deadbolt and that the deadbolt had to be replaced. Watkins believed that the office door had a deadbolt when the Premises were turned over to Storms and Burggraf. However, Watkins was unsure whether Trial Exhibit 3.91 was, in fact, the upstairs office door. He later waivered, stating that if the door had not had a deadbolt in 1996, such a condition "would have been repaired."

Tamar Metcalf remembered that the office door never had a deadbolt in it, during her employment for Storms and Brownstone, beginning in 2002. Kathy Burggraf

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[232] See: Trial Exhibits 3.79 and 3.80.

testified that the office door depicted in Trial Exhibit 3.91 was in the exact same condition as when she and Storms took possession of the Premises.

4. Emergency Exit Latch on Garage Door.[234]

Trial Exhibits 23 and 33 show charges for the installation of an emergency exit device on the man door next to the north side garage door behind the kitchen on the Premises. Restaurant employee Ryan Getsinger testified that no emergency exit alarm was installed on the man-door next to the garage door during his employment for Storms and Brownstone from 2007 until the Restaurant closed in 2010. Storms also stated that an alarm device on the man-door next to the garage door never existed during his leasehold of the Premises.

Trial Exhibit 38.29 shows the man door next to the garage door without a red bar or red device. Trial Exhibit 38.29 was taken as Storms and Brownstone exited the Premises.

Trial Exhibit 39.05, on the other hand, shows the same door with a red handle or device for sounding an alarm if the door is opened. Trial Exhibit 39.05 was taken during the renovations of the Premises for Gerald Mitchell.

This Court finds that Watkins has not shown entitlement to the costs of installing an emergency exit device where no such device was utilized by Storms and Brownstone.

5. Storms' and Brownstone's Counterclaim.

Storms and Brownstone seek recovery of attorney fees, storage rental fees, insurance for the Premises, liability and equipment insurance, electricity costs, and added move-out costs for the period of time they were forced to remain in possession of the

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[233] See: Trial Exhibit 3.91.

Premises under the temporary restraining order, entered by this Court at Watkins' request, and the follow-up litigation over Watkins' requested writ of attachment.[235] Storms' and Brownstone's counterclaim totals $21,078.39.[236]

Watkins argues that Storms and Brownstone cannot recover damages incurred by the temporary restraining order and follow-up litigation unless Storms and Brownstone were "wrongfully enjoined or restrained."[237] Watkins contends there is no allegation or evidence that it acted wrongfully in seeking the temporary restraining order or preliminary injunction, or that this Court wrongfully issued the partial preliminary injunction.[238]

The parties arguments require a detailed look into litigation which occurred prior to Storms' and Brownstone's relinquishment of the Premises to Watkins. On October 1, 2010, this Court issued the temporary restraining order, pursuant to Idaho Code § 8-502(d), enjoining Storms and Brownstone from removing "any property" from the Premises.[239] Watkins posted the requisite $10,000.00 bond on October 5, 2010.[240]

On October 14, 2010, this Court held a Show Cause hearing on Watkins' Motion for Prejudgment Writ of Attachment and Preliminary Injunction.[241] The matter was taken

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[234] See: Trial Exhibits 38.29 and 39.05.
[235] Storms' and Brownstone's Argument, at pp. 50-52.
[236] Storms' and Brownstone's Argument, at p. 52, ¶ 40.
[237] Watkins' Closing Argument, at p. 31; Idaho Rule of Civil Procedure 65(c).
[238] Watkins' Closing Argument, at p. 32.
[239] *Temporary Restraining Order*, at p. 2.
[240] Notice of Filing Bond, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed October 5, 2010).
[241] Minute Entry, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010) (hereinafter the **"November 24, 2010 Minute Entry"**). This Court notes that the handwritten date on page 1 of the November 24, 2010 Minute Entry is erroneous.

under advisement, with the parties given additional briefing time.[242] The *Temporary Restraining Order* remained in effect until the Court issued its ruling.[243]

On November 4, 2010, this Court issued its *Partial Preliminary Injunction*, wherein Watkins' request for a prejudgment writ of attachment was denied on the ground that Watkins had not shown a reasonable probability that it would prevail on its claims under the "New Lease."[244] Thus, Watkins did not have a valid claim against Storms and Brownstone for which attachment would issue.

However, this Court granted Watkins a partial preliminary injunction based upon Idaho Code § 55-308, which prohibits a tenant from removing fixtures from rented premises if such removal would cause damage to the premises.[245] In so doing, the *Temporary Restraining Order* was dissolved. "[A] restraining order is effective only until a hearing is had upon the order to show cause, and if, upon such hearing, an injunction *pendent lite* is granted, the latter supersedes the temporary restraining order, which has then served its purpose and become *functus officio*."[246]

This Court also relied upon Idaho Rule of Civil Procedure 65(c) for the authority to issue the preliminary injunction.[247] Watkins was required to post a $10,000 cash or surety bond prior to the issuance of the preliminary injunction.[248] Watkins did not post a separate bond pertaining to the *Partial Preliminary Injunction* or request that the *Temporary Restraining Order* bond be substituted for the *Partial Preliminary Injunction* bond. (Neither did Watkins request exoneration of the *Temporary Restraining Order*

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[242] November 24, 2010 Minute Entry, at p. 4.
[243] Id.
[244] *Partial Preliminary Injunction*, at p. 12.
[245] *Partial Preliminary Injunction*, at p. 13.
[246] *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869, 872-3 (1925).

bond, however.) Watkins was also ordered to prepare the preliminary injunction order, which Watkins did not do.[249]

Instead, on November 9, 2010, Watkins moved for reconsideration of the *Partial Preliminary Injunction* and argued that the "New Lease" was a valid contract between the parties pursuant to Idaho Code § 55-307.[250] Watkins renewed its request for a prejudgment writ of attachment.[251] On the same date, Storms and Brownstone moved for reconsideration of the partial preliminary injunction only, on the grounds that no evidence had been submitted for preliminary injunction or the amount of the bond.[252] This Court set aside the *Partial Preliminary Injunction* that same day, November 9, 2010.[253]

A hearing was held on the two motions for reconsideration on November 17, 2010.[254] Watkins' Reconsideration Motion was denied.[255] Watkins orally moved for a Rule 54(b) certificate for purposes of appeal.[256] As to the preliminary injunction issue, the parties stipulated to most of the items in dispute, save for three: the bar, the outdoor signs and poles, and the north and east awnings.[257] The Court took under advisement the matters of Watkins' Rule 54(b) certificate request and the three items in dispute.[258]

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[247] Id.
[248] *Partial Preliminary Injunction*, at p. 14.
[249] Id.
[250] Watkins' Reconsideration Motion, at p. 2.
[251] Id.
[252] See: Storms' and Brownstone's Reconsideration Motion.
[253] See: *Set Aside Order*.
[254] Minute Entry, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010).
[255] Id., at p. 2.
[256] Id.
[257] Id.
[258] Id., at p. 4.

On November 24, 2010, this Court issued the *Second Partial Preliminary Injunction*. This Court granted Watkins a preliminary injunction as to the outdoor poles only. Watkins was required to post a bond in the amount of $10,500.00 to cover the cost of the poles.[259] The preliminary injunction was predicated upon the posting of the bond.[260] Nothing in the record shows that Watkins posted the preliminary injunction bond. Neither did Watkins request to substitute the *Temporary Restraining Order* bond for the *Second Partial Preliminary Injunction* bond. This Court, by separate order dated November 24, 2010, denied Watkins' request for a Rule 54(b) certificate.[261]

Thus, a writ of attachment never issued in this case. Indeed, a preliminary injunction never issued in this case either. Instead, the *Temporary Restraining Order*, originally granted on October 1, 2010, remained in effect until November 24, 2010. This is because after the November 4, 2010 *Partial Preliminary Injunction*, wherein Watkins' argument in favor of a writ of attachment was denied, Watkins moved for reconsideration of this Court's denial of a writ of attachment. Storms and Brownstone were not at liberty to move anything out of the Restaurant until Watkins' request for a writ of attachment was finally adjudicated (both on the merits and with regard to Watkins' request for a Rule 54(b) certificate). In short, Watkins prolonged the period of time in which Storms and Brownstone remained in possession of the Premises through November 24, 2010.

Furthermore, the preliminary injunction granted pursuant to Idaho Code § 55-308 in the *Partial Preliminary Injunction*, which issued on November 4, 2010, never came

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[259] *Second Partial Preliminary Injunction*, at p. 12.
[260] Id.
[261] Order Denying Plaintiff's Request for a Rule 54(b) Certificate, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010).

into being. Watkins never filed the bond required.[262] Watkins never prepared the preliminary injunction order, as required by the *Partial Preliminary Injunction*.[263]

Storms and Brownstone requested reconsideration of the *Partial Preliminary Injunction* on the grounds that evidence to sustain the injunction had not been offered.[264] This Court dissolved the *Partial Preliminary Injunction* on November 9, 2010.[265] When the *Second Partial Preliminary Injunction* issued on November 24, 2010, Watkins was again ordered to post a bond with the Clerk of the Court in the amount of $10,500.00, which represented the replacement costs for the poles supporting the two outdoor signs Storms and Brownstone were enjoined from removing.[266] Only the original $10,000.00 bond, paid at the issuance of the temporary restraining order, remained with the Clerk of the Court. Watkins did not pay the additional amount required in the *Second Partial Preliminary Injunction.*

Whether or not the *Second Partial Preliminary Injunction* came into being based upon the $10,000.00 temporary restraining order bond is, in the end, of little relevance. The *Temporary Restraining Order*, based upon Watkin's request for a writ of attachment under Idaho Code § 8-502(d), expired when this Court denied the writ. Watkins moved for reconsideration of this Court's denial of the writ.[267] At the November 17, 2010 hearing, this Court denied Watkins' Reconsideration Motion.[268] Watkins then orally

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[262] See: *Partial Preliminary Injunction*, at p. 14.
[263] *Partial Preliminary Injunction*, at p. 12.
[264] Storms' and Brownstone's Reconsideration Motion, at p. 2.
[265] *Set Aside Order*.
[266] *Second Preliminary Injunction*, at p. 11.
[267] Watkins' Reconsideration Motion.
[268] Minute Entry, *The Watkins Company, LLC v. Storms*, Bonneville County case no,. CV-2010-5958 (filed November 24, 2010), at p. 2.

requested a Rule 54(b) certificate to appeal this Court's denial of the writ.[269] Watkins' request for a Rule 54(b) certificate was denied on November 24, 2010.[270]

During the pendency of the writ question, not only did Watkins' temporary restraining order bond remain with the Clerk of the Court, but also, Storms and Brownstone could not remove any of their property from the Premises. Simply put, the issue had not been finally adjudicated. Watkins sought a writ to attach on all of Storms' and Brownstone's property within the Premises.[271]

While prohibited from removing property and equipment from the Premises, Storms and Brownstone incurred costs and fees for insurance and utilities to protect both the property within the Premises and the Premises itself. Neither Idaho Code § 8-502(d) nor § 8-503 addresses the wrongful issuance of a temporary restraining order, only the wrongful issuance of a writ. (This Court notes that the term "wrongful," in the context of a writ of attachment, does not mean a malicious attachment without probable cause, but a writ for which no valid grounds for attachment exist.)[272]

On the other hand, Idaho Rule of Civil Procedure 65(c), which pertains to all restraining orders issued, requires a bond "for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Wrongful restraint does not equate to malicious conduct, but to a determination that the basis for the requested restraint was without merit.

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[269] Id.
[270] Order Denying Plaintiff's Request for a Rule 54(b) Certificate, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 24, 2010).
[271] Watkins' Affidavit, at p. 5, ¶ 21.
[272] See: *Taylor v. Fluharty*, 35 Idaho 705, 208 P. 866, 870-1 (1922).

Such is the situation in this case. Watkins sought a writ of attachment based upon the New Lease he claimed against Storms and Brownstone. This Court determined that the New Lease never came into effect between the parties. Thus, Watkins' basis for the temporary restraining order was ultimately found to be without merit. Therefore, Storms and Brownstone may recover their costs and fees up to the amount of the bond.

Storms identified attorney fees he paid to Mr. Brandstetter for time spent on the temporary restraining order and writ of attachment issues.[273] The fees indicated in Trial Exhibit J were incurred from September 29, 2010 through December 21, 2010.[274]

The litigation between the parties to this lawsuit, between the dates of October 1, 2010 and November 24, 2010, revolved entirely around Watkins' request for a temporary restraining order and writ of attachment. The issues which were eventually tried dealt with the state of the Premises after Storms and Brownstone vacated the building. Thus, it is clear from the record that the attorney fees incurred by Storms and Brownstone from September 29, 2010 through November 24, 2010 are recoverable under Idaho Rule of Civil Procedure 65(c) because the temporary restraining order was ultimately determined to be without merit, and because the only issues before the Court from the inception of the lawsuit (October 1, 2010) until the writ and injunction issues were finally adjudicated (November 24, 2010) were the writ and injunction matters.

