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### **Caldwell Land and Cattle, LLC v. Johnson Thermal Systems, Inc. Clerk's Record Dckt. 46056**

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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

CALDWELL LAND AND CATTLE, LLC, )  
an Idaho limited liability company )  
a/k/a CALDWELL LAND & CATLE )  
COMPANY, LLC., )  
 )  
Plaintiff-Respondent, )  
 )  
-vs- )  
 )  
JOHNSON THERMAL SYSTEMS, Inc., )  
an Idaho corporation, )  
 )  
Defendant-Appellant. )  
 )

Supreme Court No. 46056-2018

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE CHRISTOPHER S. NYE, Presiding

Lynnette M. Davis, ISB No. 5263  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000, PO Box 1617, Boise, Idaho 83701-1617

Attorney for Appellant

Robert L. Janicki, Graden P. Jackson (Pro Hac Vice),  
William B. Ingram (Pro Hac Vice), STRONG & HANNI  
102 South 200 East, Ste. 800, Salt Lake City, Utah 84111

Attorneys for Respondent



CANYON COUNTY DISTRICT COURT

**CASE SUMMARY**

**CASE NO. CV-2015-587**

**Caldwell Land and Cattle**  
**vs.**  
**Johnson Thermal Systems, Colliers Paragon Llc**

§  
§  
§  
§  
§  
§

Location: **Canyon County District Court**  
 Judicial Officer: **Nye, Christopher S.**  
 Filed on: **01/22/2015**  
 Case Number History:  
 Appellate Case Number: **46056-2018**  
 Previous Case Number: **CV-2015-587-C**

**CASE INFORMATION**

**Bonds**

Transcript Bond \$200.00  
 5/7/2018 Posted  
 8/28/2018 Exonerated  
 Counts: 1

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

Case Status: **05/02/2018 Appealed Case - Supreme Court Appeal**

**DATE**

**CASE ASSIGNMENT**

**Current Case Assignment**

Case Number CV-2015-587  
 Court Canyon County District Court  
 Date Assigned 05/13/2015  
 Judicial Officer Nye, Christopher S.



**PARTY INFORMATION**

		<i>Lead Attorneys</i>
<b>Plaintiff</b>	<b>Caldwell Land and Cattle</b>	<b>Janicki, Robert Lewis</b> <i>Retained</i> 801-323-2015(W)
<b>Defendant</b>	<b>Colliers Paragon Llc</b>	<b>McAllister, Bruce Richard</b> <i>Retained</i> 208-345-8600(W)
	<b>Johnson Thermal Systems</b>	<b>Davis, Lynnette Michele</b> <i>Retained</i> 208-344-6000(W)
<b>Third Party Defendant</b>	<b>Colliers Paragon Llc</b>	<b>McAllister, Bruce Richard</b> <i>Retained</i> 208-345-8600(W)
<b>Third Party Plaintiff</b>	<b>Johnson Thermal Systems</b>	<b>Davis, Lynnette Michele</b> <i>Retained</i> 208-344-6000(W)

**DATE**








**EVENTS & ORDERS OF THE COURT**

**INDEX**

01/22/2015	New Case Filed Other Claims <i>New Case Filed-Other Claims</i>	
01/22/2015	Miscellaneous <i>Filing: A - All initial case filings in Magistrate Division of any type not listed in categories B,C,D,G and H(2) Paid by: Strong &amp; Hanni PC Receipt number: 0003843 Dated: 1/22/2015 Amount: \$166.00 (Check) For: Caldwell Land and Cattle (plaintiff)</i>	
01/22/2015	 Complaint Filed <i>Complaint Filed</i>	
01/22/2015	 Summons Issued	

**CASE SUMMARY**

**CASE NO. CV-2015-587**

	<i>Summons Issued</i>
01/22/2015	Change Assigned Judge <i>Change Assigned Judge</i>
02/06/2015	 Affidavit of Service <i>Affidavit Of Service-Johnson Thermal Systems 1-29-15</i>
02/17/2015	Miscellaneous <i>Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Bjorkman, Kristin E (attorney for Johnson Thermal Systems) Receipt number: 0009448 Dated: 2/17/2015 Amount: \$136.00 (Check) For: Johnson Thermal Systems (defendant)</i>
02/17/2015	 Notice of Appearance <i>Notice Of Appearance - Bjorkman</i>
02/25/2015	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 05/11/2015 09:45 AM)</i>
02/25/2015	Hearing Scheduled <i>Hearing Scheduled (Conference - Status 06/10/2015 09:00 AM)</i>
02/25/2015	Hearing Scheduled <i>Hearing Scheduled (Court Trial 06/10/2015 10:00 AM)</i>
02/26/2015	 Motion <i>Motion to Strike (fax)</i>
02/26/2015	 Notice of Hearing <i>Notice Of Hearing 3-12-15 (fax)</i>
02/26/2015	Hearing Scheduled <i>Hearing Scheduled (Motion Hearing 03/12/2015 09:00 AM) defs motn to strike</i>
02/26/2015	 Miscellaneous <i>Order Setting Case and Scheduling Order</i>
03/04/2015	 Notice <i>Notice of Change of Address (Fax)</i>
03/10/2015	 Motion <i>Stipulated Motion for leave to Amend Complaint (with order)</i>
03/11/2015	Hearing Vacated <i>Hearing result for Motion Hearing scheduled on 03/12/2015 09:00 AM: Hearing Vacated defs motn to strike</i>
03/11/2015	 Order <i>Order Granting Stipulated Motion for Leave to Amend Complaint (Judge DeMeyer)</i>
03/12/2015	<b>CANCELED Motion Hearing</b> (9:00 AM) (Judicial Officer: DeMeyer, Gary D.) <i>Vacated</i> <i>defs motn to strike Hearing result for Motion Hearing scheduled on 03/12/2015 09:00 AM: Hearing Vacated</i>
03/24/2015	 Amended Complaint Filed

**CASE SUMMARY**

**CASE NO. CV-2015-587**

*Verified Amended Complaint*

- 03/24/2015  Summons Issued  
*Summons Issued*
- 04/01/2015 Change Assigned Judge  
*Change Assigned Judge*
- 04/01/2015 Hearing Vacated  
*Hearing result for Court Trial scheduled on 06/10/2015 10:00 AM: Hearing Vacated*
- 04/01/2015 Hearing Vacated  
*Hearing result for Conference - Status scheduled on 06/10/2015 09:00 AM: Hearing Vacated*
- 04/01/2015 Hearing Vacated  
*Hearing result for Pre Trial scheduled on 05/11/2015 09:45 AM: Hearing Vacated*
- 04/10/2015  Answer  
*Answer to Amended Complaint and Counterclaim*
- 04/29/2015 Hearing Scheduled  
*Hearing Scheduled (Conference - Telephone 05/12/2015 11:30 AM) scheduling*
- 04/29/2015  Miscellaneous  
*Order Setting Case for Scheduling Conference (Judge Ryan)*
- 05/05/2015  Miscellaneous  
*Reply to Counterclaim*
- 05/05/2015  Motion  
*Plaintiffs Motion for Partial Summary Judgment*
- 05/05/2015  Memorandum  
*Memorandum in Support of Motion for Partial Summary Judgment*
- 05/05/2015  Certificate of Service  
*Certificate of Service of Plaintiffs First Requests for Interrogatories, Requests for Production of Documents, and Requests for Admission to Defendant Johnson Thermal Systems Inc*
- 05/05/2015  Notice  
*Notice of Change of Address - Kristin Bjorkman Dunn*
- 05/11/2015 **CANCELED Pre Trial (9:45 AM)** (Judicial Officer: DeMeyer, Gary D.)  
*Vacated*  
*Hearing result for Pre Trial scheduled on 05/11/2015 09:45 AM: Hearing Vacated*
- 05/12/2015  DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Conference - Telephone scheduled on 05/12/2015 11:30 AM: District Court Hearing Held*  
*Court Reporter: Patricia Terry*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*
- 05/12/2015 Hearing Held  
*Hearing Held*
- 05/12/2015 **Telephone Conference (11:30 AM)** (Judicial Officer: Kerrick, Juneal C.)

**CASE SUMMARY**

**CASE NO. CV-2015-587**

*Hearing result for Conference - Telephone scheduled on 05/12/2015 11:30 AM: District Court  
Hearing Held  
Court Reporter: Patricia Terry  
Number of Transcript Pages for this hearing estimated: Less than 100 pages*

05/13/2015  Order for Disqualification of Judge  
*Order for Disqualification-Judge Kerrick*

05/13/2015 Disqualification of Judge - Self  
*Disqualification Of Judge - Self*

05/13/2015 Change Assigned Judge  
*Change Assigned Judge*

05/15/2015  Order  
*Order of Assignment-Judge Nye*

05/26/2015  Motion  
*Motion for Pro Hac Vice Admission of Ryan C Bullock*

05/26/2015  Motion  
*Motion for Pro Hac Vice Admission of R Roman Groesbeck*

05/26/2015  Motion  
*Motion for Pro Hac Vice Admission of Graden P Jackson*

05/27/2015  Order  
*Order Granting Pro Hac Vice Admission of R Roman Groesbeck*

05/27/2015  Order  
*Order Granting Pro Hac Vice Admission of Graden P Jackson*

05/27/2015  Order  
*Order Granting Pro Hac Vice Admission of Ryan C Bullock*

06/08/2015  Notice of Hearing  
*Notice Of Hearing -7-16-15*

06/08/2015 Hearing Scheduled  
*Hearing Scheduled (Motion Hearing 07/16/2015 09:00 AM) plts motn for summ judg*

06/10/2015 **CANCELED Status Conference (9:00 AM)** (Judicial Officer: DeMeyer, Gary D.)  
*Vacated  
Hearing result for Conference - Status scheduled on 06/10/2015 09:00 AM: Hearing Vacated*

06/10/2015 **CANCELED Court Trial (10:00 AM)** (Judicial Officer: DeMeyer, Gary D.)  
*Vacated  
Hearing result for Court Trial scheduled on 06/10/2015 10:00 AM: Hearing Vacated*

07/02/2015  Memorandum  
*Memorandum in Opposition to Motion for Partial Summary Judgment*

07/02/2015  Affidavit  
*Affidavit of Darrell Gustaveson*

**CASE SUMMARY**

**CASE NO. CV-2015-587**

07/10/2015  Memorandum  
*Reply Memorandum in Support of Motion for Partial Summary Judgment*

07/16/2015 Hearing Held  
*Hearing result for Motion Hearing scheduled on 07/16/2015 09:00 AM: Hearing Held plts motn for summ judg*

07/16/2015  DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Motion Hearing scheduled on 07/16/2015 09:00 AM: District Court Hearing Held  
Court Reporter: Tamara Weber  
Number of Transcript Pages for this hearing estimated: less than 100 pages*

07/16/2015 Hearing Held  
*Hearing result for Motion Hearing scheduled on 07/16/2015 09:00 AM: Motion Held plts motn for summ judg*

07/16/2015 **Motion Hearing (9:00 AM)** (Judicial Officer: Nye, Christopher S.)  
*plts motn for summ judg Hearing result for Motion Hearing scheduled on 07/16/2015 09:00 AM: Hearing Held*

08/14/2015  Decision or Opinion  
*Memorandum decision and order denying plaintiff's motion for partial summary judgment*