Taking into consideration the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal services properly, the experience and ability of Mr. Brandstetter in the particular field of law, the charges incurred in comparison to fees incurred in similar cases, the amount involved and the results

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[273] See: Trial Exhibit J.

obtained, the undesirability of the case, and awards in similar cases, this Court finds that Mr. Brandstetter's fee of $11,815.00 is reasonable for the work Mr. Brandstetter accomplished regarding the temporary restraining order and Watkins' efforts to gain a writ of attachment. This fee encompasses the period of September 29, 2010 through November 17, 2010.[275]

The remaining $810.00 requested by Storms shall not be included in the Rule 65(c) award for the reason that the temporary restraining order and writ of attachment issues were finalized by November 24, 2010. In addition, Mr. Brandstetter's time sheet shows that after November 17, 2010, he was involved in preparation of the answer to Watkins' Complaint, as well as correspondence and teleconferences with Storms and with opposing counsel. None of the entries after November 17, 2010 reference the restraining order or writ issues. Accordingly, the attorney fees charged after November 17, 2010 shall not be recovered by Storms and Brownstone under their Rule 65(c) theory.

In terms of the insurance and utilities Storms paid for the Premises during the months of October, November, and December of 2010, Storms could not begin to move out of the Premises until November 25, 2010. Therefore the costs Storms incurred from October 1, 2010 through and including November 24, 2010 are attributable to Watkins' wrongful temporary restraining order and its failed efforts to impose a writ of assistance on Storms and Brownstone. Therefore, Storms is entitled to recover as damages, those insurance and utility costs and fees associated with the period of October 1, 2010 through and including November 24, 2010.

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[274] Id.
[275] See: Trial Exhibit J.

Storms rented storage space from Lincoln Storage (no. A18) at a cost of $120.00 per month beginning on September 29, 2010.[276] Storms rented space A18 for the months of October and November of 2010. Storms is entitled to recover rent for the month of October and twenty-four days of November (at the rate of $4.00 per day for a thirty-day month) for the rental of Lincoln Storage space A18, for a total recovery of $216.00.

Storms rented Lincoln Storage space A12, at a cost of $135.00 per month, beginning on August 24, 2009.[277] He moved personal items from space A12 to another location so that he could use space A12 for equipment from the Restaurant. Storms' did not identify when he moved his personal items out of space A12, but he did testify that he rented the space for October, November, and December of 2010. Without better evidence of when Storms moved his personal items out of space A12, however, the record does not support a finding that Storms' rental of space A12 is attributable to Watkins.

Storms rented Lincoln Storage space A09, at a cost of $135.00 per month, beginning on September 22, 2010.[278] Storms rented space A09 for the months of October and November of 2010. Storms is entitled to recover rent for the months of October and twenty-four days of November (at the rate of $4.50 per day for a thirty-day month) for the rental of Lincoln Storage space A09, at a total recovery of $243.00.

Storms continued to insure the building in which the Restaurant had been located through October 25, 2010. The annual cost for the building insurance was $2,385.00.[279] The monthly cost of the building insurance ($2,385.00 ÷ 12) equaled $198.75, making

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[276] Trial Exhibit B, at pp. 00001 and 00002.
[277] Trial Exhibit B, at pp. 00003 and 00004.
[278] Trial Exhibit B, at pp. 00005 and 00006.

the daily insurance rate for October $6.41. Storms is entitled to recover $160.25 for the building insurance premium attributable to the period of October 1, 2010 through October 25, 2010.

Storms also maintained business personal property insurance, liability rated on sales/payroll, liquor liability, equipment breakdown coverage, terrorism coverage, cluster endorsement, and food contamination insurance on the Premises through January 11, 2011.[280] The $4,334.00 combined annual premium breaks down to $361.17 per month. Storms is entitled to recover the insurance premiums he paid on the Premises for the month of October 2010 and for twenty-four days of the month of November 2010 (at $12.04 per day for a thirty-day month), for a total amount of $650.13.

Storms paid $678.97 for electrical usage, water, sewer, and garbage for the month of October 2010.[281] Storms is entitled to recover that amount under Rule 65(c).

Storms paid $1,246.80 for electrical usage, water, sewer, and garbage for the month of November 2010.[282] This figure breaks down to $41.56 per day for a thirty-day month. Storms is entitled to recover $997.44 for utilities for November 1-24, 2010 under Rule 65(c).

Storms paid $298.54 to Intermountain Gas Company for October of 2010, and $794.34 for November of 2010.[283] Storms shall recover the gas charges he paid for October of 2010. The November charge breaks down to $26.48 per day for a thirty-day

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[279] Trial Exhibit D, at pp. 00004 and 00005.
[280] Trial Exhibit D, at pp. 00004, 00008.
[281] Trial Exhibit F, at p. 1.
[282] Trial Exhibit F, at pp. 1, 2.
[283] Trial Exhibit H

month. Storms is entitled to recover, pursuant to Rule 65(c), $635.52 for November 1-24 of 2010, together with $298.54 for the month of October, for a total recovery of $934.06.

Furthermore, Storms paid Herbert Rockhold an additional $2,000.00 in moving costs because the move took place in the snow and ice of late-November and December of 2010 instead of early-October of 2010 due to the temporary restraining order and Watkins' attempts to secure a writ of attachment. The weather conditions slowed the move-out process, necessitating the additional $2,000.00 charged by Rockhold. Storms is entitled to recover the additional $2,000.00 charged by Rockhold pursuant to Idaho Rule of Civil Procedure 65(c).

In sum, Storms and Brownstone have shown themselves entitled to receive $17,015.88 in costs and fees attributable to Watkins' wrongful temporary restraining order. Since Storms and Brownstone are allowed costs and fees only up to the amount of the bond, they shall recover the full $10,000.00 bond from Watkins.

6. Attorney Fees.

The parties' attorney fee requests shall be determined upon the filing of motions, if any, by the parties. Any attorney fee motions shall be filed within fourteen (14) days of the date of the forthcoming judgment.[284]

VI. CONCLUSIONS OF LAW

Based upon the foregoing findings and analyses, the following conclusions are appropriate:

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[284] Idaho Rules of Civil Procedure 54(d)(5), 54(e)(5).

1. The terms of the Lease carried over into Storms' and Brownstone's tenancy at will as guidelines for determining whether or not Storms and Brownstone breached their duties as tenants to Watkins.

2. Storms and/or Brownstone breach the covenant to repair in the Lease with regard to the broken vestibule window pane, the unusable panic bar on the north-side entrance, and the uncleaned grease trap.

3. Watkins should be awarded $699.64 for cleaning or repairs of the Premises as a result of Storms' and/or Brownstone's breach. In the alternative, Watkins should recover $699.64 from Storms and Brownstone for waste committed upon the Premises.

4. Storms and Brownstone were not unjustly enriched by possession of the Premises from November 25, 2010 to December 30, 2010 without paying rent.

5. Storms and Brownstone shown themselves entitled to recover storage rental expenses, additional moving expenses, insurance expenses, utility expenses, and attorney fees as damages for the temporary restraining order entered against them.

6. Storms and Brownstone are entitled only to recover the amount of the bond paid by Watkins for the temporary restraining order, which amounts to $10,000.00.

VII. ORDERS

In accordance with the foregoing findings and conclusions, the following orders are appropriate:

1. Watkins shall take nothing by its allegations against Burggraf.

2. Watkins shall take nothing by its Count One (breach of contract) claims against the defendants.

3. Watkins' Count Two request for injunctive relief is denied as moot.

4. Watkins' shall take nothing by its Count Three request for an accounting under the "New Lease."

5. Watkins' request for the defendants' eviction in Count Four of its Second Amended Complaint is denied as moot.

6. Watkins shall recover $699.64 from Storms and Brownstone for repairs to the Premises necessitated by Storms' and Brownstone's breach of the expectations of their at-will tenancy with Watkins or, in the alternative, for waste to the Premises.

7. Watkins shall take nothing by its claim of unjust enrichment against Storms and Brownstone.

8. Storms and Brownstone shall recover the full amount of the $10,000.00 bond given by Watkins for the *Temporary Restraining Order* on their counterclaim against Watkins.

IT IS SO ORDERED.

DATED this 19TH day of November 2014.

Darren B. Simpson
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on November 19, 2014, I served a true copy of the foregoing Findings of Fact and Conclusions of Law on the parties listed below by deposit into the U.S. mail, by deposit into the attorney's courthouse mailbox, or by facsimile transmission.

B.J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

☐ U.S. Mail ☑ Courthouse Box ☐ Facsimile

Dean C. Brandstetter, Esq.
COX, OHMAN &
BRANDSTETTER, CHARTERED
510 "D" Street
P.O. Box 51600
Idaho Falls, ID 83405-1600

☐ U.S. Mail ☑ Courthouse Box ☐ Facsimile

RONALD LONGMORE, Clerk of the Court

By: _____
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT STATE OF IDAHO BINGHAM COUNTY

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
November 19, 2014
AT 9:21 a.m.
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	**CASE NO. CV-2010-5958** **JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff The Watkins Company, LLC, an Idaho Limited Liability Company (hereinafter "Watkins") shall take nothing by its allegations against defendant Kathy Burggraf, an individual.

Watkins shall take nothing by its breach of the "New Lease" claims against the defendants.

Watkins' request for injunctive relief against the defendants is denied as moot.

Watkins' shall take nothing by its request for an accounting under the "New Lease."

Watkins' request for the defendants' eviction is denied as moot.

Watkins shall recover $699.64 from defendant Michael Storms, an individual (hereinafter "Storms"), and defendant Brownstone Companies, Inc., an Idaho Corporation (hereinafter "Brownstone"), for repairs to the premises located at 455 River Parkway, Idaho Falls, Idaho (hereinafter the "Premises") necessitated by Storms' and Brownstone's breach of the expectations of their at-will tenancy with Watkins or, in the alternative, for waste to the Premises.

Watkins shall take nothing by its claim of unjust enrichment against Storms and Brownstone.

Storms and Brownstone shall recover the full amount of the $10,000.00 bond given by Watkins for the *Temporary Restraining Order* on their counterclaim against Watkins.

IT IS SO ORDERED.

DATED this 19TH day of November 2014.

Darren B. Simpson
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on November 19, 2014, I served a true copy of the foregoing Judgment on the parties listed below by deposit into the U.S. mail, by deposit into the attorney's courthouse mailbox, or by facsimile transmission.

B.J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
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RONALD LONGMORE, Clerk of the Court

By: _____
Deputy Clerk

SEVENTH JUDICIAL DISTRICT
DISTRICT COURT
STATE OF IDAHO
BINGHAM COUNTY

DEAN C. BRANDSTETTER, ESQ.
COX, OHMAN & BRANDSTETTER, CHARTERED
510 "D" STREET
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(208) 522-8606
Fax: (208) 522-8618
Idaho State Bar No.: 2960

ATTORNEYS FOR MICHAEL STORMS AND BROWNSTONE COMPANIES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC., an Idaho Limited Liability Company, Plaintiff/Counter-Defendant vs. MICHAEL STORMS, an individual; and BROWNSTONE COMPANIES, INC., an Idaho Corporation collectively doing , Defendants/Counterclaimants.	**Case No.: CV-10-5958** **MOTION FOR ATTORNEY FEES AND COSTS**

COMES NOW the Defendants/Counterclaimants, Michael Storms and Brownstone Companies, by and through their attorney of record, Dean C. Brandstetter, Esq., and move the Court for an award of attorney fees and costs necessarily incurred by Defendants/Counterclaimants in successfully defending Plaintiff's causes of action and prosecuting Defendants'/Counterclaimants' counterclaim. Said motion is made and based pursuant to the provisions of Idaho Code §12-120(3). This motion is based on the record and file in this matter and the affidavit and memorandum of costs and attorney fees filed simultaneously

herewith. Defendants/Counterclaimants request oral argument.

DATED this 3rd day of December, 2014.

DEAN C. BRANDSTETTER, ESQ.
Attorney for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 3rd day of December, 2014, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

B.J. Driscoll, Esq. Smith, Driscoll and Associates 414 Shoup P.O. Box 50731 Idaho Falls ID 83405 Fax: 529-4166	[ ] By pre-paid post [ ] By hand delivery [X] By facsimile transmission [ ] By Courthouse box
Honorable Darren B. Simpson Bingham County Courthouse 501 N. Maple St. #402 Fax: 782-3167	[ ] By pre-paid post [ ] By hand delivery [X] By facsimile transmission [ ] By Courthouse box

DEAN C. BRANDSTETTER, ESQ.

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(208) 522-8606
Fax: (208) 522-8618
Idaho State Bar No.: 2960

ATTORNEYS FOR MICHAEL STORMS AND BROWNSTONE COMPANIES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC., an Idaho Limited Liability Company, Plaintiff/Counter-Defendant vs. MICHAEL STORMS, an individual; and BROWNSTONE COMPANIES, INC., an Idaho Corporation collectively doing , Defendants/Counterclaimants.	**Case No.: CV-10-5958** **MEMORANDUM OF ATTORNEY'S FEES AND COSTS**

Defendants/Counterclaimants submit the following Memorandum of Attorney Fees and Costs to be assessed against The Watkins Company, LLC.,:

$ 80,126.50	-	Cox, Ohman & Brandstetter, Chartered Attorney's Fees;
$ 220.57	-	02/28/2014 Electronic legal research
$ 500.00	-	12/27/2012 Richard St.Clair Mediator Fee;
$ 80,846.97	-	**TOTAL**

The above attorney fees are more particularly itemized in the Affidavit of counsel filed herein of which is by reference made a part hereof as though fully set out herein.

STATE OF IDAHO)
) ss.
County of Bonneville)

DEAN C. BRANDSTETTER, being first duly sworn, says that he is the attorney for Defendants/Counterclaimants, in the above-entitled action and as such is fully informed relative to the above described costs and attorney fees incurred by him in defense of Plaintiff's causes of action and in prosecution of Defendants/Counterclaimants counterclaim against Plaintiff. That to the best of Affiant's knowledge and belief, the costs and attorney fees incurred by Kirk Vance herein and as set out in the above Memorandum and the Affidavit filed herein are true and correct; that same have been necessarily incurred by Defendants/Counterclaimants in defending and prosecuting this matter; and that the costs and attorney fees are in compliance with Idaho law.

DATED this 3rd day of December, 2014.

DEAN C. BRANDSTETTER, ESQ.

SUBSCRIBED AND SWORN to before me this 3 day of December, 2014.

JESSICA M. HOWARD NOTARY PUBLIC STATE OF IDAHO

Jessica M. Howard
NOTARY PUBLIC FOR IDAHO
Residing at : Bonneville
My Commission Expires: 9-22-2020

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 3rd day of December 2014, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

B.J. Driscoll, Esq.
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Idaho Falls ID 83405
Fax: 529-4166

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IDAHO FALLS, IDAHO 83405-1600
(208) 522-8606
Idaho State Bar No.: 2960

ATTORNEYS FOR MICHAEL STORMS AND BROWNSTONE COMPANIES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC., an Idaho Limited Liability Company, Plaintiff/Counter-Defendant vs. MICHAEL STORMS, an individual; and BROWNSTONE COMPANIES, INC., an Idaho Corporation collectively doing , Defendants/Counterclaimants.	**Case No.: CV-10-5958** **AFFIDAVIT IN SUPPORT OF MEMORANDUM OF ATTORNEY'S FEES AND COSTS**

STATE OF IDAHO)
)ss.
County of Bonneville)

DEAN C. BRANDSTETTER, ESQ., being first duly sworn on oath, deposes and says:

1. Affiant is a partner in the law firm of Cox, Ohman & Brandstetter, Chartered, which represents the Defendants/Counterclaimants in the above-entitled matter.

2. The firm of COX, OHMAN & BRANDSTETTER, Chartered, was retained by

Defendants/Counterclaimants, to assist Defendants/Counterclaimants in defense of the causes of action brought by Plaintiff and in prosecution of the Defendants/Counterclaimants Counterclaim against the Plaintiff.

3. Affiant's hourly rate is $225.00.

4. Affiant was required to participate in a multiple hearings and a trial lasting seven days. Affiant defended and prosecuted multiple Motions for Summary Judgment. Affiant propounded and answered extensive discovery, and brought and defended multiple motions to compel. Filed answers to several amended complaints and prepared an Counterclaim on behalf of Defendants/Counterclaimants. Affiant performed extensive legal research on the various claims, causes of action and issues raised throughout the case and prepared multiple memoranda and briefs. Further, affiant exhaustively interviewed large numbers of witnesses, reviewed voluminous records, photographs, exhibits, and documents. Finally, affiant prepared comprehensive proposed findings of fact, conclusions of law and argument after the evidence concluded.

5. The case dealt with difficult questions of law and fact and did consume the amount of time and effort set forth.

6. The skill requisite to perform the services properly were that typical of researching legal issues and presenting them in court.

7. Affiant has been litigating cases since 1982 and has thirty two (32) years of litigation experience.

8. There was no time limitation imposed by the Defendants/Counterclaimants and much of the work was responsive to the Plaintiffs actions in the proceedings.

9. The circumstances of the case imposed no time limitations except in regards to the questions involved.

10. The attorney fee is fixed.

11. Affiant has represented Defendants/Counterclaimants since 2010 in other proceedings and matters.

12. The action was not undesirable and affiant's efforts were greatly successful. Plaintiff sought damages in excess of $27,000, but were denied virtually all relief except $699.64 or roughly 2%. Further, on the Counterclaim, the Defendants/Counterclaimants requested an award of $21,078.39, the court found damages in favor of Storms and Brownstone in the amount of $17,015.88 and recovered judgment in the amount of $10,000 the amount of the bond posted by Plaintiff and set by the court.

13. Defendants/Counterclaimants are entitled to attorney's fees pursuant to Idaho Code §12-120(3) in that a commercial transaction was alleged (all transactions except for personal or household purposes).

14. Between November 18, 2010 and the date hereof the time and labor required devoted exclusively to the defense of plaintiff's claims and the prosecution the counterclaim of amounts to $86,876.50 or three hundred eighty six and twelve hundredths (386.12) hours. Throughout, affiant's representation of Defendants/Counterclaimants in these proceedings by reason of the extensive time that was required and as a courtesy to Defendants/Counterclaimants Affiant discounted the number of hours actually billed. As reflected in the itemized charges for services attached hereto and made a part hereof thirty (30) hours were not charged. While in Affiant's opinion, the Plaintiff is not entitled to the benefit of affiant's courtesy, Affiant claims

attorney fees only in the amount actually charged and paid by Defendants/Counterclaimants amounts to $406.50 or three hundred fifty two and ninety-two hundredths (2.92) hours. That the foregoing attorney fees pertain solely to the prosecution of the within action. Attached hereto as **Exhibit "A"** is a true and correct copy of this office's billing setting forth costs and attorneys fees incurred for the above purposes

15. In addition Affiant has incurred attorney fees in the sum of $720.00 or three and two tenths (3.2) hours in the preparation of the Motion for Attorney Fees and Costs, the Memorandum of Costs and Attorney Fees and the Affidavit of Attorney Fees and Costs and supporting exhibit. Since no hearing has been held and if objection is made to the request for attorney fees additional attorney fees may be incurred, the Defendants/Counterclaimants reserve the right to supplement the request as additional attorney fees are incurred.

16. To the best of Affiant's knowledge and belief, the amount of $80,126.50 for attorney fees and $720.47 for costs is correct and to which the Defendants/Counterclaimants are entitled to recover in the total sum of $80,846.97.

17. Awards in similar cases are similar to the amount requested herein.

18. In the course of my experience I have become familiar with the time other attorney devote and charges other attorneys charge for like work and the prevailing charges for like work would be comparable to those charged and sought herein.

19. That based on Affiant's knowledge, belief and expertise as a practicing Idaho attorney for over thirty years, Affiant verily believes and opines that the costs, disbursements and attorney fees as charged and set for herein are fair, reasonable, correctly stated, properly claimed and are in accordance with Idaho Law.

20. On behalf of Defendants/Counterclaimants affiant hereby requests that Defendants/Counterclaimants be permitted to recover their attorney fees in the sum of $80,126.50 and costs in the sum of $20.47 for the total sum of $80,846.97 and that Defendants/Counterclaimants have judgment against Plaintiff for that amount.

DATED this 3rd day of December, 2014.

DEAN C. BRANDSTETTER, ESQ.
Attorney for Defendants/Counterclaimants

SUBSCRIBED AND SWORN to before me this 3rd day of December, 2014.

Jessica M. Howard
NOTARY PUBLIC FOR IDAHO
Residing at: Bonneville
My Commission Expires: 9-22-2020

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 3rd day of December, 2014, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

B.J. Driscoll, Esq.
Smith, Driscoll and Associates
414 Shoup
P.O. Box 50731
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510 "D" Street
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(208) 522-8606
TIN 82-0365834

MICHAEL STORMS
999 S Lee
Idaho Falls ID 83404

December 03, 2014
ACCOUNT NO: 25075-000M
STATEMENT NO: 54

Landlord/Tenant

12/01/2010	Office Conference with client	337.50
	Review and respond to email from Mr. Driscoll	22.50
	Preparation of Answer to Complaint	90.00
12/02/2010	Telephone Conference with client	22.50
12/03/2010	Review and respond to emails from counsel	45.00
12/06/2010	Telephone Conference with client	45.00
12/10/2010	Review and respond to emails from Mr. Driscoll	67.50
12/14/2010	Preparation of letter to Mr. Driscoll	45.00
	Review email from Mr. Driscoll	22.50
12/15/2010	Preparation of email to client	22.50
12/21/2010	Telephone Conference with Mr. Driscoll	45.00
	Telephone Conference with client	45.00
	Review and respond to email from Mr. Driscoll	45.00
08/30/2011	Preparation of Motion to Dismiss and Notice of Hearing	112.50
09/06/2011	Telephone Conference with Mr. Driscoll	45.00
09/20/2011	Office Conference with client	405.00
09/21/2011	Telephone Conference with client	22.50
	Review of e-mail from client	45.00
	Preparation of Notice Vacating Heating and Withdrawing Motion to Dismiss	67.50
	Telephone Conference with Mr. Driscoll	22.50
10/13/2011	Preparation of Notice of No Conflict	45.00
10/18/2011	Review and respond to e-mail from Mr. Driscoll	45.00
	Review of e-mail from Mr. Driscoll and preparation of e-mail to client	45.00

10/24/2011	Preparation of Motion, Order, and Affidavit for Retention	180.00
12/09/2011	Telephone Conference with client	45.00
01/03/2012	Review e-mails from client	45.00
01/11/2012	Telephone Conference with client	45.00
05/11/2012	Preparation of e-mail to client	45.00
07/17/2012	Review and respond to e-mail from Mr. Driscoll	45.00
08/01/2012	Office Conference with client	292.50
08/07/2012	Court Appearance at Status Conference	225.00
08/17/2012	Preparation of letter to Mr. Whyte	45.00
09/12/2012	Preparation of letter to Mr. Driscoll	157.50
09/26/2012	Preparation of letter to Mr. Driscoll - 2nd cause	157.50
10/09/2012	Preparation of letter to Mr. Driscoll - 2nd cause	45.00
11/06/2012	Research landlord/tenant law tenancy at will, month to month, holdover tenancy, potential effect of remaining in possession after order of eviction, creating a term for years, month to month, or one year	225.00
11/07/2012	Review and respond to e-mail from Mr. Driscoll	45.00
	Preparation of e-mail to client	22.50
	Preparation of Interrogatories and Requests for Production of Documents	337.50
11/08/2012	Preparation of final revisions to discovery	225.00
11/09/2012	Preparation of letter to client	45.00
	Preparation of Notices of Service	112.50
11/13/2012	Preparation of e-mail to client and review of response	45.00
11/14/2012	Review and respond to e-mail from Judge St. Clair	45.00
11/19/2012	Preparation of letter to client	67.50
	Preparation of letter to client	67.50
	Preparation of e-mail to client	22.50
12/04/2012	Preparation of e-mail to client	45.00
	Review and respond to e-mail from client	45.00
12/06/2012	Office Conference with client	337.50
12/11/2012	Preparation of letter to Mr. Driscoll	45.00
	Preparation of Notice of Compliance Witnesses	112.50
12/13/2012	Preparation of letter to client	45.00

12/17/2012	Preparation for Mediation	90.00
	Appearance at Mediation	1,012.50
12/18/2012	Preparation of Motion to Compel and Stay Summary Judgment proceedings, and Affidavit	337.50
12/26/2012	Review and respond to e-mail from client	45.00
	Preparation of letter to Counsel	45.00
12/27/2012	Preparation of letter to Richard St. Clair	45.00
01/03/2013	Preparation of Motion for Summary Judgment, Notice of Hearing, Motion and Order Shortening Time	337.50
	Partial preparation of Responses to Discovery Requests	562.50
01/04/2013	Review and respond to e-mail from counsel	45.00
	Telephone Conference with client	45.00
	Preparation of partial and additional responses to discovery requests	225.00
01/07/2013	Office Conference with client	337.50
01/09/2013	Preparation of final revisions to discovery response and Notice of Service	112.50
	Search of all e-mails to include in discovery	112.50
01/11/2013	Review and respond to e-mail from counsel	112.50
	Partial preparation of Affidavit in Opposition to Motion for Summary Judgment	225.00
01/12/2013	Further preparation on Affidavit in Opposition to Motion for Summary Judgment and partial research on equitable relief	337.50
01/14/2013	Preparation of Affidavit in Opposition to Motion for Summary Judgment	450.00
	Preparation of e-mail to client	45.00
01/15/2013	Research "unjust enrichment, conferring of benefit, measure damages, unjust to retain the benefit"	337.50
	Review and respond to e-mail from client	45.00
	Office Conference with client	112.50
	Partial preparation of Brief in Opposition to Motion for Summary Judgment	112.50
01/16/2013	Office Conference with client, preparation of final revisions to Affidavit and Exhibits, preparation of Memorandum in Opposition to Motion for Summary Judgment, review and respond to e-mail from counsel, preparation of Motion to Compel, Affidavit in Support of Motion to Compel, and Notice of Hearing	1,800.00
01/17/2013	Telephone Conference with client	45.00
	Preparation of Motion, Affidavit, and Order Shortening Time	225.00
	Telephone Conference with Court Clerk	45.00
01/22/2013	Telephone Conference with Court and Counsel	67.50
	Telephone Conference with Mr. Driscoll	67.50
	Preparation of e-mail to client	22.50
01/28/2013	Preparation of e-mail to client	45.00
	Review of Watkins Supplemental Discovery	225.00
	Preparation and organization of photos to be included in Affidavit (discounted 1 1/2 hrs.)	112.50