10/29/2015  Order  
*Order to File Stipulated Trial Dates*

10/29/2015  Notice of Service  
*Notice Of Service (fax)*

11/03/2015  Notice of Taking Deposition Duces Tecum  
*Notice Of Taking Deposition of Lincoln Hagood*

11/03/2015  Notice of Taking Deposition Duces Tecum  
*Notice Of Taking Deposition of Jeff Johnson*

11/03/2015  Notice of Taking Deposition Duces Tecum  
*Notice Of Taking Deposition of Dave Erlebach*

11/03/2015  Notice of Taking Deposition Duces Tecum  
*Notice Of Taking Deposition of Darrell Gustaveson*

11/03/2015  Notice of Taking Deposition Duces Tecum  
*Notice Of Taking Deposition of Sheri Johnson*

11/09/2015  Affidavit of Service  
*Affidavit Of Service-Lincoln Hagood 10-29-15*

11/16/2015  Stipulation  
*Stipulated Response to Court's Order to File Trial Dates*

11/19/2015  Miscellaneous  
*Order Setting Pretrial Conference and Jury Trial*








**CASE SUMMARY**

**CASE NO. CV-2015-587**

11/19/2015	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 06/21/2016 09:00 AM) 4 day</i>
11/19/2015	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 04/21/2016 11:00 AM)</i>
12/08/2015	 Stipulation <i>Stipulation for Scheduling and Planning</i>
12/14/2015	 Notice of Service <i>Notice Of Service of Plaintiffs Responses to Defendants First Set of Interrogatories and Requests for Production of Documents</i>
02/04/2016	 Miscellaneous <i>Amended Order Setting pretrial conference and court trial</i>
02/12/2016	 Motion <i>Motion for Partial Summary Judgment</i>
02/12/2016	 Affidavit <i>Affidavit of Rebecca A Rainey in Support of Motion for Partial Summary</i>
02/12/2016	 Memorandum <i>Memorandum in Support of Motion for Partial Summary Judgment</i>
02/12/2016	 Notice of Hearing <i>Notice Of Hearing 3-17-16</i>
02/12/2016	Hearing Scheduled <i>Hearing Scheduled (Motion Hearing 03/17/2016 09:00 AM) Def Mo Partial Sum Judgment</i>
02/22/2016	 Notice of Hearing <i>Notice Of Hearing</i>
02/22/2016	 Motion <i>Motion for leave to add third party</i>
02/22/2016	 Affidavit <i>Affidavit of Rebecca A Rainey in support of Motion to add thir party</i>
02/22/2016	 Memorandum <i>Memorandum in support of motion to add third party</i>
02/24/2016	Hearing Vacated <i>Hearing result for Motion Hearing scheduled on 03/17/2016 09:00 AM: Hearing Vacated Def Mo Partial Sum Judgment/ Defns mtm to add 3rd party</i>
02/25/2016	 Notice of Hearing <i>Amended Notice of Hearing - 04.21.16</i>
02/26/2016	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 04/21/2016 09:00 AM) Def Mo Partial Sum Judgment/ Defns mtm to add 3rd party</i>











**CASE SUMMARY**

**CASE NO. CV-2015-587**

03/17/2016	<b>CANCELED Motion Hearing</b> (9:00 AM) (Judicial Officer: Nye, Christopher S.) <i>Vacated</i> <i>Def Mo Partial Sum Judgment/ Defns mtn to add 3rd party Hearing result for Motion Hearing scheduled on 03/17/2016 09:00 AM: Hearing Vacated</i>
03/28/2016	 <b>Notice</b> <i>Notice of Non Opposition to Defendants Motion for Leave to Add Third Party</i>
03/28/2016	 <b>Motion</b> <i>Plaintiffs Cross-Motion for Partial Summary Judgment</i>
03/28/2016	 <b>Affidavit</b> <i>Affidavit of Ryan C Bullock in Support of Opposition to Motion for Partial Summary Judgment and Cross-Motion</i>
03/28/2016	 <b>Memorandum</b> <i>Memorandum in Opposition to Plaintiffs Motion for Partial Summary Judgment and in Support of Plaintiffs Cross-Motion</i>
03/28/2016	 <b>Notice of Hearing</b> <i>Notice Of Hearing Plaintiffs Cross Motion for Partial Summary Judgment 4-21-16</i>
04/08/2016	 <b>Memorandum</b> <i>Reply Memorandum in support of defendant's motion for partial summary judgment and in opposition to plaintiff's cross-motion for summary judgment (fax)</i>
04/18/2016	 <b>Memorandum</b> <i>Plaintiffs Reply Memorandum in Support of Cross Motion for Summary Judgment</i>
04/21/2016	 <b>DC Hearing Held: Court Reporter: # of Pages:</b> <i>Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: District Court Hearing Held Court Reporter: Tamara Weber</i> <i>Number of Transcript Pages for this hearing estimated: less than 100 pages - Def Mo Partial Sum Judgment/ Defns mtn to add 3rd party/Plts Cross Motion for Partial Summary Judgment</i>
04/21/2016	<b>Hearing Held</b> <i>Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: Hearing Held Def Mo Partial Sum Judgment/ Defns mtn to add 3rd party/Plts Cross Motion for Partial Summary Judgment</i>
04/21/2016	<b>Hearing Held</b> <i>Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: Motion Held Def Mo Partial Sum Judgment/ Defns mtn to add 3rd party/Plts Cross Motion for Partial Summary Judgment</i>
04/21/2016	<b>Motion Granted</b> <i>Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: Defns mtn to add 3rd party/</i>
04/21/2016	<b>Motion Denied</b> <i>Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: Motion Denied Def Mo Partial Sum Judgment/ /Plts Cross Motion for Partial Summary Judgment</i>
04/21/2016	<b>Pre Trial</b> (9:00 AM) (Judicial Officer: Nye, Christopher S.) <i>Def Mo Partial Sum Judgment/ Defns mtn to add 3rd party/Plts Cross Motion for Partial Summary Judgment Hearing result for Pre Trial scheduled on 04/21/2016 09:00 AM: District Court Hearing Held</i> <i>Court Reporter: Tamara Weber</i> <i>Number of Transcript Pages for this hearing estimated: less than 100 pages -</i>

**CASE SUMMARY**

**CASE NO. CV-2015-587**

- 04/26/2016  Order  
*Order Granting Motion For Leave to Add Third Party and Denying Defendant's Motion for Partial Summary Judgment and Plaintiff's Motion For Partial Summary Judgment*
- 04/28/2016  Complaint Filed  
*Third Party Complaint Filed*
- 05/04/2016  Summons Issued  
*Summons Issued - Collier's Paragon, LLC*
- 05/06/2016  Acceptance of Service  
*Acceptance of Service-Third Party Plaintiff Collier 5-5-16 (fax)*
- 05/12/2016  Notice of Hearing  
*Notice Of Hearing - 05.26.16 (Fax)*
- 05/12/2016 Hearing Scheduled  
*Hearing Scheduled (Conference - Status 05/26/2016 09:00 AM) Def Telephonic (Court Initiate Call)*
- 05/25/2016  Notice of Appearance  
*Notice Of Appearance - Bruce McAllister (Colliers Paragon)*
- 05/25/2016 Miscellaneous  
*Filing: II - Initial Appearance by persons other than the plaintiff or petitioner Paid by: McAllister, Bruce R (attorney for Colliers Paragon Llc) Receipt number: 0031773 Dated: 5/25/2016 Amount: \$136.00 (Check) For: Colliers Paragon Llc (defendant)*
- 05/26/2016  DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Conference - Status scheduled on 05/26/2016 09:00 AM: District Court Hearing Held  
Court Reporter: Tamara Weber  
Number of Transcript Pages for this hearing estimated: Less than 100 pages*
- 05/26/2016 Hearing Held  
*Hearing result for Conference - Status scheduled on 05/26/2016 09:00 AM: Hearing Held*
- 05/26/2016 Hearing Vacated  
*Hearing result for Jury Trial scheduled on 06/21/2016 09:00 AM: Hearing Vacated 4 day*
- 05/26/2016 **Status Conference (9:00 AM)** (Judicial Officer: Nye, Christopher S.)  
*Hearing result for Conference - Status scheduled on 05/26/2016 09:00 AM: District Court Hearing Held  
Court Reporter: Tamara Weber  
Number of Transcript Pages for this hearing estimated: Less than 100 pages*
- 06/06/2016  Miscellaneous  
*Notice of Intent to Take Default*
- 06/07/2016  Answer  
*Defendant Colliers Paragon LLC's Answer to Third-Party Complaint and Demand for Jury Trial (fax)*
- 06/13/2016  Miscellaneous  
*Second Amended Order Setting Pretrial Conference and Jury Trial*



**CASE SUMMARY****CASE NO. CV-2015-587**

06/13/2016	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 06/27/2017 09:00 AM) 4 day</i>
06/13/2016	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 04/20/2017 11:00 AM)</i>
06/22/2016	<b>Jury Trial (9:00 AM) (Judicial Officer: Nye, Christopher S.)</b> <b>06/22/2016-06/24/2016</b> <i>4 day Hearing result for Jury Trial scheduled on 06/21/2016 09:00 AM: Hearing Vacated</i>
06/28/2016	 Stipulation <i>Second Amended Stipulation for Scheduling and Planning</i>
11/10/2016	Hearing Vacated <i>Hearing result for Jury Trial scheduled on 06/27/2017 09:00 AM: Hearing Vacated 4 day</i>
11/10/2016	Hearing Vacated <i>Hearing result for Pre Trial scheduled on 04/20/2017 11:00 AM: Hearing Vacated</i>
11/10/2016	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 06/15/2017 11:00 AM)</i>
11/10/2016	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 08/22/2017 09:00 AM)</i>
11/16/2016	 Miscellaneous <i>Third Amended Order Setting Pretrial Conference and Jury Trial</i>
12/01/2016	 Stipulation <i>Stipulation for Scheduling and Planning (Fax)</i>
02/07/2017	 Motion <i>Third Party Defendant Colliers Paragon LLC's Motion for Summary Judgment</i>
02/07/2017	 Memorandum <i>Memorandum in support of Third Party Defendant Colliers Paragon LLC's Motion for Summary Judgment</i>
02/07/2017	 Affidavit <i>Affidavit of bruce R Mcallister in Support of Third Party Defendant Colliers Paragon LLC's Motion for Summary Judgment</i>
02/07/2017	 Notice of Hearing <i>Notice Of Hearing</i>
02/07/2017	Hearing Scheduled <i>Hearing Scheduled (Motion Hearing 04/20/2017 09:00 AM) Third Party Defendant's Motion for Summary Judgment</i>
02/09/2017	Hearing Vacated <i>Hearing result for Motion Hearing scheduled on 04/20/2017 09:00 AM: Hearing Vacated Third Party Defendant's Motion for Summary Judgment</i>
02/09/2017	Hearing Scheduled <i>Hearing Scheduled (Motion Hearing 03/16/2017 09:00 AM) Third Party Defendant's Motion for Summary Judgment</i>