01/29/2013	Preparation of revisions and amendments to Affidavit in Opposition to Motion for Summary Judgment and exhibits (discounted from 3.0 to 1.0)	225.00
	Telephone Conference with client	45.00
	Preparation of Supplemental Response to discovery (discounted)	337.50
01/30/2013	Preparation for Motion to Compel cross motions	225.00
	Court Appearance at Motion to Compel cross motions	337.50
	Preparation of e-mail to Mr. Driscoll	22.50
	Preparation of two (2) e-mails to Mr. Driscoll (1/29/2013)	67.50
01/31/2013	Telephone Conference with client	22.50
	Preparation of revisions to Affidavit in Opposition to Motion for Summary Judgment	180.00
02/01/2013	Review of discovery responses and additional copies made, and preparation of letter to Clerk	67.50
	Preparation of revisions to Affidavit in Opposition to Motion for Summary Judgment	180.00
02/06/2013	Telephone Conference with Judge Simpson's Clerk	45.00
	Telephone Conference with Judge Simpson's Clerk	45.00
02/13/2013	Review and respond to e-mail from Mr. Driscoll	22.50
	Research ability to file additional affidavits authorities	112.50
02/14/2013	Review of exit photos and preparation of e-mails to client	90.00
	Review and respond to e-mails from client	22.50
02/15/2013	Partial preparation for hearing on Motion for Summary Judgment	225.00
02/19/2013	Court Appearance at hearing on Motion for Summary Judgment and Motion to Amend	450.00
	Office Conference with client	337.50
	Review and forward e-mail to client	22.50
	Preparation for hearing on Motion for Summary Judgment	225.00
	Telephone Conference with Court and Counsel	45.00
02/20/2013	Preparation of letter to client	112.50
	Review and respond to e-mail from Mr. Driscoll	22.50
02/21/2013	Preparation of witness list and e-mail to client	45.00
	Preparation of e-mail to client	22.50
	Telephone Conference with client	67.50
	Telephone Conference with client	22.50
	Preparation of e-mail to Mr. Driscoll	22.50
	Review and respond to e-mail from Mr. Driscoll	67.50
02/22/2013	Review and respond to e-mail from Mr. Driscoll	225.00
	Detailed review of discovery responses from Watkins and timing of same	225.00
	Review and raespond to various e-mails from client	112.50
02/25/2013	Telephone Conference with Judge Simpson's Clerk	22.50
	Telephone Conference with client	45.00
	Telephone Conference with client	22.50
	Preparation of Counterclaim	225.00
02/26/2013	Office Conference with client	225.00
	Preparation of e-mail to Mr. Driscoll and preparation of revisions to Counterclaim	67.50

	Review e-mail from client	22.50
	Review and respond to e-mail from Mr. Driscoll	22.50
02/27/2013	Telephone Conference with client	45.00
	Preparation for Status Conference hearing	112.50
	Telephonic Status Conference hearing	112.50
	Telephone Conference with Mr. Driscoll	45.00
	Telephone Conference with client	45.00
	Preparation of e-mail to Mr. Driscoll	67.50
02/28/2013	Telephone Conference with client	45.00
	Preparation of e-mail to counsel	45.00
03/05/2013	Telephone Conference with Judge's Clerk	45.00
03/06/2013	Telephone Conference with client	45.00
	Office Conference with client	225.00
03/11/2013	Telephone Conference with client	22.50
	Office Conference with client	22.50
	Preparation of letter to Mr. Driscoll	45.00
	Preparation of e-mail to client	22.50
03/12/2013	Review of e-mail from Mr. Driscoll and forward to client	45.00
	Review e-mail, preparation of e-mail to client and to Mr. Driscoll	45.00
03/13/2013	Preparation of e-mail to client	22.50
03/14/2013	Review and respond to e-mail from client	22.50
03/19/2013	Office Conference with client	225.00
03/20/2013	Preparation of letter to Mr. Driscoll	67.50
03/21/2013	Preparation of e-mail to client	22.50
03/22/2013	Preparation of Notice of Settlement Failure	112.50
04/02/2013	Review of e-mail and attachments from Mr. Driscoll, and preparation of e-mail to client	67.50
04/03/2013	Office Conference with client	225.00
04/10/2013	Telephone Conference with Judge Simpson's Clerk	45.00
04/11/2013	Office Conference with client	112.50
05/14/2013	Review and forward of e-mail to Mr. Driscoll	22.50
	Review Decision on Motion for Summary Judgment	112.50
05/15/2013	Office Conference with client	180.00
06/10/2013	Telephonic Court Appearance with Court and counsel.	45.00
06/17/2013	Office Conference with client.	67.50

07/23/2013	Office Conference with client.	45.00
	Preparation for hearing on Motion for Sanctions and Motion to Amend.	225.00
07/24/2013	Preparation for hearing and argument outline.	225.00
	Court Appearance for hearing on Opposition to Motion to Amend and Motion for Sanctions.	337.50
	Preparation of Affidavit in Opposition to Motion for Sanctions.	112.50
08/21/2013	Preparation of Notice of Available Trial Dates.	45.00
09/17/2013	Review of email from counsel and preparation of email to client.	45.00
09/18/2013	Telephone Conference with client.	45.00
09/19/2013	Preparation of Defendant's 3rd Supplemental Answer to Discovery.	90.00
09/20/2013	Preparation of Amended Notice of Available Trial Dates.	67.50
09/23/2013	Office Conference with client.	225.00
	Preparation of Notice of available trial dates.	67.50
	Preparation of Notice of Service.	45.00
	Review and respond to email from Clerk.	45.00
09/25/2013	Preparation of email to Clerk	45.00
	Office Conference with client.	67.50
10/22/2013	Preparation of Answer to Second Amended Complaint and Counterclaim.	337.50
	Preparation of email to client and review of damage claims.	112.50
10/23/2013	Office Conference with client.	225.00
11/05/2013	Research filing a first counterclaim in response to a 2nd Amended Complaint	225.00
11/07/2013	Review of discovery and supplementation	112.50
	Preparation of email to client	45.00
11/12/2013	Office Conference with client	112.50
11/13/2013	Preparation of Response to Motion to Dismiss	112.50
11/15/2013	Preparation of Supplemental Response to Requests for Production and Interrogatories and Notice of Service	157.50
	Office Conference with client	45.00
	Telephone Conference with client	45.00
11/25/2013	Preparation for hearing on Motion to Strike Counterclaim	450.00
	Court Appearance at hearing on Motion to Strike Counterclaim	112.50
12/06/2013	Review and respond to email from Mr. Driscoll and prepare email to client	45.00
12/09/2013	Review and respond to email from Mr. Driscoll	22.50
12/18/2013	Preparation of email to Mr. Driscoll	22.50
01/07/2014	Preparation of Notice of Intent to Take Default and fax to Court and counsel	90.00

	Research Construction of contracts, Obligation to maintain, obligation to restore premises	225.00
	Research Idaho case law on issues raised by Motion for Summary Judgment on interpretation of "surrender of premises" provision of lease.	292.50
	Preparation of Memorandum to Mr. Brandstetter summarizing results of legal research	180.00
01/08/2014	Preparation for hearing on Motion for Summary Judgment, detail review and analysis of supporting and opposing cases.	450.00
	Court Appearance at hearing on Motion for Summary Judgment	180.00
01/13/2014	Office Conference with client	225.00
	Preparation of Settlement Statement	450.00
01/22/2014	Preparation of final draft and exhibits to mediation statement	225.00
01/29/2014	Preparation for mediation	112.50
01/30/2014	Participation in mediation in Pocatello	832.50
	Preparation of letter to client	67.50
02/05/2014	Beginning of trial preparation, trial notebook, discovery notebook, exhibits	450.00
	Court Appearance at Pre-Trial Conference	112.50
	Office Conference with client	67.50
02/11/2014	Office Conference with client	180.00
	Preparation for trial, review of photos of Watkins submitted in discovery	225.00
	Research health care inspection standards criteria, grease (FOG) trap maintenance standards	450.00
02/12/2014	Telephone Conference with Kelli Eiger from Eastern Idaho Health Department	45.00
	Preparation for trial, Watkins discovery organization and review	225.00
	Research cooking hood maintenance standards, fire code requirements	225.00
	Review , organization and preparation of photographs; organization and outline of issues; trial notebook; and Watkins discovery notebook	450.00
	Office Conference with client and 6 witnesses	1,462.50
02/18/2014	Office Conference with Michael and Levi	112.50
02/21/2014	Office Conference with client	157.50
02/26/2014	Preparation of partial exhibits and photographs list and organization of same	225.00
02/27/2014	Email to Judge's Clerk regarding exhibit binder preference	45.00
	Preparation of exhibit binder and trial organization	675.00
02/28/2014	Office Conference with client	225.00
	Preparation of emails to Judge's Clerk	90.00
	Telephone Conference with Mr. Driscoll	45.00
	Preparation of Motion and Order to Extend time to file exhibits	157.50
	Preparation of Notice of Compliance Exhibit List, Witness List and Pre-Trial Order	225.00
	Office Conference with client	675.00
03/03/2014	Preparation of exhibit labels, exhibit list revisions, exhibit binders, exhibits	675.00
	Preparation of Notice of Compliance: Exhibits, letter to Clerk	112.50
	Office Conference with client	67.50
	Office Conference with client	67.50

Landlord/Tenant

03/10/2014	Preparation of email to Mr. Driscoll	45.00
	Review email from Mr. Driscoll	22.50
03/11/2014	Preparation of email to client	22.50
	Office Conference with client	405.00
03/12/2014	Office Conference with client	787.50
	Preparation for trial, review of exhibits, legal research elements, fact issues, photo analysis plaintiff and defendant (3 hours spent billed 2 hours)	450.00
	Review and respond to emails from Mr. Driscoll	67.50
03/13/2014	Preparation for trial, interview witnesses, Jeff Dexter and Katie Williams. Meeting with client, preparation of subpoenas (11); legal research pleadings, judicial notice, research door parts, grease interceptors standards. (12 hours spent billed 9 as courtesy to client)	2,025.00
03/14/2014	Preparation for trial, meeting with client, exhibit review and identification, testimony outlines	2,025.00
03/15/2014	Preparation for trial, meeting with Mr. Storms, meeting with Alison Noble, Ryan Getsinger and Herb Rockhold	787.50
03/17/2014	Telephone Conference with Alan Flores	45.00
	Preparation of letter to Mr. Flores and Mr. Englis	45.00
	Preparation for trial and conference with client	2,250.00
03/18/2014	Office Conference with client, witnesses and attend trial (14 hours spent, billed 11)	2,475.00
03/19/2014	Office Conference with client, witnesses and attend trial (13 hours spent billed 11)	2,475.00
03/20/2014	Office Conference with client, witnesses and attend trial	2,250.00
03/21/2014	Office Conference with client, witnesses and attend trial	1,800.00
04/14/2014	Preparation of Stipulation to Continue 2nd day of trial and email to Mr. Driscoll	
	Review of decision denying motion for involuntary dismissal	90.00
04/15/2014	Preparation of Order Granting Continuance of Trial Date (no charge)	
04/23/2014	Office Conference with client and preparation for trial	1,575.00
04/24/2014	Office Conference with client, witness and trial preparation (13 hours spent billed 9)	2,025.00
04/25/2014	Preparation for trial and conference with client	337.50
	Court Appearance for trial	1,800.00
05/05/2014	Office Conference with client	675.00
05/06/2014	Office Conference with client	180.00
	Court Appearance - Trial Day 6	1,687.50
05/28/2014	Office Conference with client	292.50
	Preparation for last day of trial	225.00
05/29/2014	Preparation for trial	90.00
	Telephone Conference with Mr. Driscoll's office	22.50

	Telephone Conference with client	45.00
	Research rebuttal testimony	112.50
06/02/2014	Office Conference with client	112.50
06/09/2014	Review and respond to email from Mr. Driscoll	45.00
06/12/2014	Telephone Conference with client	45.00
06/13/2014	Telephone Conference with Bingham County Clerk	45.00
	Preparation of email to client	45.00
06/17/2014	Preparation of Available Dates	90.00
07/28/2014	Office Conference with client	112.50
07/29/2014	Preparation for trial	112.50
	Court Appearance at last day of trial	1,125.00
08/07/2014	Review and respond to email from Mr. Driscoll	45.00
09/09/2014	Telephone Conference with Dan Williams, Court Reporter	45.00
	Preparation of email to client	22.50
	Telephone Conference with client	67.50
	Partial preparation of proposed Findings of Fact and Conclusions of Law	450.00
09/10/2014	Review and respond to email from client	22.50
	Partial preparation of findings and conclusions	1,125.00
09/11/2014	Partial preparation of Finding of Fact (10 hours spent - 8 hours billed)	1,800.00
	Preparation of Motion and Order for Extension of Time	167.50
	Telephone Conference with Mr. Driscoll	45.00
09/12/2014	Partial preparation of findings of fact (12 hours spent - 8 hours billed as courtesy to client)	1,800.00
09/14/2014	Partial preparation of Findings of Fact and Conclusions of Law	675.00
09/15/2014	Partial preparation of Findings, Conclusions and Argument	1,575.00
09/16/2014	Preparation of partial findings of fact	1,125.00
09/17/2014	Partial preparation of findings, conclusions, argument and legal research (10.5 hrs. spent - billed 7.5 as courtesy to client)	1,687.50
	Review file, research remedies, compile research document	1,501.50
09/18/2014	Revisions, editing, and partial preparations conclusions of law and argument and research of elements unjust enrichment, waste, breach of lease provision for repair and maintenance (15 hours spent - 10 hours billed)	2,250.00
	Review and edit FF/CL document	585.00
09/19/2014	Preparation of final revisions, editing findings of fact, conclusions of law and argument	337.50
10/27/2014	Office Conference with client	157.50
11/19/2014	Telephone Conference with court clerk	45.00

	Telephone Conference with client	45.00
11/20/2014	Review Findings of Fact and Conclusions of Law	225.00
	FOR CURRENT SERVICES RENDERED	79,406.50
	TOTAL CURRENT WORK	79,406.50

B. J. Driscoll, Esq. – ISB #7010
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **MOTION TO DISALLOW COSTS AND ATTORNEY'S FEES**

COMES NOW the plaintiff, The Watkins Company, LLC ("Watkins"), by and through its counsel of record, and pursuant to Idaho Rules of Civil Procedure 54(d)(6) and 54(e)(6) moves the court for an order disallowing all of the costs and attorney's fees claimed by the defendants in the present case.

This motion is made on the grounds and for the reasons that the defendants are not the prevailing parties in this case, any award of costs and fees may be affected by the court's ruling on Watkins' pending Motion to Alter or Amend the Judgment, and as a matter of law the defendants cannot recover anything the costs and attorney's fees

they seek. Pursuant to Idaho Rule of Civil Procedure 7(b)(3)(C), Watkins shall "file a brief within fourteen (14) days with the court in support of the motion," and therein shall set forth in detail its arguments and authorities in support of this motion.

The motion is based on this Motion and the Notice of Hearing filed concurrently herewith, on the Brief in Support of Motion to Disallow Costs and Attorney's Fees to be filed within fourteen (14) days, and on the court's records and files herein.

The plaintiff requests oral argument.

DATED this 17 day of December, 2014.

SMITH, DRISCOLL & ASSOCIATES, PLLC

B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of December, 2014, I caused a true and correct copy of the foregoing **MOTION TO DISALLOW COSTS AND ATTORNEY'S FEES** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq. COX, OHMAN & BRANDSTETTER, CHTD P.O. Box 51600 510 "D" Street Idaho Falls, ID 83405	[ ] U. S. Mail [ ] Fax [ ] Overnight Delivery [✓] Hand Delivery
Honorable Darren B. Simpson District Judge Bingham County Courthouse 501 N. Maple, #310 Blackfoot, ID 83221	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery

B. J. Driscoll

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff, v. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	Case No. CV-10-5958 **BRIEF IN SUPPORT OF MOTION TO DISALLOW COSTS AND ATTORNEY'S FEES**

I. INTRODUCTION.

Pursuant to Idaho Rules of Civil Procedure 54(d)(6), 54(e)(6), and 7(b)(3)(C), the plaintiff/counterdefendant, The Watkins Company, LLC ("Watkins"), files this brief in support of its motion to disallow costs and attorney's fees requested by the defendants/counterclaimants, Michael Storms ("Storms") and Brownstone Companies, Inc. ("Brownstone"). As explained more fully below, the court should grant Watkins' motion and disallow all of Storms and Brownstone's costs and attorney's fees.

II. THE COURT SHOULD DISALLOW ALL OF STORMS AND BROWNSTONE'S COSTS AND ATTORNEY'S FEES BECAUSE THEIR TOTAL RECOVERY IS LIMITED TO THE AMOUNT OF THE SECURITY BOND.

As Watkins has previously pointed out to the court, any recovery by Storms and Brownstone is capped by the amount of the bond. Idaho Rule of Civil Procedure 65(c) provides in pertinent part as follows:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, ***for the payment of such costs and damages including reasonable attorney's fees*** to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

I.R.C.P. 65(c) (emphasis added). By the plain language of Rule 65, the bond limitation includes all costs and damages "including reasonable attorney's fees."

Idaho courts have addressed this issue and expressly accepted the majority view that there can be no recovery in excess of the bond absent a showing of malicious prosecution. The court in *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 402 (Ct. App. 1987), explained, "In jurisdictions with rules or statutes similar to I.R.C.P. 65(c), ***most courts have held that there can be no recovery in excess of the bond absent a showing of malicious prosecution***." (Emphasis added.) The court explained the reasoning as follows:

> Although attorney fees expended on pretrial restraint issues are embraced by Rule 65(c), the rule does not mandate that every dollar of such fees will be recovered. Rather, ***the rule strikes a balance,*** articulated by Justice Cardozo, ***between protecting wrongfully restrained defendants and avoiding undue hardship for plaintiffs who present facially meritorious claims in good faith***.

Id. at 400 (emphasis added).

In *McAtee*, several decreed water right owners appealed the limitation on their recovery to the amount of the security bond in their favor, arguing that the final award at trial "was inadequate because it failed to cover all attorney fees." *Id.* The owners also argued the limitation was unfair because the trial judge had commented that "he did not believe a final recovery would be limited by the bond." *Id.* at 401. The appellate court disagreed, applied the plain language of Rule 65(c), and limited the owners' total recovery to the amount of the bond. Even though the appellate court acknowledged that the party "took this statement [from the trial court] to be an assurance that the bond amount would not adversely affect them," *id.*, the court nonetheless limited the party's recovery to the amount of the bond.

The owners in *McAtee* had provided some authority for the minority view that "when a bond proves inadequate, the plaintiff ought to pay the excess because it was his request for pretrial restraint which caused the defendant's loss." *Id.* The *McAtee* court admitted that "[t]he minority view seems attractive on its surface" because it "provides compensation for the entire loss resulting from the wrongful restraint" and "places the burden of compensation on the litigant who made the 'mistake,' albeit in good faith, of seeking the pretrial restraint." *Id.* Nonetheless, the *McAtee* court following the majority view that "there can be no recovery in excess of the bond absent a showing of malicious prosecution," following the reasoning of Justice Cardozo and the "public policy of encouraging ready access to the courts." *Id.*

Importantly, restrained parties like the defendants in *McAtee* are not without a remedy. There, the court recognized that the trial court had "left the door open to

further adjustment of the bond before trial," but that the party "sought no further adjustment." *Id.* The water right owners could have sought to increase the bond amount at some point in the proceeding, thus increasing their potential final recovery in the case. However, the owners "let the $5,000 bond go unchallenged until a final judgment on the merits had been entered." 113 Idaho at 402. As the owners had not sought modification until after the trial court had entered final judgment, the court could not consider awarding any more.

Here, Storms and Brownstone's recovery for all costs, damages, and attorney's fees is limited to the amount of the $10,000 bond, which amount the court has already awarded in the judgment.[1] As a matter of law, Storms and Brownstone cannot recover more. They may attempt to raise the same failed argument as the owners in *McAtee* that the bond was "inadequate" because it did not cover all of their damages or attorney's fees, but the law has not changed. And unlike in *McAtee*, Storms and Brownstone cannot claim they relied on any statement from the trial court that "he did not believe a final recovery would be limited by the bond," 113 Idaho at 401, because this court made no such comment.

Moreover, if courts followed the minority rule and allowed a restrained party to recover more than the bond amount, then the party seeking the injunction would face unfair surprise at the end of the case. The main value of legal precedent is to allow parties to make educated decisions about the relative strength of their position and to evaluate the risk of continuing litigation. Watkins has a right to rely on Rule 65(c) and

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[1] See p. 2 of the Judgment filed 11/19/2014, already on file with the court.

McAtee that a restrained party cannot recover more than the bond amount to evaluate its risk as the case progresses.

While the minority view may offer some appeal, Idaho courts follow the majority view that "there can be no recovery in excess of the bond absent a showing of malicious prosecution." *Id.* at 402. Storms and Brownstone had four years to seek an adjustment of the bond amount before entry of final judgment, but they did not. Applying well-established and well-reasoned Idaho law, the court should grant Watkins' motion and disallow Storms and Brownstone's request for costs and fees above the bond amount the court has already awarded in the judgment.

III. THE COURT SHOULD DISALLOW ALL OF STORMS AND BROWNSTONE'S COSTS AND ATTORNEY'S FEES BECAUSE THEY ARE NOT THE PREVAILING PARTIES.

For any party to recover costs and attorney's fees, it must first establish that it is the "prevailing party." In this regard, Idaho Rule of Civil Procedure 54(d)(1) provides in pertinent part as follows:

> (A) Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.
>
> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

As the Supreme Court of Idaho explains, "An award of costs under I.R.C.P. 54(d)(1), as the rule itself provides, is committed to the sound discretion of the district

court." *Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 857 (1996) (citations omitted).

Where the trial court grants relief to each party on some of their claims, the court acts within its discretion to order that each side bear their own costs and attorney fees. In a landlord-tenant dispute context, the most analogous case to the present is *Mountain Restaurant Corp. v. ParkCenter Mall Associates*, 122 Idaho 261, where both the landlord and the tenant prevailed in part and the court awarded no costs or fees to either party. The tenant established a breach of contract, but the breach was not held material. For its part, the landlord recovered rent for the time period the tenant was in the building, but the trial court denied any prospective rent damages because the landlord had failed to mitigate its damages. Thus, with both the landlord and the tenant prevailing in part, the trial court declined to award any attorney's fees. The appellate court affirmed this decision. This court would likewise act well within its discretion by refusing to award any costs or fees to Storms and Brownstone.

This case is also akin to *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 750 (Ct. App. 1984), where the trial court explained, "'[e]ach [party] was about equally justified in bringing suit. It appears to me that the liability for the incurring of costs and attorney fees is about equal. In fact the suit was necessary to resolve the difficulties confronting both sides.'" On appeal, one of the parties challenged the court's denial of the request for costs and attorney's fees. However, the court of appeals affirmed the trial court's exercise of discretion, recognizing that where both parties had prevailed in part on their

respective claims, the trial court acted well within its discretion to deny the party's request for costs and attorney's fees. *Id.*

Here, like in *Ace Realty*, the court would act well within its discretion by denying Storms and Brownstone's request for costs and attorneys because both sides prevailed on some issues. This is especially true where Storms and Brownstone did not even succeed in recovering the attorney's fees they claimed to have incurred from the initial proceedings on the motion for temporary restraining order and preliminary injunction. Storms and Brownstone obtained a bond in the amount of $10,000. Their attorney's fees incurred in the first seven weeks of this case amounted to $11,815.[2] They never sought to amend the amount of the bond. As a result, ***Storms and Brownstone continued to litigate for nearly four more years, but recovered nothing more***. For its part, Watkins' recovery was less than the amount sought, but the amount of recovery should increase somewhat following the court's decision on the motion to alter or amend the judgment. Viewing the case as a whole, Storms and Brownstone are not the prevailing parties in this action, and the court would act comfortably within its discretion by denying Storms and Brownstone any costs or attorney's fees.

That Storms is not the prevailing party is especially true where he admitted at trial that he personally suffered no damages on his counterclaim.[3]

Consider also *Decker v. Homeguard Systems, a Div. of Intermountain Gas Co.*, 105 Idaho 158, 161 (Ct. App. 1983), where the plaintiffs had 22 of their 28 causes of

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[2] See Trial Exhibit J and p. 99 of the Findings of Fact and Conclusions of Law filed 11/19/2014, already on file with the court.

[3] See pp. 8-9 of the Brief in Support of Motion to Alter or Amend the Judgment filed 12/3/2014, already on file with the court.

action dismissed, recovered only 3% of what it sought, and the defendant prevailed on a counterclaim against one of the plaintiffs, but the court still held that the plaintiffs were a prevailing party. Like *Ace*, the *Decker* case is also analogous to this case, where the court rejected most of Watkins' claims, but Watkins recovered about 2% of what it sought (with the motion to amend the judgment still pending), and Storms and Brownstone obtained a only a limited recovery on its counterclaim. But *Decker* is even stronger authority to reject Storms and Brownstone's request for costs and fees because if this case were like *Decker*, then ***Watkins*** would arguably be the prevailing party, not Storms and Brownstone. This is even a greater reason to hold Storms and Brownstone are not the prevailing parties and are not entitled to any award of costs or fees.

Finally, the Supreme Court of Idaho's decision in *Crump v. Bromley*, 148 Idaho 172 (2009), provides further support for a holding that Storms and Brownstone are not the prevailing parties. In *Crump*, the plaintiff received judgment against the defendant, and the defendant received no judgment against the plaintiff, but the court determined that the ***defendant who obtained no affirmative relief was the prevailing party*** in the action and awarded costs and attorney's fees. The Supreme Court affirmed, even going so far as to say, "[T]he fact that a party receives no affirmative relief does not prohibit it from being deemed the prevailing party." *Id.* at 174. Here, the conclusion that Storms and Brownstone are not prevailing parties could be justified even if Watkins had recovered no judgment against them, but denial of Storms and Brownstone's request is especially appropriate where Watkins recovered judgment against them.

IV. THE COURT SHOULD REDUCE ANY AWARD TO STORMS AND BROWNSTONE BASED ON THE REQUIREMENTS AND CONSIDERATIONS OF RULE 54.

As posited above, the court should disallow all costs and attorney fees Storms and Brownstone seek because the amount is already capped by the bond amount, and because Storms and Brownstone are not the prevailing parties in this case. In the alternative, any award to them should be reduced as follows.