**CASE SUMMARY****CASE NO. CV-2015-587**

02/09/2017	 Miscellaneous <i>Amended Notice of Hearing-Fax</i>
02/21/2017	 Notice of Hearing <i>AMENDED Notice Of Hearing</i>
02/21/2017	Hearing Vacated <i>Hearing result for Pre Trial scheduled on 06/15/2017 11:00 AM: Hearing Vacated</i>
02/21/2017	Hearing Scheduled <i>Hearing Scheduled (Pre Trial 06/22/2017 11:00 AM)</i>
03/09/2017	 Notice of Hearing <i>Notice Of Vacate Hearing-03/16/2017</i>
03/09/2017	Hearing Vacated <i>Hearing result for Motion Hearing scheduled on 03/16/2017 09:00 AM: Hearing Vacated Third Party Defendant's Motion for Summary Judgment</i>
03/16/2017	<b>CANCELED Motion Hearing (9:00 AM)</b> (Judicial Officer: Nye, Christopher S.) <i>Vacated Third Party Defendant's Motion for Summary Judgment Hearing result for Motion Hearing scheduled on 03/16/2017 09:00 AM: Hearing Vacated</i>
04/05/2017	 Stipulation <i>Stipulation for Dismissal of Third Party Defendant Colliers Paragon, LLC Only</i>
04/11/2017	 Order <i>Order of dismissal with prejudice</i>
04/11/2017	 Judgment <i>Final Judgment- Third party defendant Colliers Paragon LLC Only</i>
04/11/2017	Civil Disposition Entered <i>Civil Disposition entered for: Colliers Paragon Llc, Defendant; Caldwell Land and Cattle, Plaintiff. Filing date: 4/11/2017</i>
04/11/2017	<b>Dismissed With Prejudice</b> Comment (Colliers Paragon ONLY) Party (Colliers Paragon Llc) Party (Caldwell Land and Cattle)
04/12/2017	 Notice of Service <i>Notice Of Service (fax)</i>
04/20/2017	<b>CANCELED Pre Trial (11:00 AM)</b> (Judicial Officer: Nye, Christopher S.) <i>Vacated Hearing result for Pre Trial scheduled on 04/20/2017 11:00 AM: Hearing Vacated</i>
04/20/2017	<b>CANCELED Motion Hearing (9:00 AM)</b> (Judicial Officer: Nye, Christopher S.) <i>Vacated Third Party Defendant's Motion for Summary Judgment Hearing result for Motion Hearing scheduled on 04/20/2017 09:00 AM: Hearing Vacated</i>
05/30/2017	 Notice of Service <i>Notice Of Service of Plaintiff's Responses to Defendant's Second Set of Interrogatories and Requests for Production of Documents</i>

**CASE SUMMARY**

**CASE NO. CV-2015-587**

- 05/31/2017  Notice  
*notice of deposition of Graden Jackson (fax)*
- 05/31/2017  Notice  
*Amended notice of deposition of Graden Jackson (fax)*
- 06/06/2017  Notice  
*Notice of Taking 30(b)(6) Deposition of Caldwell Land & Cattle CO., LLC (fax)*
- 06/12/2017  Notice of Service  
*Notice Of Service (fax)*
- 06/13/2017  Notice of Service  
*Notice Of Service (fax)*
- 06/15/2017  Miscellaneous  
*Pre Trial Brief (fax)*
- 06/15/2017 **CANCELED Pre Trial (11:00 AM)** (Judicial Officer: Nye, Christopher S.)  
*Vacated*  
*Hearing result for Pre Trial scheduled on 06/15/2017 11:00 AM: Hearing Vacated*
- 06/16/2017  Miscellaneous  
*PETN'S Pre Trial Brief (fax)*
- 06/20/2017  Notice of Service  
*Notice Of Service of Plaintiff's Responses to Defendant's Second Set of Interrogatories and Requests for Production of Documents*
- 06/22/2017 Hearing Scheduled  
*Hearing Scheduled (Court Trial 08/23/2017 09:00 AM)*
- 06/22/2017 Hearing Scheduled  
*Hearing Scheduled (Court Trial 08/23/2017 10:00 AM)*
- 06/22/2017  DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Pre Trial scheduled on 06/22/2017 11:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*
- 06/22/2017 Hearing Held  
*Hearing result for Pre Trial scheduled on 06/22/2017 11:00 AM: Hearing Held*
- 06/22/2017  Notice of Taking Deposition Duces Tecum  
*Notice Of Deposition Of Blake Jackson-Fax*
- 06/22/2017  Notice of Taking Deposition Duces Tecum  
*Amended Notice Of Taking 30(b)(6)Deposition Of Caldwell Land & Cattle Co.,LLC-Fax*
- 06/22/2017  Miscellaneous  
*Plaintiff's Disclosure Of Lay Witnesses-Fax*
- 06/22/2017 Hearing Scheduled

**CASE SUMMARY**

**CASE NO. CV-2015-587**

*Hearing Scheduled (Conference - Status 08/10/2017 08:30 AM) Telephonic - Court to initiate*

- 06/22/2017 **CANCELED Pre Trial** (11:00 AM) (Judicial Officer: Nye, Christopher S.)  
*Vacated*  
*Hearing result for Pre Trial scheduled on 06/22/2017 11:00 AM: Hearing Vacated*
  
- 06/22/2017 **Pre Trial** (11:00 AM) (Judicial Officer: Nye, Christopher S.)  
*Hearing result for Pre Trial scheduled on 06/22/2017 11:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*
  
- 06/23/2017  **Miscellaneous**  
*Defendant's Disclosure Of Lay Witnesses-Fax*
  
- 06/26/2017  **Acceptance of Service**  
*Acceptance of Service for deposition subpoena (fax)*
  
- 06/28/2017  **Notice of Service**  
*Notice Of Service of Plaintiff's Second Supplemental Responses to Defendant's Second Set of Interrogatories and Requests for Production of Documents*
  
- 06/28/2017  **Brief Filed**  
*Pretrial Brief*
  
- 06/28/2017 **Jury Trial** (9:00 AM) (Judicial Officer: Nye, Christopher S.)  
**06/28/2017-06/30/2017**  
*4 day Hearing result for Jury Trial scheduled on 06/27/2017 09:00 AM: Hearing Vacated*
  
- 06/29/2017  **Miscellaneous**  
*Amended Subpoena to take deposition of Idaho Power Company (fax)*
  
- 07/05/2017  **Acceptance of Service**  
*Acceptance of Service for Amended Deposition Subpoena (Fax)*
  
- 07/07/2017  **Notice of Service**  
*Notice Of Service*
  
- 07/11/2017  **Notice of Service**  
*Notice Of Service of plaintiffs third supplemental responses to defendants first and second set of interrogatories and requests for production of documents*
  
- 07/17/2017  **Motion**  
*Motion for Admission Pro Hac Vice (w/order)*
  
- 07/18/2017  **Subpoena Returned**  
*Second Amended Subpoena to Take Deposition of Idaho Power Company (Fax)*
  
- 07/18/2017  **Acceptance of Service**  
*Acceptance of Service for Second amended Deposition Subpoena (Fax)*
  
- 07/18/2017 **Motion**  
*Motion in Limine Regarding Evidence of Damages Alleged by Entities Other Than Plaintiff*
  
- 07/18/2017  **Motion**  
*Motion in Limine Regarding Evidence of Damages Alleged by Entities Other than Plaintiff*

**CASE SUMMARY**

**CASE NO. CV-2015-587**

07/18/2017  Affidavit  
*Defendant Johnson Thermal Systems' Memorandum in Support of Motion in Limine Regarding Evidence of Damages Alleged by Entities Other Than Plaintiff*

07/18/2017  Affidavit  
*Affidavit of Rebecca A. Rainey*

07/18/2017  Order  
*Order Granting Motion For Admission Pro Hac Vice-William B Ingram*

07/19/2017 Hearing Scheduled  
*Hearing Scheduled (Motion Hearing 08/02/2017 09:00 AM) def motn in limine*

07/19/2017  Notice of Hearing  
*Notice Of Hearing (fax)*

07/24/2017  Notice of Service  
*Notice Of Service (fax)*

07/25/2017  Notice of Service  
*Notice Of Service of Plaintiff's Fourth Supplemental Responses to Defendant's First and Second Set of Interrogatories and Requests for Production of Documents (Fax)*

07/26/2017  Stipulation  
*Stipulated Motion to Appear Telephonically (w/order) (Fax)*

07/27/2017  Memorandum  
*Memorandum in opposition to defendants motion in limine*

07/27/2017  Affidavit  
*Affidavit of Ryan C. Bullock in support of memorandum in opposition to defendants motion in limine*

07/28/2017  Order  
*Order on Stipulated Motion to Appear Telephonically*

07/31/2017  Answer  
*Defendant's reply in support of motion in limine (fax)*


07/31/2017  Affidavit  
*of Rebecca A. Rainey in Support of Reply to Plaintiff's Opposition to Defendant's Motion in Limine*

08/02/2017  DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Motion Hearing scheduled on 08/02/2017 09:00 AM: District Court Hearing Held  
Court Reporter: Tamara Weber  
Number of Transcript Pages for this hearing estimated: Less than 100 pages*

08/02/2017 Hearing Held  
*Hearing result for Motion Hearing scheduled on 08/02/2017 09:00 AM: Motion in Limine Held*


**CASE SUMMARY****CASE NO. CV-2015-587**


08/02/2017 Motion Denied  
*Hearing result for Motion Hearing scheduled on 08/02/2017 09:00 AM: Motion Denied*

08/02/2017  Miscellaneous  
*Defendant's Amended Disclosure Of Lay Witnesses-Fax*

08/02/2017 **Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.)  
*Hearing result for Motion Hearing scheduled on 08/02/2017 09:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*


08/10/2017 **Status Conference** (8:30 AM) (Judicial Officer: Nye, Christopher S.)  
*All parties telephonic - Court to initiate Hearing result for Conference - Status scheduled on 08/10/2017 08:30 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*


08/10/2017  Court Minutes


08/11/2017  Acceptance of Service  
*Acceptance of Service for Subpoena to Appear at Trial (fax)*

08/11/2017 DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Conference - Status scheduled on 08/10/2017 08:30 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: Less than 100 pages*


08/11/2017 Hearing Held  
*Hearing result for Conference - Status scheduled on 08/10/2017 08:30 AM: Hearing Held All parties telephonic - Court to initiate*


08/15/2017  Affidavit of Service  
*Affidavit Of Service-Lincoln Hagood served on 08/09/2017 (fax)*


08/15/2017  Affidavit of Service  
*Affidavit Of Service 08/08/17 Subpoena Nick subserved shelly (fax)*


08/15/2017  Affidavit of Service  
*Affidavit Of Service 08/11/2017 Brian served subpoena (fax)*

08/15/2017  Affidavit of Service  
*Affidavit Of Service 08/11/2017 Lincoln served subpoena (fax)*

08/21/2017  Miscellaneous  
*Acceptance Of Service For Subpoenas To Appear At Trial For Jeff Johnson, Sheri Johnson, And Darrell "Gus" Gustaveson-Fax*

08/21/2017  Subpoena Returned  
*Subpoena Returned-Jeff Johnson Attn:Rebecca Rainey*

08/21/2017  Subpoena Returned  
*Subpoena Returned-Sheri Johnson Attn:Rebecca Rainey*