Rule 54(d)(5) requires that Storms and Brownstone itemize all amounts they seek. Their memorandum of costs seek attorney's fees of $80,126.50,[4] but the only itemize $79,406,50.[5] The court should disallow the $720.00 that Storms and Brownstone have failed to itemize.

Of all the factors the court could consider in making an award, the most significant factor in this case is the amount involved and the results obtained. I.R.C.P. 54(e)(3)(G). While Storms and Brownstone assert that their efforts were "greatly successful,"[6] the record does not support that contention. Watkins obtained a modest judgment against them.[7] And while Storms and Brownstone did recover the full amount of the $10,000 security bond, they had already incurred more than that amount in attorney's fees ($11,815 by the court's determination) in the first seven weeks of the case and never sought to increase the amount of the bond. Thus, Storms and Brownstone started out the case as net losers, and then proceeded to spend another four years and approximately $80,000 in attorney's fees with absolutely no prospect of

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[4] See p. 3 of Memorandum of Attorney Fees and Costs filed 12/3/2014, already on file with the court.
[5] See the last page of Ex. "A" to the Affidavit in Support of Attorney Fees and Costs filed 12/3/2014, already on file with the court.
[6] See p. 3 of Affidavit in Support of Attorney Fees and Costs filed 12/3/2014, already on file with the court.
[7] This judgment is the subject of Watkins' pending Motion to Alter or Amend the Judgment filed 12/3/2014, already on file with the court.

recovering anything more. Under the totality of the circumstances and viewing the outcome of the case as a whole, no one could say that spending over $90,000 in attorney's fees to recover $10,000 on your best day would be a "greatly successful" endeavor. Sound judicial policy weighs against the court awarding Storms and Brownstone anything more. Otherwise, the court would be encouraging the parties to waste the time and resources of the parties and the judicial system simply to increase their chance at recovering attorney's fees at the end of the case.

Finally, while Watkins does not fault Mr. Brandstetter for offering courtesy discounts to Storms and Brownstone, this court should reject Storms and Brownstone's argument that Watkins "is not entitled to the benefit of [Mr. Brandstetter's] courtesy."[8] Under no circumstances should Watkins be required to pay for attorney's fees or costs that Storms and Brownstone never actually incurred.

V. CONCLUSION.

For all the foregoing reasons, the court should disallow Storms and Brownstone's request for an award of costs and attorney's fees. Any award above the bond amount already included in the Judgment would be reversible error.

DATED this 23 day of December, 2014.

SMITH, DRISCOLL & ASSOCIATES, PLLC

B. J. Driscoll, Esq.
Attorneys for Plaintiff

[8] See p. 3 of Affidavit in Support of Attorney Fees and Costs filed 12/3/2014, already on file with the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of December, 2014, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION TO DISALLOW COSTS AND ATTORNEY'S FEES** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq. COX, OHMAN & BRANDSTETTER, CHTD P.O. Box 51600 510 "D" Street Idaho Falls, ID 83405	[ ] U. S. Mail [✓] Fax [ ] Overnight Delivery [ ] Hand Delivery
Honorable Darren B. Simpson District Judge Bingham County Courthouse 501 N. Maple, #310 Blackfoot, ID 83221	[ ] U. S. Mail [✓] Fax [ ] Overnight Delivery [ ] Hand Delivery

B. J. Driscoll

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO on
September 15, 2015
AT 4:39 p.m.
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	**CASE NO. CV-2010-5958** **ORDER SUBSTITUTING THE ESTATE OF MICHAEL STORMS AND GRANTING ATTORNEY FEES AND COSTS**

I. STATEMENT OF THE CASE

Plaintiff The Watkins Company, LLC, an Idaho Limited Liability Company (hereinafter "Watkins"), filed this breach of contract, breach of covenant to repair, unjust enrichment, and waste action against Defendants Michael Storms, an individual (hereinafter "Storms"); Kathy Burggraf, an individual (hereinafter "Burggraf"); Brownstone Companies, Inc., an Idaho Corporation (hereinafter the "Brownstone"); and Storms, Burggraf, and Brownstone collectively doing business as the Brownstone

Restaurant and Brewhouse (hereinafter the "Restaurant").[1] Watkins also requested injunctive relief, an accounting, eviction, and attorney's fees.[2] Storms and Brownstone asserted affirmative defenses and counterclaimed for storage rental, moving, utility, and insurance expenses, together with attorney fees.[3]

A Court Trial was held on March 18-21, April 25, May 6, and July 29 of 2014.[4] Judgment was entered November 19, 2014 whereby Watkins took nothing by its breach of the "New Lease" claims, its request for an accounting under the "New Lease," and its unjust enrichment claim.[5] Watkins' requests for injunctive relief and for the defendants' eviction were denied as moot.[6] Watkins recovered $699.64 from Storms and Brownstone for repairs to the premises located at 455 River Parkway, Idaho Falls, Idaho (hereinafter the "Premises") wherein the Restaurant was located.[7] Watkins took nothing by its unjust enrichment claim against Storms and Brownstone.[8]

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[1] Second Amended Complaint, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 6, 2013) (hereinafter the **"Second Amended Complaint"**).
[2] Second Amended Complaint, at pp. 6-8.
[3] Answer to Second Amended Complaint and Counterclaim, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed October 23, 2013) (hereinafter the **"Answer and Counterclaim"**).
[4] Minute Entry [for March 18, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21, 2014); Minute Entry [for March 19, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21 2014); Minute Entry [for March 20, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed March 21, 2014); Minute Entry [for March 21, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed May 1, 2014); Minute Entry [for April 24, 2014 Court Trial], *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed May 1, 2014). This Court notes that the Bonneville County Clerk has not prepared a minute entry for the July 29, 2014 hearing as of this Order.
[5] Judgment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 19, 2014) (hereinafter the ***"Judgment"***), at pp. 1-2.
[6] Id.
[7] *Judgment*, at p. 2.
[8] *Findings of Fact and Conclusions of Law*, at p. 88.

Storms and Brownstone showed themselves entitled to receive $17,015.88 in costs and fees attributable to Watkins' wrongful temporary restraining order.[9] Storms' and Brownstone's recovery was limited by the amount of the bond, however, and Watkins was adjudged liable to Storms and Brownstone in the amount of $10,000.00.[10]

Storms and Brownstone have moved for an award of costs and attorney fees.[11] Watkins objected to Storms' and Brownstones' Motion for Fees and Costs.[12]

Storm's and Brownstone's Motion for Fees and Costs was heard on February 11, 2015 along with Watkins' request to alter or amend the *Judgment*.[13] This Court ruled upon Watkins' Motion to Alter or Amend[14] but, due to an oversight, failed to rule on Storms' and Brownstone's Motion for Fees and Costs.

Tragically, Storms has died. His estate moved for substitution into the lawsuit on Storms' behalf.[15] Watkins' objected to Storms' and Brownstone's Motion for Substitution.[16]

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[9] Findings of Fact and Conclusions of Law, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed November 19, 2014) (hereinafter the **"*Findings of Fact and Conclusions of Law*"**), at p. 102.

[1010] Id., *Judgment*, at p. 2.

[11] Motion for Attorney Fees and Costs, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 3, 2014) (hereinafter **"Storms' and Brownstone's Motion for Fees and Costs"**).

[12] Motion to Disallow Costs and Attorney's Fees, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 17, 2014) (hereinafter **"Watkins' Objection to Fees and Costs"**); Brief in Support of Motion to Disallow Costs and Attorney's Fees, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 23, 2014) (hereinafter **"Watkins' Brief re: Objection to Fees and Costs"**).

[13] Minute Entry, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed February 11, 2015).

[14] Order Denying Plaintiff's Motion to Alter or Amend Judgment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed April 9, 2015).

[15] Defendants' Motion for Substitution of Party, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed August 7, 2015) (hereinafter **"Storms' and Brownstone's Motion for Substitution"**).

[16] Plaintiff's Brief in Opposition to Motion for Substitution of Party, Judgment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed August 19, 2015) (hereinafter **"Watkins' Objection to Substitution"**).

A hearing was held on Storms' and Brownstone's Motion for Substitution on August 26, 2015.[17] At that hearing, this Court discovered its oversight with regard to Storms' and Brownstone's Motion for Fees and Costs.

Having reviewed the parties' arguments on both Storms' and Brownstone's Motion for Fees and Costs and Storms' and Brownstone's Motion for Substitution, the record in this matter, and the relevant authorities, the Estate of Michael Storms (hereinafter the "Estate") shall be substituted into this lawsuit as party defendant in place of Michael Storms, and the Estate and Brownstone shall recover in part their requested attorney fees and costs.

II. ISSUES

Storms and Brownstone request substitution of the Estate as party defendant in place of the deceased Storms.[18] Watkins objects and argues that the Estate has no "claim" to attorney fees since attorney fees are merely ancillary to the claims Storms presented at trial, and Storms' death extinguished any right of recovery of Storms' attorney fee request.[19]

Storms and Brownstone premise their attorney fee request upon Idaho Code § 12-120(3) and argue they successfully defended against Watkins' causes of action and successfully prosecuted their counterclaim.[20] Watkins parries that Storms' and Brownstone's total recovery is limited to the bond Watkins put down to enjoin Storms

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[17] Minute Entry, Judgment, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed August 26, 2015).
[18] Storms' and Brownstone's Motion for Substitution, at p. 1.
[19] Watkins' Objection to Substitution, at pp. 2-4.
[20] Storms' and Brownstone's Motion for Fees and Costs, at p. 1.

and Brownstone from removing items from the Premises.[21] Watkins also contends that Storms and Brownstone were not the prevailing parties to the lawsuit.[22] Watkins further posits that Storms' and Brownstone's fee request should be reduced based upon the requirements of Idaho Rule of Civil Procedure 54 (hereinafter "Rule 54").[23]

Based upon the parties' arguments, the following issues must be determined:

1. Is the Estate entitled to recover attorney fees, if any, awarded on behalf of Storms?

2. Are Storms and Brownstone entitled to recover attorney fees above the amount of the bond?

3. Are Storms and Brownstone prevailing parties to this lawsuit?

4. What amount of money, if any, meets the standard for reasonable attorney fees based upon the considerations outlined in Rule 54?

III. FINDINGS OF FACT

1. Watkins owns the Premises, which consists of commercial real estate.[24]

2. Storms was the president and registered agent for Brownstone.[25]

3. On July 31, 1996, Storms and Burggraf, as individuals, entered into a thirty (30) year commercial lease agreement with Watkins (hereinafter referred to as the "Lease") to lease the Premises for the operation of the Restaurant.[26]

4. After executing the Lease with Watkins, Storms and Burggraf gutted the building and renovated it to accommodate the Restaurant.[27]

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[21] Watkins' Brief re: Objection to Fees and Costs, at pp. 2-5.
[22] Watkins' Brief re: Objection to Fees and Costs, at pp. 5-8.
[23] Watkins' Brief re: Objection to Fees and Costs, at pp. 9-10.
[24] *Findings of Fact and Conclusions of Law*, at p. 4, ¶ 1.
[25] *Findings of Fact and Conclusions of Law*, at p. 4, ¶ 2.

5. In 2005, Burggraf sold her interest in the Brownstone.[28]

6. On April 21, 2010, Watkins received a judgment against Storms and Brownstone terminating the Lease.[29] Following the entry of the April 21, 2010 judgment, Storms and Brownstone retained possession of the Premises and paid rent on a month-to-month basis.[30] Storms became a tenant-at-will, possessing the Premises with Watkins' consent, but without fixed lease terms.[31]

7. By letter dated September 15, 2010, counsel for Brownstone informed Watkins of its intention to vacate the Premises on October 17, 2010.[32]

8. On September 29, 2010, Watkins filed the above-numbered and styled lawsuit against Storms, Brownstone, and Burggraf and alleged that they breached the terms of the "New Lease" by failing to timely pay rent, failing to pay late fees, failing to pay interest on their delinquent payment, and impermissibly vacating the Premises.[33] Watkins also sought to permanently enjoin Storms and Brownstone from removing any fixtures from the Premises if such removal would cause damages.[34] Watkins requested an accounting under the "New Lease" and the defendants' eviction.[35]

9. Storms and Brownstone operated the Restaurant for the last time on September 30, 2010.[36]

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[26] *Findings of Fact and Conclusions of Law*, at p. 4, ¶ 3.
[27] *Findings of Fact and Conclusions of Law*, at p. 5, ¶ 7.
[28] *Findings of Fact and Conclusions of Law*, at p. 6, ¶ 10.
[29] *Findings of Fact and Conclusions of Law*, at p. 9, ¶ 21.
[30] *Findings of Fact and Conclusions of Law*, at p9. 9-10, ¶ 21.
[31] *Findings of Fact and Conclusions of Law*, at p. 10, ¶ 22.
[32] *Findings of Fact and Conclusions of Law*, at p. 12, ¶ 30.
[33] Complaint, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 29, 2010) (hereinafter the **"Complaint"**).
[34] Complaint, at pp. 5-6.
[35] Complaint, at pp. 6-7.
[36] Id.

10. On October 1, 2010, Watkins moved for a temporary restraining order prohibiting Storms and Brownstone from removing any property located in or on the Premises.[37] A temporary restraining order was granted and the parties were directed not to remove any property from the Premises until a decision issued on Watkins' application for a prejudgment writ of attachment.[38]

11. On October 5, 2010, Watkins posted a $10,000.00 bond as required by the temporary restraining order.[39]

12. On November 4, 2010, Watkins' Motion for Prejudgment Writ of Attachment was denied, but his request for a preliminary injunction was partially granted.[40] Storms and Brownstone were enjoined from removing certain equipment and structures from the Premises.[41]

13. On November 9, 2010, the partial preliminary injunction was set aside.[42]

14. On November 24, 2010, this Court again granted Watkins a partial preliminary injunction applicable only to the outdoor poles in the vicinity of the Premises.[43] Storms and Brownstone were not enjoined from removing other disputed fixtures.[44]

15. A Court Trial took place in the spring and early summer of 2014.[45]

16. Watkins demanded compensation, in the amount of $21,739.19, for Storms' and Brownstone's alleged breach of the Lease's covenant to repair.[46] Storms and

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[37] *Findings of Fact and Conclusions of Law*, at p. 12, ¶ 32.
[38] Id.
[39] *Findings of Fact and Conclusions of Law*, at p. 92.
[40] *Findings of Fact and Conclusions of Law*, at p. 12, ¶ 33.
[41] *Findings of Fact and Conclusions of Law*, at pp 12-3, ¶ 33.
[42] *Findings of Fact and Conclusions of Law*, at p. 13, ¶ 34.
[43] *Findings of Fact and Conclusions of Law*, at p. 14, ¶ 36.
[44] Id.

Brownstone were ultimately ordered to compensate Watkins, in the amount of $699.64, for certain items left in a state of disrepair.[47]

17. Watkins' claims against Storms and Brownstone for breach of contract (as it related to the "New Lease"), an accounting, and breach of the covenant to repair under the "New Lease" were summarily adjudicated in Storms' and Brownstone's favor.[48]

18. Watkins' requests for injunctive relief and eviction were declared moot.[49]

19. Watkins' request for rent in the amount of $5,600.00, under an unjust enrichment theory, was denied.[50]

20. Storms and Brownstone counterclaimed damages in the amount of $21,078.39 for Watkins' wrongful restraint of their efforts to vacate the Premises.[51] Storms and Brownstone were found entitled to recover $17,015.88 for costs and fees attributable to Watkins' wrongful temporary restraining order.[52] Storms' and Brownstone's recovery was limited to Watkins' $10,000.00 temporary restraining order bond.[53]

IV. APPLICABLE PRINCIPLES OF LAW

A. Idaho Rule of Civil Procedure 54.

1. Under Rule 54(d)(1), costs are allowed as a matter of right to the prevailing party or parties to a lawsuit, unless otherwise ordered by the Court.

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[45] See: footnote 4.
[46] Plaintiff's Closing Argument, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 19, 2014), at p. 2.
[47] *Findings of Fact and Conclusions of Law*, at p. 104, ¶ 6.
[48] *Findings of Fact and Conclusions of Law*, at pp. 16-7, ¶¶ 48, 50, and 52.
[49] *Findings of Fact and Conclusions of Law*, at p. 16, ¶¶ 49, 51.
[50] *Findings of Fact and Conclusions of Law*, at pp. 86-89.
[51] Storms and Brownstone Proposed Findings, Conclusions and Argument, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed September 19, 2014), at p. 53.
[52] *Findings of Fact and Conclusions of Law*, at pp. 91-102.

2. At any time after a decision by the court, any party who claims costs may file and serve on the adverse parties a memorandum of costs, itemizing each claimed expense.[54]

3. In any civil action, the court may award reasonable attorney fees.[55] A party's ability to recover attorney fees matures upon the filing of a judgment in the lawsuit.[56]

B. Costs and Fees Incurred as a Result of a Wrongful Temporary Restraining Order.

1. Idaho Rule of Civil Procedure 65(c) (hereinafter "Rule 65(c)") reads, in pertinent part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

2. Rule 65(c) allows the trial court to award costs and reasonable attorney fees to any party who is found to have been wrongfully enjoined or restrained.[57]

3. If a party requesting a temporary restraining order ultimately fails on the merits of the basis for the restraining order, then the "wrongfully enjoined or restrained party" may recover its damages.[58]

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[53] *Findings of Fact and Conclusions of Law*, at p. 102.
[54] Rule 54(d)(5).
[55] Rule 54(e)(1).
[56] See, e.g.: *Western World, Inc. v. Prater*, 121 Idaho 870, 873, 828 P.2d 899, 902 (Ct. App. 1992).
[57] *Durrant v. Christensen*, 117 Idaho 70, 73785 P.2d 634, 637 (1990).
[58] See: *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 395-6, 744 P.2d 121, 123-4 (Ct. App. 1987).

4. The recoverable attorney fees under Rule 65(c) are those incurred in a proceeding to dissolve a temporary restraining order or a preliminary injunction, rather than those earned through defending the merits of the action.[59]

5. Recovery of damages, costs and attorney fees occasioned by the temporary restraining order is limited to the amount of the bond.[60]

C. Standard on Award of Attorney Fees – Prevailing Party.

1. In order to recover attorney fees under Idaho Code § 12-120(3), a party must prevail in the civil lawsuit at issue.[61]

2. A determination on prevailing parties is committed to the discretion of the trial court.[62] Thus, this Court must: (1) correctly perceived the issue as one of discretion, (2) act within the outer boundaries of its discretion and consistently with the legal standards applicable to the consideration of an award, and (3) reach its decision by an exercise of reason.[63]

3. The fact that a party receives no affirmative relief does not prohibit a party from being deemed a prevailing party.[64] This Court may, in its discretion, conclude that a party prevailed in part, and apportion the resulting costs and fees accordingly.[65] If neither

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[59] *Devine v. Cluff*, 110 Idaho 1, 3, 713 P.2d 437, 439 (Ct. App. 1985)
[60] *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho at 402, 744 P.2d at 130.
[61] Idaho Code § 12-120(3).
[62] *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718, 117 P.3d 130, 132 (2005).
[63] *Shore v. Peterson,* 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009).
[64] *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003).
[65] *Burns v. Boundary County*, 120 Idaho at 626, 818 P.2d at 330; *Smith v. Mitton*, 140 Idaho 893, 903, 104 P.3d 367, 377 (2004).

party "predominantly prevailed" in relation to each other, the Court may decline to award costs or fees.[66]

D. Standard of Review – Reasonableness of Attorney Fees and Costs.

1. The factors to be considered in determining an award of attorney fees, as set forth in Idaho Rule of Civil Procedure Rule 54(e)(3), include:

(a) the time and labor required;

(b) the novelty and difficulty of the questions;

(c) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(d) the prevailing charges for like work;

(e) whether the fee is fixed or contingent;

(f) the time limitations imposed by the client or the circumstances of the case;

(g) the amount involved and the results obtained;

(h) the undesirability of the case;

(i) the nature and length of the professional relationship with the client;

(j) awards in similar cases;

(k) the reasonable cost of automated legal research, if the court finds it was reasonably necessary in preparing a party's case; and

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[66] *Smith v. Mitton*, 140 Idaho at 903, 104 P.3d at 377; *Shore v. Peterson*, 146 Idaho at 916, 204 P.3d at 1125.

(l) any other factor which the court deems appropriate in the particular case.[67]

2. Although a court must consider the factors listed in Rule 54(e)(3) of the Idaho Rules of Civil Procedure when determining the amount to award in attorney fees, the court need not demonstrate how it employed any of the factors in reaching an award amount.[68] The court need not specifically address each of the factors, as long as the record indicates that it considered them all.[69]

E. Standard on Cost Award.

1. Idaho Rule of Civil Procedure 54(d)(1)(A) requires the award of costs as a matter of right when one party prevails over another.

2. When neither party prevails, a Court's determination as to a cost award is discretionary.[70]

3. Discretionary costs may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.[71]

V. ANALYSIS

A. Substitution of the Estate as a Party Defendant.

Initially, Watkins objects to the substitution of the Estate and argues that since no "claims" remain in this case, there is no basis to substitute the Estate into the lawsuit in

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[67] Idaho Rule of Civil Procedure 54(e)(3).
[68] *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 544, 199 P.3d 102, 119 (2008).
[69] Id.
[70] Idaho Rule of Civil Procedure 54(d)(1)(B).
[71] Idaho Rule of Civil Procedure 54(d)(1)(D).

the place of Storms.[72] Although attorney fees for prevailing over the opposing party in certain civil lawsuits are not separate and distinct "claims," attorney fees are nonetheless recoverable, at the conclusion of the litigation, by the prevailing party in a lawsuit based upon a commercial transaction.[73]

Storms, prior to his untimely death, argued that he and Brownstone prevailed over Watkins in this lawsuit. Should this Court agree with Storms' and Brownstone's prevailing party argument, then they will be entitled, at this Court's discretion, to recover some or all of their attorney fees. Storms' and Brownstone's Motion for Fees and Costs was timely filed. It was not timely ruled upon due to this Court's oversight.

Judgment has been rendered in this case. If Storms and Brownstone are considered the prevailing parties to this lawsuit, then their request for attorney fees has now matured into a claim which is over-ripe for adjudication.[74] Therefore, a claim on behalf of Storms exists, to which the Estate may aspire.

Next, Watkins takes the position that Storms' death extinguished his now mature claim for attorney fees.[75] The citation Watkins offers in support in fact runs counter to its position.[76] The attorney fee claim now before the Court arises out of the contract dispute between the parties. As such, it survives the death of Storms and may be pursued by the Estate.

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[72] Watkins' Objection to Substitution, at pp. 1-3.
[73] Idaho Code § 12-120(3).
[74] See, e.g.: *Western World, Inc. v. Prater*, 121 Idahoh at 873, 828 P.2d at 902 ("the right to costs, and an award for attorney fees, would mature anew when an amended judgment was entered").
[75] Watkins' Objection to Substitution, at p. 3.
[76] See id.

For these reasons, Storms' and Brownstone's Motion for Substitution shall be granted. The Estate shall be substituted into this lawsuit as a party defendant in place of Michael Storms.

B. Attorney Fees Over and Above the Amount of the Bond.

As this Court previously found, Rule 65(c) limits recovery of any damages or fees incurred as the result of a wrongfully issued preliminary injunction bond.[77] Storms' and Brownstone's attorney fees, incurred between October 1, 2010 and November 24, 2010, were considered as damages suffered by Storms and Brownstone as a result of having been wrongfully enjoined or restrained.[78] The fees requested by Storms and Brownstone do not include any fees generated prior to December 1, 2010.[79]

The vast majority of the pretrial and trial issues in this matter dealt with Watkins' claims for breach of the covenant to repair in the Lease, unjust enrichment, and waste. Those issues were not related to the temporary restraining order. Instead, the temporary restraining order involved Watkins' fears that Storms and Brownstone would remove furnishings and fixtures from the Premises that should remain with the Premises.

A fractional portion of the parties' issues, after resolution of the temporary restraining order, involved Storms' and Brownstone's counterclaims for damages caused by Watkins' wrongful restraint of Storms' and Brownstone's efforts to vacate the Premises. That portion of the litigation fell squarely under the auspices of the bond and cannot be recovered.

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[77] *Findings of Fact and Conclusions of Law*, at pp. 91-
[78] *Findings of Fact and Conclusions of Law*, at p. 98.
[79] Affidavit in Support of Memorandum of Attorney's Fees and Costs, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 3, 2014) (hereinafter the **"Brandstetter Affidavit"**), at attachment, p. 1.

Although Storms and Brownstone did not clarify the precise amount of time devoted to their counterclaim, this Court is very familiar with the pleadings filed and the issues tried in this lawsuit. Not more than ten percent (10%) of the pleadings, arguments, and trial evidence pertained to Storms' and Brownstone's counterclaim. The vast majority of the time, effort, and evidence in this case centered upon Watkins' claims for damages under the covenant to repair in the parties' Lease. Indeed, this Court's analyses of Storms' and Brownstone's counterclaim accounts for approximately ten percent of the 105-page *Findings of Fact and Conclusions of Law*. Therefore, Storms' and Brownstone's fee request shall be reduced by ten percent in recognition of the time spent on Storms' and Brownstone's counterclaim, which time necessarily fell under the auspices of the temporary restraining order bond.

C. Storms and Brownstone Prevailed at Trial.

Watkins argues that since both sides prevailed on some issues, this Court should decline to award attorney fees to Storms and Brownstone.[80] But Watkins recovered only $699.64 (or 2.56%) of the $27,339.19 he demanded for breach of the covenant to repair and for unjust enrichment.

Storms and Brownstone were found entitled to recover $17,015.88 (or 81%) of the $21,078.39 they counterclaimed. They ultimately recovered only $10,000.00 (or 47%), which was the amount of the bond. However, they prevailed on over ninety-seven per-cent (97%) of Watkins' claims against them.

Based upon this Court's knowledge of the parties' pleadings and arguments, and its observation of the witnesses and evidence admitted at trial, and in light of its *Findings*

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[80] Watkins' Brief re: Objection to Fees and Costs, at p. 7.

of Fact and Conclusions of Law, this Court finds that Storms and Brownstone is the prevailing party in this lawsuit.