08/21/2017  Subpoena Returned

**CASE SUMMARY**














**CASE NO. CV-2015-587**

*Subpoena Returned-Darrell "Gus" Gustavson*

- 08/23/2017 DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Court Trial scheduled on 08/23/2017 10:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: More than 500*
- 08/23/2017 Hearing Held  
*Hearing result for Court Trial scheduled on 08/23/2017 10:00 AM: Hearing Held plaintiff traveling from out of state, might start late.*
- 08/23/2017 Hearing Scheduled  
*Hearing Scheduled (Court Trial 08/24/2017 09:00 AM) Day 2*
- 08/23/2017 **Jury Trial (9:00 AM)** (Judicial Officer: Nye, Christopher S.)  
**08/23/2017-08/25/2017**  
*Hearing result for Jury Trial scheduled on 08/22/2017 09:00 AM: Hearing Vacated*
- 08/23/2017 **Court Trial (10:00 AM)** (Judicial Officer: Nye, Christopher S.)  
**08/23/2017-08/25/2017**  
*plaintiff traveling from out of state, might start late. Hearing result for Court Trial scheduled on 08/23/2017 10:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: More than 500*
- 08/23/2017  Court Minutes
- 08/24/2017 **Court Trial (9:00 AM)** (Judicial Officer: Nye, Christopher S.)  
**08/24/2017-08/25/2017**  
*Day 2 Hearing result for Court Trial scheduled on 08/24/2017 09:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: more than 500 pages*
- 08/24/2017  Court Minutes
- 08/25/2017  Court Minutes
- 08/25/2017  Exhibit List/Log
- 08/28/2017 DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Court Trial scheduled on 08/24/2017 09:00 AM: District Court Hearing Held*  
*Court Reporter: Tamara Weber*  
*Number of Transcript Pages for this hearing estimated: more than 500 pages*
- 08/28/2017 Hearing Held  
*Hearing result for Court Trial scheduled on 08/24/2017 09:00 AM: Hearing Held Day 2*
- 11/07/2017  Transcript Filed  
*(Court Trial 8-23-17 Day 1)*
- 11/07/2017  Transcript Filed  
*(Court Trial 8-24-17 Day 2)*
- 11/07/2017  Transcript Filed  
*(Court Trial 8-25-17 Day 3)*

**CASE SUMMARY**
















**CASE NO. CV-2015-587**

- 11/20/2017  Miscellaneous  
*Findings of Fact and Conclusions of Law*
- 11/20/2017  Brief Filed  
*Closing Trial*
- 01/04/2018  Findings of Fact and Conclusions of Law  
*and Order to Prepare Final Judgment*
- 01/17/2018  Memorandum of Costs & Attorney Fees  
*Plaintiff Counsel*
- 01/18/2018  Notice  
*of Filing of Amended Judgment*
- 01/23/2018  Notice of Substitution of Counsel  
*Hawley, Troxel & Ennis & Hawley LLP for Defendant Johnson Thermal Systems*
- 01/24/2018  Judgment
- 01/24/2018 **Final Judgment** (Judicial Officer: Nye, Christopher S.)  
Monetary/Property Award  
In Favor Of: Caldwell Land and Cattle  
Against: Colliers Paragon Llc; Johnson Thermal Systems  
Entered Date: 01/24/2018  
Current Judgment Status:  
Status: Active  
Status Date: 01/24/2018  
Monetary Award:  
Amount: \$86,389.26  
Interest Bearing  
Comment: 5-15-18 Amended Judgment Costs and Attorney Fees Awarded \$153,379.20
- 01/31/2018 Civil Disposition Entered
- 01/31/2018  Motion  
*to Disallow Plaintiff's Costs and Attorney Fees*
- 01/31/2018  Memorandum In Support of Motion  
*to Disallow Plaintiff's Costs and Attorney Fees*
- 02/08/2018  Reply  
*Reply in Support of Memorandum of Attorney Fees and Costs*
- 02/09/2018  Memorandum In Support of Motion  
*to Disallow Plaintiff's Costs and Attorney Fees*
- 02/09/2018  Notice of Hearing  
*Defendant's Motion to Disallow Plaintiff's Costs and Attorney Fees (03/15/18 @ 9am)*
- 02/21/2018  Response  
*to Defendant's Supplemental Memorandum in Support of Motion to Disallows Plaintiff's Attorney Fees and Costs*



**CASE SUMMARY**

**CASE NO. CV-2015-587**

- 02/22/2018  Motion  
*Defendant's to Enlarge Time for Filing Motion for Reconsideration*
- 02/22/2018  Memorandum In Support of Motion  
*Defendant's to Enlarge time for Filing Motion for Reconsideration*
- 02/22/2018  Declaration  
*of Dave Erlebach in Support of Defendant's Motion to Enlare Time for Filing Motion for Reconsideration*
- 02/22/2018  Declaration  
*of Lynnette M. Davis in Support of Defendant's Motion to Enlarge Time for Defenant's Motion for Reconsideration*
- 02/22/2018  Motion to Shorten Time  
*for Hearing*
- 02/22/2018  Affidavit  
*of William K. Smith in Support of Motion to Shorten Time for Hearing*
- 02/23/2018  Amended  
*Defendant's Motion to Enlarge Time for Filing Post-Judgment Motions*
- 02/23/2018  Motion  
*Defendant's to Stay Execution of Judgment [I.R.C.P. 62]*
- 02/23/2018  Memorandum In Support of Motion  
*Defendant's to Stay Execution of Judgment [I.R.C.P. 62]*
- 02/26/2018  Order  
*Shortening Time for Hearing*
- 02/26/2018  Notice of Hearing  
*Amended*
- 02/26/2018  Opposition to  
*Plaintiff's to Defendant's Motion to Enlarge Time for Filing Motion for Reconsideration and Motion to Stay Execution of Judgment*
- 02/27/2018  Motion  
*to Appear Telephonically*
- 02/27/2018  Order  
*on Motion to Appear Telephonically*
- 03/01/2018  Reply  
*Memorandum in Support of Amended Motion to Enlarge Time for Filing Post-Judgment Motions and Motion to Stay Execution of Judgment*
- 03/05/2018 **Motion Hearing - Civil (2:30 PM)** (Judicial Officer: Nye, Christopher S.)  
Events: 02/26/2018 Notice of Hearing  
*def motion to enlarge time for filing post trial motions and motion to stay execution of*

**CASE SUMMARY**

**CASE NO. CV-2015-587**

*judgment. Court to initiate call to Plaintiff's counsel (801)323-2013*

- 03/05/2018  Court Minutes
- 03/08/2018  Amended  
*Notice of Hearing on Defendant's Motion to Disallow Plaintiff's Costs and Attorney Fees*
- 03/12/2018  Application & Affidavit for Writ of Execution  
*and Garnishment*
- 03/12/2018  Writ Issued  
*of Execution and Garnishment- Canyon County Zions Bank*
- 03/15/2018 **CANCELED Motion Hearing - Civil (9:00 AM)** (Judicial Officer: Nye, Christopher S.)  
*Vacated  
to Disallow Plaintiffs Costs & Attorney Fees*
- 03/15/2018  Motion  
*for Reconsideration and to Alter, Amend, or Vacate Judgment*
- 03/15/2018  Memorandum In Support of Motion  
*for Reconsideration and to Alter, Amend, or Vacate Judgment*
- 03/23/2018  Application & Affidavit for Writ of Execution
- 03/23/2018  Writ Issued  
*of Execution and Garnishment re Bank of Commerce-Bonneville County*
- 03/23/2018  Writ Issued  
*of Execution and Garnishment re Bank of the West- Ada County*
- 03/23/2018  Writ Issued  
*of Execution and Garnishment re Key Bank-Power County*
- 03/23/2018  Writ Issued  
*of Execution and Garnishment re Wells Fargo-Canyon County*
- 03/27/2018  Writ Returned  
*Execution & Garnishment re Wells Fargo-Canyon County- UNSERVED- Outstanding Canyon  
County Writ still active./ Issued by error*
- 03/30/2018  Opposition to  
*Defendant's Motion to Reconsider*
- 04/02/2018  Memorandum of Costs & Attorney Fees  
*Plaintiff's Supplemental M*
- 04/04/2018  Decision or Opinion  
*Denying Combined Motions for Reconsideration and to Alter, Amend or Vacate Judgment*
- 04/09/2018  Writ Returned  
*BONNEVILLE COUNTY-Bank of Commerce - Unsatisfied NO ACCOUNT*

**CASE SUMMARY**

**CASE NO. CV-2015-587**

- 04/10/2018  Writ Returned  
*CANYON COUNTY- Zions Bank Paid \$581.33*
- 04/11/2018  Reply  
*Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees and Opposition to Supplemental Memorandum of Attorney Fees and Costs*
- 04/12/2018  Motion for Debtor's Exam  
*Under Idaho Code 11-501*
- 04/13/2018  Order for Examination of Judgment Debtor  
*under code 11-501*
- 04/16/2018  Miscellaneous  
*Supplemental Reply Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees and Opposition to Supplemental Memorandum of Attorney Fees and Costs*
- 04/18/2018  Stipulation  
*for Examination of Judgment Debtor Under Idaho Code 11-501*
- 04/19/2018 **Civil Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.)  
*Motion to Disallow Pltf Costs and Fees; Plaintiff counsel appear telephonic. Court will initiate call.*
- 04/19/2018  Writ Returned  
*ADA COUNTY- Bank of the West- Unsat. \$55.00 FEES*
- 04/19/2018  Order for Examination of Judgment Debtor  
*AMENDED*
- 04/19/2018  Court Minutes
- 04/19/2018 Miscellaneous  
*Motion Taken Under Advisement-Written Order forthcoming*
- 04/25/2018  Application & Affidavit for Writ of Execution  
*RE: Washington Trust Bank*
- 04/25/2018  Writ Issued  
*Execution and Garnishment RE: Washington Trust Bank- Ada County*
- 05/02/2018  Notice of Appeal
- 05/02/2018  Application  
*Johnson Thermal Systems, Inc's Application to Stay Execution and Enforcement of Judgment*
- 05/02/2018 Appeal Filed in Supreme Court
- 05/03/2018  Order  
*Staying Execution and Enforcement of Judgment Pending Appeal to Idaho Supreme Court*
- 05/08/2018  Clerk's Certificate of Appeal

**CASE SUMMARY**

**CASE NO. CV-2015-587**

05/10/2018	 Writ Returned <i>ADA COUNTY-Washington Trust Bank Unsatisfied \$55.00 Fees</i>
05/15/2018	 Order <i>Awarding Costs and Attorney Fees to Plaintiff \$153,379.20</i>
05/15/2018	 Amended Judgment
05/23/2018	 Objection <i>to Defendant's Supersedeas Bond &amp; Motion to Supplement the Supersedeas Bond</i>
05/24/2018	 Amended Notice of Appeal
05/31/2018	 Amended <i>Johnson Thermal Systems, Inc's Amended Application to Stay Execution and Enforcement of Judgment</i>
06/08/2018	 Stipulation <i>to Stay Execution and Enforcement of Amended Judgment Pending Appel to Idaho Supreme Court</i>
06/13/2018	 Amended <i>Order to Staying Execution and Enforcement of Judgment Pending Appeal to Supreme Court</i>
08/09/2018	 Transcript Lodged <i>SC Appeal</i>
08/10/2018	 Reporter's Notice of Transcript(s) Lodged <i>SC Appeal</i>
08/28/2018	Bond Exonerated
09/04/2018	 Exhibit List/Log
09/06/2018	 Appeal Cover/Title Page <i>SC #46056-2018</i>
09/06/2018	 Exhibit <i>Certificate of Exhibits SC Appeal #46056-2018</i>
09/06/2018	 Certificate of Service <i>SC #46056-2018</i>
09/06/2018	Case Summary <i>SC #46056-2018</i>

DATE

FINANCIAL INFORMATION

<b>Plaintiff</b> Caldwell Land and Cattle	
Total Charges	215.00
Total Payments and Credits	215.00
<b>Balance Due as of 9/11/2018</b>	<b>0.00</b>

**CASE SUMMARY**

**CASE NO. CV-2015-587**

<b>Defendant</b> Colliers Paragon Llc	
Total Charges	136.00
Total Payments and Credits	136.00
<b>Balance Due as of 9/11/2018</b>	<b>0.00</b>
<b>Defendant</b> Johnson Thermal Systems	
Total Charges	365.00
Total Payments and Credits	365.00
<b>Balance Due as of 9/11/2018</b>	<b>0.00</b>
<b>Defendant</b> Johnson Thermal Systems	
Civil Cash Bond Account Type Balance as of 9/11/2018	<b>0.00</b>

**FILED**  
A.M. P.M.

JAN 22 2015

CANYON COUNTY CLERK  
M MARTINEZ, DEPUTY

Robert L. Janicki, ISB #8911  
STRONG & HANNI  
9350 S. 150 E., Ste. 820  
Sandy, UT 84070  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

*Attorneys for Plaintiffs*

**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**COMPLAINT FOR EVICTION  
(Unlawful Detainer)**

Civil No.: CV15-587

Judge: \_\_\_\_\_

Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC  
(collectively, the "Caldwell Land"), by and through their undersigned counsel Strong & Hanni  
law firm, hereby complain and allege against Defendant Johnson Thermal Systems, Inc. ("JTS"  
or "Defendant") as follows:

### **DESCRIPTION OF PARTIES**

1. Caldwell Land is an Idaho limited liability company doing business in and around Canyon County, State of Idaho, and owns the real property forming the basis of this action, which property is located at 1505 Industrial Way, Caldwell, Idaho 83607 (Id Nos. R028007130 and R02800713B0) (the “Property”) (as described more fully below).

2. Defendant is an Idaho corporation doing business in and around Canyon County, State of Idaho.

### **JURISDICTION AND VENUE**

3. The actions complained herein relate to the Property owned by Caldwell Land and located in Canyon County, State of Idaho.

4. This Court has jurisdiction over this matter pursuant to Idaho Code §6-305.

5. This Court has venue over this matter pursuant to Idaho Code §5-401.

### **GENERAL ALLEGATIONS**

11. Caldwell Land, through its affiliated entities, is in the business of owning and operating certain semi-truck and trailer dealerships, services centers, and related businesses.

12. Upon information and belief, Defendant is engaged in the manufacturer of commercial chilling systems.

13. The Property is comprised of, among other things, a certain industrial building (the “Building”) and minimally improved surrounding land (“Land”).

14. Effective on or around February 10, 2012, Defendant and the Gilbert Family Limited Partnership, the former owner of the Property (“Prior Owner”), entered into that certain Commercial Lease Agreement, pursuant to which Prior Owner leased the Building for a specified term of thirteen (13) months (the “Commercial Lease Agreement”). An executed copy of the Commercial Lease Agreement is attached hereto as Exhibit A.

15. Among other things, the Commercial Lease Agreement expressly provides that “[it] may not be amended, modified, or changed except by a writing signed by all parties hereto.”

16. In the months and years following the execution of the Commercial Lease Agreement, Defendant and the Prior Owner entered into three (3) separate written amendments to that instrument (the “Lease Amendments”). Executed copies of each of the Lease Amendments are attached hereto as Exhibit B.

17. As a consequence of the Lease Amendments, the specified term of the Commercial Lease Agreement expired on October 15, 2014 (the “Lease Expiration Date”).

18. In the months, leading up to the Lease Expiration Date, Defendants and the Prior Owner, through its leasing agent, engaged in varied discussions regarding a possible six (6) month extension of the Lease Expiration Date, however, no oral or written agreement was formed as to any such six (6) month extension.

19. Upon information and belief, the proposed six (6) month extension of the Lease Expiration Date was sought by Defendant in order to accommodate its transition into a new building that it was constructing, and by which Defendant, through its written representations to



the Prior Owner and its leasing agent, stated it would be moving into as early as “December [2014],” and then, as later indicated by Defendants in subsequent communications, in “January or February [2015]<sup>1</sup>.”

20. A representative sample of the back-and-forth communications and discussions between Defendants and the Prior Owner, through its leasing agent, regarding the a possible six (6) month extension of the Lease Expiration Date and regarding Defendant’s planned transition into its new building, include:

a. E-mail from Defendant to Prior Owner’s leasing agent on 4/10/14 stating “it would “like to do a 6 month lease with the option to go month to month for an additional 3-6months. *If that’s amenable to [Prior Owner], get it drawn up and we’ll sign.*” (Emphasis added).

b. E-mails from Defendant on 4/18/14 and 4/19/14 discussing Defendant’s anticipated vacation date and stating “*we are still hoping on the December move in on the new building, but it could be January,*” and “*...we are tentatively planning to move in January or February,* however, if the final permit approval continues to lag, this could stretch.” (Emphasis added).

c. e-mail from Prior Owner’s leasing agent to Defendant on 9/26/14 stating “I have convinced [Prior Owner] that you staying on the property is fine and would

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<sup>1</sup> Plaintiff notes that under any of these three date scenarios, i.e., December, January or February of 2015, the vacation, and, thus, the transition, date of Defendant from the Building to its new building would be completed months prior to the expiration of any proposed six (6) month extension term discussed between Defendants and the Prior Owner.

benefit her...*Please also keep me informed on you planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup> [2014].*" (Emphasis added).

d. E-mail exchange between Prior Owner's leasing agent to Defendant on 12/8/14 in which the former states "[i]f you were able to locate correspondence between you and [Prior Owner] in October extending your lease please provide such documentation as [Prior Owner] doesn't have any documentation other than the 3rd lease amendment that I provided....Per our previous correspondence and latest discussions on Friday [12/5/14] you stated that you thought you could be out of 1505 Industrial by the end of January," and to which Defendant responds as follows " *...I did not find any correspondence with [Prior Owner] beyond the 3rd amendment...*" (Emphasis added).

21. As evidenced in the forgoing communications, among other things, no oral or written agreement was formed or exists between Defendant and the Prior Owner as to any six (6) month extension of the Lease Expiration Date.

22. Notwithstanding the expiration of the Lease Expiration Date, Defendant has remained in possession of the Building, and continues to possess the Building as of the current date.

23. During the time of its possession of the Building following the Lease Expiration Date, and through December of 2014, Defendant has paid the Prior Owner rent at a monthly rate then acceptable to the Prior Owner as market rental for each such applicable month.

24. By virtue of Defendant's continued possession of the Building after the expiration, and without any express extension of, the Lease Expiration Date, Defendant is in possession of said Building as a tenant at will.

25. On or around December 11, 2014, Prior Owner delivered<sup>2</sup> to Defendant, via certified mail and electronic transmission, that certain Notice of Termination (the "Notice of Termination"). A true and correct copy of the Notice of Termination is attached hereto as Exhibit C.

26. The Notice of Termination provides, among other things, that:

a. Pursuant to Idaho Code § 55-208, Prior Owner, as the lessor, has the right to terminate the Commercial Lease Agreement upon written notice to Defendant to remove from the Premises within a period of not less than one (1) month.

b. That as of midnight on January 31, 2015, the Commercial Lease Agreement with Defendant shall terminate and not be renewed or extended, and Defendant shall no longer be entitled to possession of the Building or any other part of the Property.

c. That Defendant is requested to vacate and surrender possession of the Building, together with all other parts of the Property, on or prior to January 31, 2015, which shall include the Defendant's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Building, together with all other parts

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<sup>2</sup> Plaintiff states that (1) pursuant to the Commercial Lease Agreement, any notice given thereunder shall be deemed delivered when mailed by certified mail, and (2) Defendant's counsel, in a letter dated December 22, 2014, acknowledged Defendant's actual receipt of the Notice of Termination.

of the Property, in the same condition, reasonable wear and tear excepted, as the Building and all other parts of the Property were in at the beginning of the lease.

d. That rent will continue to be due and payable so long as Defendant continues in possession of the Building or any other part of the Property, pursuant to the terms of the second of the Lease Amendments.

27. On or around December 31, 2014, Plaintiff purchased the Property from the Prior Owner.

28. By virtue of its purchase of the Property, Plaintiff may avail itself of, among other rights and obligations related to the Property, the Notice of Termination.

29. As of the date of this action, Defendant, through its counsel, has represented that it will refuse to surrender and vacate from the Property on the January 31, 2015, date identified in the Notice of Termination.

30. Defendants, though their stated intention to refuse and disregard the January 31, 2015, surrender and vacation date, are and will at such time be guilty of unlawful detainer pursuant to Idaho Code § 6-303(1).

31. By virtue of Defendant's represented intention not to vacate the Property, Plaintiff has and continues to incur costs and damages in connection with its inability to relocate its business to the Property.

**FIRST CLAIM FOR RELIEF**  
**(Unlawful Detainer – Idaho Code § 6-303(1))**

32. Plaintiffs hereby incorporate by this reference the allegations set forth above in paragraphs 1 through 31 as if fully set forth herein.

33. Defendants are tenants at will with respect to the Property, specifically the Building.

34. Defendant, by the Notice of Termination, has been provided with written notice providing that Defendant must remove from the Property within a period of not less than one (1) month of such notice.

35. Defendant, through counsel and in response to the Notice of Termination, has represented that it will refuse to surrender and vacate from the Property on January 31, 2015, the applicable vacation date identified in the Notice of Termination.

36. Defendant, through the above described actions, and through its representation that it will continue in possession of the Property after the January 31, 2015, the applicable vacation date identified in the Notice of Termination, is and will be in violation of Idaho Code § 6-303(1).

37. Pursuant to Idaho Code § 6-301, *et seq.*, Plaintiff is entitled to judgment for immediate restitution of the premises, and an order of execution directing the sheriff or constable of Canyon County, Idaho to return possession of the leased premises to the Plaintiff.

38. Pursuant to Idaho Code § 6-301, *et seq.*, or as otherwise provided by law, Plaintiff is further entitled to damages incurred as a result of Defendant's continued unlawful use/and or possession of the Property, trebled, and attorneys fees and costs, each in an amount to be determined at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. On the First Claim for Relief,

a. For judgment for immediate restitution of the Property together with an order of execution directing the sheriff or constable of Canyon County, Idaho to return possession of the leased premises to the Plaintiff, as provided by law.

b. For and damages incurred by Plaintiffs as a result of Defendant's continued unlawful use/and or possession of the Property, trebled, as provided by law;

c. For attorneys fees and costs, as provided by law;

d. For an award of costs incurred in bringing this action, as provided by law;

and

e. For any and all other relief the Court deems just and proper.

DATED this 16 day of January, 2015.

STRONG & HANNI

By: \_\_\_\_\_

Robert L. Janicki  
*Attorneys for Plaintiff*

**EXHIBIT A**  
(Commercial Lease Agreement)

**COMMERCIAL LEASE AGREEMENT**

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between **GILBERT FAMILY LIMITED PARTNERSHIP** the party of the first part, hereinafter referred to as **LESSOR**, and **JOHNSON THERMAL SYSTEMS, INC.**, the party of the second part, hereinafter referred to as **LESSEE**.

**WITNESSETH:**

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

Rent Schedule (Initial Term)

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16



**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statutes, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste

material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contact. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiving or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:

**Lessor**  
Gilbert Family Limited Partnership  
P.O. Box 1064  
Caldwell, Idaho 83606

**Lessee**  
Johnson Thermal Systems, Inc.  
22228 Hoskins  
Caldwell, ID 83607

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

**Commercial Lease Agreement - Page | 5**

**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.


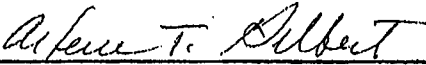
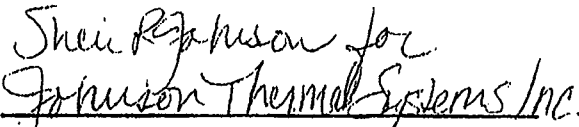
**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.

**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

<b>LESSOR:</b>		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Bill Gilbert</b>	<b>Date</b>
		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Arlene T. Gilbert</b>	<b>Date</b>
<b>LESSEE:</b>		2/27/12
	<b>Johnson Thermal Systems Inc.</b>	<b>Date</b>

Lessor: Gilbert Family Limited Partnership

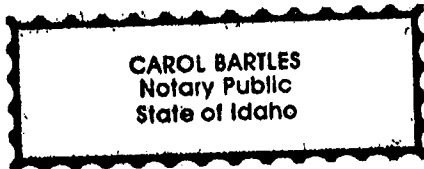
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles  
Notary public for Idaho  
Residing at: Wilder ID  
My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

:SS

County of Canyon)

On this 21 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Theresa Squibb

Notary Public of Idaho

Residing at Idaho

My commission expires: 9-21-2012

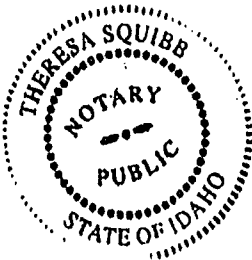




Exhibit A  
"Legal Description"

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

EXCEPTING THEREFROM

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

BEGINNING at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.

**EXHIBIT B**

(Lease Amendments)

**FIRST AMENDMENT**

This FIRST AMENDMENT to the COMMERCIAL LEASE AGREEMENT, dated February 10, 2012, for the lease of the Property entered into between GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") and JOHNSON THERMAL SYSTEMS, INC ("Lessee"), (the "Agreement") is hereby made and entered into by the Lessor and Lessee.

**WITNESSETH:**

WHEREAS, the parties desire to move the commencement date and amend certain terms set forth in the Lease.

NOW, THEREFORE, in consideration of the covenants set forth herein, the parties agree as follows:

1. Lease commencement date shall be April 1, 2012. However, early access shall be granted to Lessee to do improvements.
2. Lessor shall service the current fire sprinkling system before the commencement date.
3. Lessee shall pay for the monitoring service for the fire sprinkling system.
4. Lessor shall have all personal property removed no later than April 1, 2012.
5. All other terms and conditions of the Agreements, not specifically amended hereby, including but not limited to all dates previously set forth in the Agreements, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Lessee:

By: *Shirley Johnson*

Date: *3/21/12*

Lessor:

By: *Adlene Delbert*

Date: *3-26-12*

February 14, 2014

JTS will rent the available dirt lot adjacent to its current facility, owned by Gilbert Family Limited Partnership, for a period of six months.

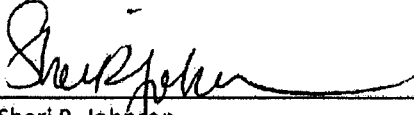
Rent period will be from February 17, 2014 through August 30, 2014, renewal by agreement of both parties on a month by month basis.

Payment will be pre-paid for the initial six month and two-week period. Amount is \$3,250.00. Subsequent months will be paid by the 10<sup>th</sup> of each month.

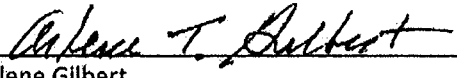
JTS will be fencing the lot for security and will remove the fencing at the end of the rental period. After the six month period, either JTS or GFLP can end this agreement with a 30 day written notice to the other party.

*JTS will take care of spraying or removing weeds during the period.*

Parties have read, understood and agree to the above terms:

  
\_\_\_\_\_  
Sheri R. Johnson  
President, JTS

*2/14/14*  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Arlene Gilbert  
Gilbert Family Limited Partnership

*2-17-14*  
\_\_\_\_\_  
Date

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

Recitals

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

Agreement

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

Sign: Arlene Gilbert  
Print: Arlene Gilbert  
Date 4-18-14

TENANT: Johnson Thermal Systems Inc.

Sign: Sheri Johnson for Johnson Thermal Systems Inc.  
Print: Sheri Johnson  
Date 4/15/14

**EXHIBIT C**

(Notice of Termination)

VIA E-MAIL AND CERTIFIED MAIL

Johnson Thermal Systems, Inc.  
1505 Industrial Way  
Caldwell, ID 83605  
Attention: Darrell "Gus" Gustavson  
gusg@johnsonthermal.com

Re: NOTICE OF TERMINATION  
1505 Industrial Way, Caldwell, ID

Dear Mr. Gustavson:

This Notice of Termination is given by GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") to JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), with reference to that certain Commercial Lease Agreement, dated February 10, 2012, and the First, Second and Third Amendments thereto (collectively, the "Lease").

NOTICE IS HEREBY GIVEN that, pursuant to Idaho Code § 55-208, Lessor has the right to terminate the Lease upon written notice to Lessee to remove from the Premises within a period of not less than one (1) month. Accordingly, as of midnight on January 31, 2015, the Lease with Lessee shall TERMINATE and not be renewed or extended, and Lessee shall no longer be entitled to possession of the Premises. Accordingly, Lessee is hereby requested to vacate and surrender possession of the Premises to Lessor on or prior to January 31, 2015, which shall include the Lessee's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Premises in the same condition, reasonable wear and tear excepted, as the Premises were in at the beginning of the Lease.

Please note that pursuant to the Lease and despite Landlord's termination of the Lease, monthly rent will continue to be due and payable if Lessee continues in possession of the Premises. In the event that Lessee holds over and rent payment is not made, Landlord intends to pursue all remedies under the Lease despite Landlord's termination of the Lease as set forth herein. This includes, without limitation, rent pursuant to the Second Amendment, both unpaid and coming due and payable for any further period of possession by Lessee.

Please also note that in the event that Lessor is required to commence a lawsuit for possession of the Premises upon termination of the Lease or otherwise (including, but not limited, to non-payment of rent for all or any part of the Premises), that Lessor will pursue attorneys' fees and costs pursuant to the Lease and/or applicable Idaho Code, including, but not limited to, Idaho Code §§ 6-324, 12-120 and/or 12-121.

The Third Amendment to the Lease provides that Lessee had the option to extend the Lease for an additional period of either six (6) months or on a month to month basis. The Lease provides that any notice given under the terms of the Lease shall be deemed delivered when mailed by certified mail. The Lease further provides that any modification to the Lease must be in a writing by all parties. Lessee did not timely or properly exercise the option.

That the option to extend the Lease was not timely or properly exercised is evidenced by the following:

(i) Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Amendment. No notice of exercise, written or verbal, was ever provided. Rather, Lessee simply continued to hold over upon the Premises and pay monthly rent in the same amount as paid for the last month of the previous extended term.

(ii) Lessee did not obtain a writing signed by all parties that would modify the Lease in any way that would support the payment of rent after the conclusion of the Third Amendment's lease extension as being an effective exercise of the lease extension option.


(iii) Time is of the essence of the Lease, as specifically set forth in the Lease.

(iv) Verbal communication from Lessee to Lessor or its agents after the conclusion of the lease extension under the Third Amendment (i.e. after October 15, 2014) indicated that Lessee intended to vacate the Premises as soon as Lessee completed the construction of a new building, thereby evidencing that Lessee did not intend a six month extension, but intended to hold over for a shorter duration.

Lessor reserves all its right and remedies, whether under the Lease or at law or in equity, whether or not mentioned herein, to terminate the Lease and cause Lessee to vacate the Premises.

Please be guided accordingly.

Sincerely,

  
\_\_\_\_\_  
Arlene Gilbert  
Gilbert Family Limited Partnership

12-11-14



**FILED**  
~~10:05~~ A.M. P.M.

MAR 24 2015

CANYON COUNTY CLERK  
K CARLTON, DEPUTY

Robert L. Janicki, ISB # 8911  
STRONG & HANNI  
9350 S. 150 E., Suite 820  
Sandy, UT 84070  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiffs*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**VERIFIED AMENDED COMPLAINT**

Civil No.: CV15-587

Judge: Meyer

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Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, the "Caldwell Land"), by and through their undersigned counsel Strong & Hanni law firm, hereby complain and allege against Defendant Johnson Thermal Systems, Inc. ("JTS" or "Defendant") as follows:

**DESCRIPTION OF PARTIES**

1. Caldwell Land is an Idaho limited liability company doing business in and around Canyon County, State of Idaho, and owns the real property forming, in part, the basis of this action, which property is located at 1505 Industrial Way, Caldwell, Idaho 83607 (Id Nos. R028007130 and R02800713B0) (the "Property") (as described more fully below).

2. Defendant is an Idaho corporation doing business in and around Canyon County, State of Idaho.

### **JURISDICTION AND VENUE**

3. The actions complained herein relate to the Property owned by Caldwell Land and located in Canyon County, State of Idaho, and to a written contract, the Commercial Lease Agreement and Lease Amendments (each defined further below), to be performed in Canyon County, State of Idaho.

4. This Court has jurisdiction over this matter pursuant to Idaho Code §6-305 and §1-705.

5. This Court has venue over this matter pursuant to Idaho Code §5-401 and §5-404.

### **GENERAL ALLEGATIONS**

11. Caldwell Land, through its affiliated entities, is in the business of owning and operating certain semi-truck and trailer dealerships, services centers, and related businesses (the "Business").

12. Upon information and belief, Defendant is engaged in the manufacture of commercial chilling systems.

13. The Property is comprised of, among other things, a certain industrial building (the "Building") and minimally improved surrounding land ("Land").

14. Effective on or around February 10, 2012, Defendant and the Gilbert Family Limited Partnership, the former owner of the Property ("Prior Owner"), entered into that certain Commercial Lease Agreement, pursuant to which Prior Owner leased the Building for a specified term of thirteen (13) months (the "Commercial Lease Agreement"). An executed copy of the Commercial Lease Agreement is attached hereto as Exhibit A.

15. Pursuant to page 2 of the Commercial Lease Agreement, under the paragraph titled "Liability Insurance," it is stated, in pertinent part, that "Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgment, liabilities, or expenses arising from the use and occupancy of the [Property] by Lessee, Lessee's agents, employees or customers...."

16. Pursuant to page 3 of the Commercial Lease Agreement, under the paragraph titled "Maintenance and Repair," it is stated, in part, that "[t]he Lessee agrees to maintain the demised [Property] and improvements in good condition and repair, reasonable wear and tear expected."

17. Pursuant to page 3 of the Commercial Lease Agreement, under the paragraph titled "Improvements," it is stated, that "[t]he Lessee shall not reconstruct, remodel, or change any part of the [Property] without consent of the Lessor, which consent shall not be unreasonably withheld or delayed."

18. Pursuant to page 5 of the Commercial Lease Agreement, under the paragraph titled "Maintenance and Repair," it is stated that:

Upon the expiration of this agreement, the Lessee shall quit and surrender the [Property] in the same state of condition, reasonable wear and tear expected, that the [Property] was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

19. The Commercial Lease Agreement further provides that "[t]he losing party in any court action brought to enforce any provision of or to collect any sums due under the terms of this Agreement shall pay the prevailing party...a reasonable attorney's fee...in addition to the costs allowed by law."

20. The Commercial Lease Agreement also expressly provides that "[it] may not be amended, modified, or changed except by a writing signed by all parties hereto."

21. In the months and years following the execution of the Commercial Lease Agreement, Defendant and the Prior Owner entered into three (3) separate written amendments to that instrument (the "Lease Amendments"). Executed copies of each of the Lease Amendments are attached hereto as Exhibit B.

22. None of the Lease Amendments changed or modified that provisions of the Commercial Lease Agreement identified in paragraphs 15 through 19 of this Verified Amended Complaint.

23. However, as a consequence of the Lease Amendments, the amended term of the Commercial Lease Agreement expired on October 15, 2014 (the "Lease Expiration Date").

24. In the months, leading up to the Lease Expiration Date, Defendants and the Prior Owner, through its leasing agent, engaged in varied discussions regarding a possible six (6) month extension of the Lease Expiration Date, however, no oral or written agreement was formed as to any such six (6) month extension.

25. Upon information and belief, the proposed six (6) month extension of the Lease Expiration Date was sought by Defendant in order to accommodate its transition into a new building that it was constructing, and by which Defendant, through its written representations to the Prior Owner and its leasing agent, stated it would be moving into as early as “December [2014],” and then, as later indicated by Defendants in subsequent communications, in “January or February [2015]<sup>1</sup>,” and, then, only more recently, by April 15, 2015<sup>2</sup>.

26. A representative sample of the back-and-forth communications and discussions between Defendants and the Prior Owner, through its leasing agent, regarding the a possible six (6) month extension of the Lease Expiration Date and regarding Defendant’s planned transition into its new building, include:

a. E-mail from Defendant to Prior Owner’s leasing agent on 4/10/14 stating “it would like to do a 6 month lease with the option to go month to month for an additional 3-6months. *If that’s amenable to [Prior Owner], get it drawn up and we’ll sign.*” (Emphasis added).

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<sup>1</sup> Plaintiff notes that under any of these three date scenarios, i.e., December, January or February of 2015, the vacation, and, thus, the transition, date of Defendant from the Building to its new building would be completed months prior to the expiration of any proposed six (6) month extension term discussed between Defendants and the Prior Owner.

<sup>2</sup> See Paragraphs 36 and 37, *infra*.

b. E-mails from Defendant on 4/18/14 and 4/19/14 discussing Defendant's anticipated vacation date and stating "*we are still hoping on the December move in on the new building, but it could be January,*" and "*...we are tentatively planning to move in January or February,* however, if the final permit approval continues to lag, this could stretch." (Emphasis added).

c. e-mail from Prior Owner's leasing agent to Defendant on 9/26/14 stating "I have convinced [Prior Owner] that you staying on the property is fine and would benefit her...*Please also keep me informed on you planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup> [2014].*" (Emphasis added).

d. E-mail exchange between Prior Owner's leasing agent to Defendant on 12/8/14 in which the former states "[i]f you were able to locate correspondence between you and [Prior Owner] in October extending your lease please provide such documentation as [Prior Owner] doesn't have any documentation other than the 3rd lease amendment that I provided...Per our previous correspondence and latest discussions on Friday [12/5/14] you stated that you thought you could be out of 1505 Industrial by the end of January," and to which Defendant responds as follows "*...I did not find any correspondence with [Prior Owner] beyond the 3rd amendment...*" (Emphasis added).

27. As evidenced in the forgoing communications, among other things, no oral or written agreement was formed or exists between Defendant and the Prior Owner as to any six (6) month extension of the Lease Expiration Date.

28. Notwithstanding the expiration of the Lease Expiration Date, Defendant remained in possession of the Building.

29. During the time of its possession of the Building following the Lease Expiration Date, and through December of 2014, Defendant has paid the Prior Owner rent at a monthly rate then acceptable to the Prior Owner as market rental for each such applicable month.

30. By virtue of Defendant's continued possession of the Building after the expiration, and without any express extension of, the Lease Expiration Date, Defendant was in possession of said Building as a tenant at will.

31. On or around December 11, 2014, Prior Owner delivered<sup>3</sup> to Defendant, via certified mail and electronic transmission, that certain Notice of Termination (the "Notice of Termination"). A true and correct copy of the Notice of Termination is attached hereto as Exhibit C.

32. The Notice of Termination provides, among other things, that:

a. Pursuant to Idaho Code § 55-208, Prior Owner, as the lessor, has the right to terminate the Commercial Lease Agreement upon written notice to Defendant to remove from the Premises within a period of not less than one (1) month.

b. That as of midnight on January 31, 2015, the Commercial Lease Agreement with Defendant shall terminate and not be renewed or extended, and

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<sup>3</sup> Plaintiff states that (1) pursuant to the Commercial Lease Agreement, any notice given thereunder shall be deemed delivered when mailed by certified mail, and (2) Defendant's counsel, in a letter dated December 22, 2014, acknowledged Defendant's actual receipt of the Notice of Termination.

Defendant shall no longer be entitled to possession of the Building or any other part of the Property.

c. That Defendant is requested to vacate and surrender possession of the Building, together with all other parts of the Property, on or prior to January 31, 2015, which shall include the Defendant's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Building, together with all other parts of the Property, in the same condition, reasonable wear and tear excepted, as the Building and all other parts of the Property were in at the beginning of the lease.

d. That rent will continue to be due and payable so long as Defendant continues in possession of the Building or any other part of the Property, pursuant to the terms of the second of the Lease Amendments.

33. On or around December 31, 2014, Plaintiff purchased the Property from the Prior Owner (the "Property Purchase Date").

34. By virtue of its purchase of the Property, Plaintiff is entitled to avail itself of, among other rights and obligations related to the Property, those afforded under the Notice of Termination, the Commercial Lease Agreement, and the Lease Amendments.

35. Following Plaintiff's purchase of the Property, Plaintiff and Defendant engaged in various discussions regarding Defendant's vacation from the Property, Plaintiff's plans to immediately relocate its Business to the Property, together with the monetary and other



considerations of both parties related to the effect of Defendant's continued possession of the Property past January 31, 2015, date identified in the Notice of Termination.

36. In connection with such discussions, Plaintiff, through counsel, communicated and detailed to Defendant, through counsel, the types and scope of damages, costs, expenses and injuries that Plaintiff would necessarily suffer if Defendant did not vacate the property by January 31, 2015, the date identified in the Notice of Termination.

37. Notwithstanding, on or around January 29, 2015, two days prior to the date on which Defendant was required to vacate the property, as identified in the Notice of Termination, and with knowledge of the types and scope of damages, costs, expenses and injuries that Plaintiff would necessarily suffer if Defendant did not vacate the property by January 31, 2015, Defendant, through counsel, represented to Plaintiff's counsel that it would not comply with the Notice of Termination and would not vacate the Property by January 31, 2015, and, instead, would continue in possession of the Property until April 15, 2015.

38. An e-mail from Defendant's counsel, sent to Plaintiff's counsel on January 29, 2015, conveying that Defendant would not vacate the Property until April 15, 2015, is attached to this Verified Amended Complaint as Exhibit D.

39. Thereafter, Defendant did in fact fail to vacate and quit the Building or the Property by January 31, 2015, the date identified in the Notice of Termination.

40. Defendant, though its failure to vacate the Building and Property by January 31, 2015, is guilty of unlawful detainer pursuant to Idaho Code § 6-303.

41. Such failure to vacate the Building and Property is, among other things, also a breach of the Commercial Lease Agreement, as the term of the lease between Plaintiff and Defendant for the Building and the Property expired on January 31, 2015.

42. As a direct result of Defendant's representation that it would not vacate the Property as required in the Notice of Termination, and of Defendant's use of and actual failure to vacate and surrender the Property on January 31, 2015, Plaintiff incurred significant damages, including, without limitation, damages related to extending the term of its current lease on commercial property where it operates its Business in Idaho, together with other Business-related damages incurred as a result of Plaintiff's delay in being able to utilize the Property as of Property Purchase Date.

43. However, approximately two weeks following Defendant's counsel representation that Defendant would remain in possession of the Property until April 15, 2015, on or around February 12, 2015, Defendant's counsel contacted Plaintiff's counsel and stated that Defendant had vacated the Property.

44. As of the date of this Verified Amended Complaint, Defendant has vacated the property; provided, Plaintiff is unaware of the actual date of Defendant's vacation thereof.

45. In connection with its vacation of the Property, Defendant caused, among other damages, damages to the Building which damage is not reasonable or ordinary wear or tear, as contemplated in the Commercial Lease Agreement.

46. Such damage caused to the Building by Defendant in connection with its vacating the Property constitutes a breach of the Commercial Lease Agreement.

47. Concerning certain of the damages identified in the forgoing paragraphs, Defendants, have, both prior to and after the Approximate Vacation Date (defined below), intentionally and maliciously caused injury and damage to the Property, by, among other things, causing to be removed an electrical transformer from the side of the Building which transformer allows for the Building to receive electricity, and placing plastic zip ties on and around a number of natural gas or propane operated heating apparatuses in a manner that was apparently intended to cause damage and/or injury to those items and to the Building once the heating apparatuses were turned on by Plaintiffs.

48. Defendant has caused the damages to the Property identified in the forgoing paragraph with knowledge that Plaintiff is the owner of the Property and that Defendant has no right to remove the electrical transformer or otherwise change or modify the heating apparatuses, and has done so with the intention of maliciously interfering with and/or injuring the Property, without the permission of Plaintiff.

49. By virtue of Defendant's failure to actually vacate the Property by January 31, 2015, and its unlawful detainer of the same, Plaintiff has and continues to incur costs and damages in connection with, among others, the delay incurred by it to relocate its Business to the Property.

50. Following Plaintiff's purchase of the Property, Plaintiff has performed in a satisfactory manner and in good faith each and every obligation of Plaintiff to be performed pursuant to the Commercial Lease Agreement and the Lease Amendments.

51. Notwithstanding Plaintiff's performance under the Commercial Lease Agreement and the Lease Amendments, and notwithstanding Plaintiff's various verbal and written demands to Defendants to do so, Defendant has failed to meet its obligations under the Commercial Lease Agreement and the Lease Amendments, including, among other things, failing to vacate and surrender the Building and the Property by the expiration of the term of the lease, January 31, 2015, and failing to adequately maintain and/or repair the Building during the term of the Commercial Lease Agreement, as amended by the Lease Amendments, each as required by the express terms of the Commercial Lease Agreement.

52. Such actions of Defendant, as alleged herein, constitute a breach of the terms of the Commercial Lease Agreement.

53. By virtue of Defendant's breaches of the Commercial Lease Agreement and the Lease Amendments, Plaintiff has incurred significant damages, including, without limitation, damages related to extending the term of its current lease on commercial property where it operates its Business in Idaho, together with other Business-related damages incurred as a result of Plaintiff's delay in being able to utilize the Property as of Property Purchase Date, together with damages relating to the current condition of the Building, as finally surrendered to it by Defendant.

54. Pursuant to the express terms of the Commercial Lease Agreement, Defendant is liable to Plaintiff for, among other things, “[all] damages, suits, judgment, liabilities, or expenses arising from the use and occupancy of the [Property] by Lessee.”

55. A detailed statement identifying the damages incurred by Plaintiff to date as a result of Defendant’s unlawful detainer of the Property and of its breach of the Commercial Lease Agreement and the Lease Amendments is attached hereto as Exhibit E (the “Summary of Damages<sup>4</sup>”).

56. From and as of January 31, 2015, Plaintiff has taken reasonable and necessary actions to mitigate the damages it has sustained as a result of Defendant’s unlawful detainer of the Property and breaches of the Commercial Lease Agreement and the Lease Amendments.

**FIRST CLAIM FOR RELIEF**  
**(Unlawful Detainer - Damages)**

57. Plaintiff hereby incorporates by this reference the allegations set forth above in paragraphs 1 through 56 as if fully set forth herein.

58. Defendant was a tenant at will with respect to the Property, specifically the Building, during that time from the Lease Expiration Date through the date Defendant’s vacated the Property on or around February 12, 2015 (the “Approximate Vacation Date”).

59. Defendant, by the Notice of Termination, was furnished with written notice providing that Defendant must remove from the Property within a period of not less than one (1) month of such notice.

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<sup>4</sup> Note, the Summary of Damages does not include all damages caused by Defendant to the Building itself, as the evaluation of such damages was ongoing as of the date this action was filed.

60. Defendant, through counsel and in response to the Notice of Termination, represented that it would refuse to surrender and vacate from the Property on January 31, 2015, the applicable vacation date identified in the Notice of Termination, and thereafter, actually failed to surrender and vacate from the Property on such date.

61. As a direct result of Defendant's representation that it would not vacate the Property as required in the Notice of Termination, and of Defendant's use of the Property, and actual failure to vacate and surrender the Property on January 31, 2015, Plaintiff incurred significant damages, including, without limitation, damages related to extending the term of its current lease on commercial property where it operates its Business in Idaho, together with other Business-related damages incurred as a result of Plaintiff's delay in being able to utilize the Property as of Property Purchase Date.

62. Defendant's continued possession of the Property, specifically the Building, during the timeframe beginning on the Lease Expiration Date and ending on the Approximate Vacation Date, was effected with malice and/or wantonness towards Plaintiff and its rights in and to the Property.

63. Defendant, through the above described actions, has committed an unlawful detainer of the Property, and consequently has violated Idaho Code § 6-303.

64. Consequently, Plaintiff is entitled to damages incurred as a result of Defendant's unlawful use/and or possession of the Property during the timeframe beginning on the Lease

Expiration Date and ending on the Approximate Vacation Date, trebled, together with attorneys fees and costs, each in an amount to be determined at trial.

**SECOND CLAIM FOR RELIEF**  
**(Breach of Contract)**

65. Plaintiff hereby incorporates by this reference the allegations set forth above in paragraphs 1 through 64 as if fully set forth herein.

66. The Commercial Lease Agreement, as amended by the Lease Amendments, is a valid and enforceable contract between the parties.

67. Plaintiff has performed and otherwise satisfied in full all obligations owing to Defendant under the Commercial Lease Agreement, as amended by the Lease Amendments.

68. Notwithstanding Plaintiff's performance under the Commercial Lease Agreement and the Lease Amendments, and notwithstanding Plaintiff's various verbal and written demands to Defendants to do so, Defendant failed to meet its obligations under the Commercial Lease Agreement and the Lease Amendments, including, among other things, failing to vacate and surrender the Building and the Property by the expiration of the term of the lease, January 31, 2015, and failing to adequately maintain and/or repair the Building during the terms of the Commercial Lease Agreement, as amended by the Lease Amendments, each as required by the express terms of the Commercial Lease Agreement.

69. Such actions of Defendant, together with the other applicable actions, as alleged herein, constitute a breach of the terms of the Commercial Lease Agreement.

70. By virtue of Defendant's breach of the Commercial Lease Agreement and the Lease Amendments, Plaintiff has incurred significant damages, including, without limitation, damages related to extending the term of its current lease on commercial property where it operates its Business in Idaho, together with other Business-related damages incurred as a result of Plaintiff's delay in being able to utilize the Property as of Property Purchase Date, together with damages relating to the current condition of the Building, as surrendered to it by Defendant.

71. Pursuant to the express terms of the Commercial Lease Agreement, Defendants are liable to Plaintiff for, among others, "[all] damages, suits, judgment, liabilities, or expenses arising from the use and occupancy of the [Property] by Lessee."

72. Consequently, as a result of Defendant's forgoing breaches, Plaintiffs are entitled to damages, attorneys fees and costs, each as provided under the Commercial Lease Agreement and the Lease Amendments, in an amount to be determined at trial, but not less than \$55,142.26.

**THIRD CLAIM FOR RELIEF**  
**(Breach of Implied Covenant of Good Faith and Fair Dealing)**

73. Plaintiff incorporates paragraphs 1 through 72 by reference as though fully set forth herein.

74. Defendant breached the implied covenant of good faith and fair dealing inherent in the Commercial Lease Agreement, and the Lease Amendment, with Plaintiff.

75. Defendant's refusal to meet its obligations under the Commercial Lease Agreement and the Lease Amendments, including, among other things, failing to vacate and surrender the Building and the Property by the expiration of the term of the lease, January 31,



2015, and failing to adequately maintain and/or repair the Building during the terms of the Commercial Lease Agreement, as amended by the Lease Amendments has caused Plaintiff to suffer significant damages for which Defendant should be held liable.

76. Defendant's breach of the above-referenced agreement and other conduct described herein are evidence of Defendant's breach of the implied covenant of good faith and fair dealing.

77. As a direct and proximate result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff has suffered damages in an amount not less than \$55,142.26, the precise amount to be determined at trial.

**FOURTH CLAIM FOR RELIEF**  
**(Intentional and Malicious Injury to Property)**

78. Plaintiff incorporates paragraphs 1 through 77 by reference as though fully set forth herein.

79. In connection with its vacation of the Property, Defendant caused significant damages to the Property, including the Building.

80. Concerning the forgoing, Defendants, have, both prior to and after the Approximate Vacation Date, intentionally and maliciously caused injury and damage to the Property, by, among, other things causing to be removed an electrical transformer from the side of the Building which transformer allows for the Building to receive electricity, and placing plastic zip ties on and around a number of natural gas or propane operated heating apparatuses in

a manner that was evidently intended to cause damage and/or injury to those items and to the Building once the heating apparatuses were turned on by Plaintiffs.

81. Defendant has caused the damages to the Property identified in the forgoing paragraphs with knowledge that Plaintiff is the owner of the Property and that Defendant has no right to remove the electrical transformer or otherwise change or modify the heating apparatuses, and has done so with the intention of maliciously interfering with and/or injuring the Property.

82. Defendants have caused the forgoing damages to the Property without the permission of Plaintiff.

83. As a direct and proximate result of Defendant's intentional in malicious acts, Plaintiff has suffered damages in an amount to be determined at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. On the First Claim for Relief,

a. For damages incurred by Plaintiff as a result of Defendant's continued unlawful use/and or possession of the Property during the timeframe beginning on the Lease Expiration Date and ending on the Approximate Vacation Date, trebled, in an amount to be determined at trial;

c. For attorneys fees and costs, as provided by law, in an amount to be determined at trial;

d. For an award of costs incurred in bringing this action, as provided by law, in an amount to be determined at trial; and

e. For any and all other relief the Court deems just and proper.

2. On the Second Claim for Relief,

a. For damages incurred by Plaintiff as a result of Defendant's breach of the Commercial Lease Agreement and the Lease Amendments, in an amount to be determined at trial, but not less than \$55,142.26;

b. For attorneys fees and costs, as provided under the express terms of the Commercial Lease Agreement and Lease Amendments, in an amount to be determined at trial;

c. For such other sums due and payable to Plaintiff pursuant to the Commercial Lease Agreement and the Lease Amendments, in an amount to be determined at trial.

3. On the Third Claim for Relief,

a. For damages incurred by Plaintiff as a result of Defendant's breach of the Implied Covenant of Good Faith and Fair Dealing, in an amount to be determined at trial, but not less than \$55,142.26;

b. For any and all other relief the Court deems just and proper.

4. On the Fourth Claim for Relief,


a. For actual damages incurred by Plaintiff, and punitive damages, each as a result of Defendant's intentional in malicious acts, and each in an amount to be determined at trial.

b. For any and all other relief the Court deems just and proper.

DATED this 10 day of March, 2015.

STRONG & HANNI

By: \_\_\_\_\_

  
Robert L. Janicki  
*Attorneys for Plaintiff*

VERIFICATION

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

Blake Jackson, as Manager of Caldwell Land & Cattle, LLC and a Caldwell Land & Cattle Company, LLC, being first duly sworn, deposes and states

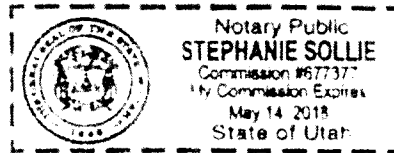
That he has read the allegations contained in this Verified Amended Complaint, knows the contents thereof, and believe the same to be true, accurate, and complete.

I verify under penalties of perjury that the foregoing is true and correct.

*Blake Jackson*  
Blake Jackson

SUBSCRIBED AND SWORN to before me this 2 day of March, 2015.

Notary Public *Stephanie Sollie*



**EXHIBIT A**  
(Commercial Lease Agreement)

**COMMERCIAL LEASE AGREEMENT**

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between GILBERT FAMILY LIMITED PARTNERSHIP the party of the first part, hereinafter referred to as LESSOR, and JOHNSON THERMAL SYSTEMS, INC., the party of the second part, hereinafter referred to as LESSEE.

**WITNESSETH:**

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

**Rent Schedule (Initial Term)**

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16

**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statutes, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste



material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contact. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiver or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:

**Lessor**  
Gilbert Family Limited Partnership  
P.O. Box 1064  
Caldwell, Idaho 83606

**Lessee**  
Johnson Thermal Systems, Inc.  
22228 Hoskins  
Caldwell, ID 83607

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

Commercial Lease Agreement - Page | 5

**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.

**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.

**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

LESSOR:	<u>Bill Gilbert</u> Gilbert Family Limited Partnership Bill Gilbert	<u>2-23-12</u> Date
	<u>Arlene T. Gilbert</u> Gilbert Family Limited Partnership Arlene T. Gilbert	<u>2-23-12</u> Date
LESSEE:	<u>Sheil Johnson for Johnson Thermal Systems Inc