D. Storms' and Brownstone's Attorney Fee Request is Reasonable.

Watkins argues that Storms' and Brownstone's claimed attorney fees should be reduced, based upon Rule 54, for a number of reasons. First, Watkins argues that $720.00 of Storms' and Brownstone's request was not itemized and therefore should be denied.[81] This discrepancy is dealt with in the Brandstetter Affidavit, however. Fees and costs incurred by Storms and Brownstone through November 20, 2014 amounted to $79,406.50.[82] Storms and Brownstone incurred the additional $720.00 in preparing their Motion for Fees and Costs, which Motion was filed on December 3, 2014.[83]

Next, Watkins argues that Storms and Brownstone were "net losers" because they only recovered the amount of the bond on their counterclaim.[84] This position ignores the fact that Storms and Brownstone defeated the vast majority of Watkins' claims against them.

Finally, Watkins argues that Storms and Brownstone should not recover the thirty (30) hours of attorney time which Mr. Brandstetter did not charge, as a courtesy, to his clients.[85] Mr. Brandstetter did not include the courtesy discounts in the attorney fee he requests from Watkins.[86] In other words, Watkins received the same "discount" in Storms' and Brownstone's fee request as did Storms and Brownstone.

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[81] Watkins' Brief re: Objection to Fees and Costs, at p. 9.
[82] Brandstetter Affidavit, at attachment, p. 10.
[83] Brandstetter Affidavit, at p. 4, ¶ 15.
[84] Watkins' Brief re: Objection to Fees and Costs, at p. 9.
[85] Watkins' Brief re: Objection to Fees and Costs, at p. 10.
[86] Brandstetter Affidavit, at p. 3, ¶ 3.

As for the Rule 54(e)(3) factors, the time and labor Mr. Brandstetter required to prepare for and defend this lawsuit, which consumed over four years, was commensurate with the vast number of issues Watkins raised. While the questions at bar were not novel, they were complex and detailed. The skill required to perform the legal services necessary was moderately high, as the volume of claims pursued by Watkins required experienced organization and thorough investigatory skills. Mr. Brandstetter showed the requisite ability and skill in his representation of Storms and Brownstone.

Mr. Brandstetter's hourly fee of $225.00 falls within the range of highly experienced litigators in southeast Idaho. His fixed fee for his work is typical for civil defense in this area.

Although time limitations were not a factor in this case, the time and labor necessary to answer all of Watkins' issues necessarily consumed a vast amount of time, investigation and skill. Mr. Brandstetter obtained very favorable results for his clients. Mr. Brandstetter did not find the action undesireable.[87] Mr. Brandstetter has represented Storms and Brownstone since 2010 in other proceedings and matters.[88]

The attorney fee requested by Storms and Brownstone is similar to other cases involving multiple claims of damage to a building.

Mr. Brandstetter incurred $220.57 in electronic legal research fees.[89] Given the nature and complexity of this lawsuit, such fee is reasonable.

Based upon the foregoing analyses, Storms' and Brownstone's request for attorney fees in the amount of $80,347.07 is reasonable under the circumstances

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[87] Brandstetter Affidavit, at p. 3, ¶ 12.
[88] Brandstetter Affidavit, at p. 3, ¶ 11.

presented in this lawsuit. This amount shall be decreased by ten percent (10%), as discussed above, for a total attorney fee recovery of $72,312.36.

E. Costs.

Storms and Brownstone also request the $500.00 fee they paid to the mediator.[90] As the prevailing party, Storms and Brownstone are entitled to recover their costs as a matter of right under Rule 54(d)(1)(A). The mediator's fee is not enumerated as one of the costs as a matter of right, however.[91] Thus, it falls within the ambit of a discretionary cost.[92]

Mediation is ordered in most civil lawsuits in Idaho. As such, the mediator's fee is not an exceptional cost. Storms and Brownstone do not offer any reason why this cost should be assessed against Watkins. Accordingly, this cost shall be denied.

VI. CONCLUSION OF LAW

Based upon the foregoing findings and analyses, the following conclusions are appropriate:

1. The Estate is entitled to recover attorney fees, if any, awarded on behalf of Storms.

2. Storms and Brownstone are entitled to recover attorney fees above the amount of the bond.

3. Storms and Brownstone are the prevailing parties to this lawsuit.

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[89] Memorandum of Attorney's Fees and Costs, *The Watkins Company, LLC v. Storms*, Bonneville County case no. CV-2010-5958 (filed December 3, 2014), at p. 1.
[90] Id.
[91] See: Idaho Rule of Civil Procedure 54(d)(1)(C).
[92] See: Idaho Rule of Civil Procedure 54(d)(1)(D).

4. The amount of $72,312.36 meets the standard for reasonable attorney fees based upon the considerations outlined in Rule 54.

VII. ORDER

Accordingly, the Estate is hereby substituted into this lawsuit as a party defendant in place of Michael Storms.

The Estate and Brownstone are entitled to recover attorney fees in the amount of $72,312.36 from Watkins.

IT IS SO ORDERED.

DATED this 15th day of September 2015.

Darren B. Simpson
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order Substituting the Estate of Michael Storms and Granting Attorney Fees and Costs was delivered to the parties listed below by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 15th day of September 2015, to:

B.J. Driscoll, Esq.
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Dean C. Brandstetter, Esq.
COX, OHMAN & BRANDSTETTER, CHARTERED
510 "D" Street
P.O. Box 51600
Idaho Falls, ID 83405-1600

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

RONALD LONGMORE, Clerk of the Court

By: Brandee Cammack
Deputy Clerk

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO on
September 15, 2015
AT 4:39 pm
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company, Plaintiff, vs. THE ESTATE OF MICHAEL STORMS, an individual, KATHY BURGGRAF, an individual, and BROWNSTONE COMPANIES, INC., an Idaho Corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants.	**CASE NO. CV-2010-5958** **FIRST AMENDED JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff The Watkins Company, LLC, an Idaho Limited Liability Company (hereinafter "Watkins") shall take nothing by its allegations against defendant Kathy Burggraf, an individual.

Watkins shall take nothing by its breach of the "New Lease" claims against the defendants.

Watkins' request for injunctive relief against the defendants is denied as moot.

Watkins' shall take nothing by its request for an accounting under the "New Lease."

Watkins' request for the defendants' eviction is denied as moot.

Watkins shall recover $699.64 from defendant The Estate of Michael Storms, an individual (hereinafter the "Estate"), and defendant Brownstone Companies, Inc., an Idaho Corporation (hereinafter "Brownstone"), for repairs to the premises located at 455 River Parkway, Idaho Falls, Idaho (hereinafter the "Premises") necessitated by Michael Storms' and Brownstone's breach of the expectations of their at-will tenancy with Watkins or, in the alternative, for waste to the Premises.

Watkins shall take nothing by its claim of unjust enrichment against the Estate and Brownstone.

The Estate and Brownstone shall recover the full amount of the $10,000.00 bond given by Watkins for the *Temporary Restraining Order* on their counterclaim against Watkins.

The Estate and Brownstone shall recover attorney fees in the amount of $72,312.36 from Watkins.

IT IS SO ORDERED.

DATED this 15th day of September 2015.

Darren B. Simpson
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on September 15, 2015, I served a true copy of the foregoing First Amended Judgment on the parties listed below by deposit into the U.S. mail, by deposit into the attorney's courthouse mailbox, or by facsimile transmission.

B.J. Driscoll, Esq.
SMITH, DRISCOLL &
ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Dean C. Brandstetter, Esq.
COX, OHMAN &
BRANDSTETTER, CHARTERED
510 "D" Street
P.O. Box 51600
Idaho Falls, ID 83405-1600

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

RONALD LONGMORE, Clerk of the Court

By: Brandee Cammack
Deputy Clerk

DISTRICT COURT SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO
BINGHAM COUNTY

B. J. Driscoll, Esq. – ISB #7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166
Email: bjd@eidaholaw.com

Attorneys for Appellant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff/Counterdefendant/Appellant, v. MICHAEL STORMS, an individual, and BROWNSTONE COMPANIES, INC., an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendants/Counterclaimants/Respondents. and KATHY BURGGRAF, an individual, Defendant.	Case No. CV-10-5958 **NOTICE OF APPEAL**

TO: THE ESTATE OF MICHAEL STORMS and BROWNSTONE COMPANIES, INC., Defendants/Counterclaimants/Respondents, and DEAN C. BRANDSTETTER, ESQ., THEIR ATTORNEY OF RECORD; and TO THE CLERK OF THE ABOVE-ENTITLED COURT;

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff/counterdefendant/appellant, THE WATKINS COMPANY, LLC ("WATKINS"), appeals to the Idaho Supreme Court from the Seventh

Judicial District Court's Judgment entered November 20, 2014; First Amended Judgment entered September 15, 2015; and from the Order Substituting The Estate of Michael Storms and Granting Attorney Fees and Costs entered September 15, 2015, in the above-entitled action, the Honorable Darren B. Simpson, District Judge, presiding.

2. Watkins has the right to appeal to the Idaho Supreme Court, and judgments and order described in paragraph one above are subject to appeal pursuant to Idaho Appellate Rule 11(a).

3. A preliminary statement of the issues on appeal which Watkins intends to assert on appeal are the following, provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal:

a. Did the district court commit reversible error by apportioning and awarding the respondents 90% of their attorney's fees where the memorandum of costs and underlying attorney time entries did not isolate fees recoverable on the contract defense from the fees that were not recoverable on the counterclaim?

4. There has been no order entered sealing any portion of the record in this case;

5. Watkins does not request a transcript;

6. Watkins requests the following documents be included in the clerk's record, which request is more limited than the standard record under Idaho Appellate Rule 28:

a. Register of actions;

b. The original and all amended complaints;

c. The original and any amended answers to the complaints;

d. The original and any amended counterclaim;

e. The original and any amended answer to a counterclaim;

f. The original findings of fact and conclusions of law filed in chambers on November 19, 2014, but listed as filed on November 20, 2014, on the register of actions from the Idaho Supreme Court Data Repository for the case;

g. The original judgment filed in chambers on November 19, 2014, but listed as filed on November 20, 2014, on the register of actions from the Idaho Supreme Court Data Repository for the case;

h. The defendants' motion for attorney fees and costs filed December 3, 2014;

i. The defendants' memorandum of attorney's fees and costs filed December 3, 2014;

j. The defendants' affidavit in support of memorandum of attorney's fees and costs filed December 3, 2014;

k. The plaintiff's motion to disallow costs and attorney's fees filed December 17, 2014;

l. The plaintiff's brief in support of motion to disallow costs and attorney's fees filed December 17, 2014;

m. The order substituting the estate of Michael Storms and granting attorney fees and costs filed September 15, 2015; and

n. The First Amended Judgment filed September 15, 2015.

7. Watkins does not request any additional documents, charts, or exhibits to be copied and sent to the Supreme Court.

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 as named below at the address set out below: None.

(b) That the clerk of the district court has not been paid the estimated fee for preparation of the reporter's transcript because none has been requested.

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid; and

(e) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 29 day of September, 2015.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
B. J. Driscoll, Esq.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of September, 2015, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq. COX, OHMAN & BRANDSTETTER, CHTD P.O. Box 51600 510 "D" Street Idaho Falls, ID 83405	[ ] U. S. Mail [ ] Fax [ ] Overnight Delivery [✓] Hand Delivery
Honorable Darren B. Simpson District Judge Bingham County Courthouse 501 N. Maple, #310 Blackfoot, ID 83221	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Ronald Longmore 605 N. Capital Avenue Idaho Falls, ID 83402	[ ] U. S. Mail [ ] Fax [ ] Overnight Delivery [✓] Hand Delivery

B. J. Driscoll

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff/Counterdefendant/Appellant, vs. MICHAEL STORMS, an individual, and BROWNSTONE COMPANIES, INC.,an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendant/Counterclaimants/Respondents.	)	Case No. CV-2010-5958 Docket No. 43649 **CLERK'S CERTIFICATION OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets.

Plaintiff's Exhibit 1- Defendant Michael Storms and Brownstone Companies, Inc. Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, dated January 30, 2013.

Plaintiff's Exhibit 2- Defendant's Supplemental Answers to Discovery, dated January 30, 2013.

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 17 day of December, 2015.

7TH JUDICIAL DISTRICT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company,	)	
Plaintiff/Counterdefendant/Appellant,	)	Case No. CV-2010-5958
vs.	)	Docket No. 43649
MICHAEL STORMS, an individual, and BROWNSTONE COMPANIES, INC.,an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE,	)	**CLERK'S CERTIFICATE**
Defendant/Counterclaimants/Respondents.	)	

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 17 day of December, 2015.

7TH JUDICIAL DISTRICT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

RONALD LONGMORE
Clerk of the District Court

By: Amanda L Beith
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THE WATKINS COMPANY, LLC, an Idaho limited liability company, Plaintiff/Counterdefendant/Appellant, vs. MICHAEL STORMS, an individual, and BROWNSTONE COMPANIES, INC.,an Idaho corporation; collectively doing business as BROWNSTONE RESTAURANT AND BREWHOUSE, Defendant/Counterclaimants/Respondents.	Case No. CV-2010-5958 Docket No. 43649 **CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17 day of December, 2015, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

B.J. Driscoll
PO Box 50731
Idaho Falls ID 83405

Dean C. Brandstetter
PO Box 51600
Idaho Falls ID 83405-1600

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

7TH JUDICIAL DISTRICT COUNTY OF BONNEVILLE STATE OF IDAHO DISTRICT COURT

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk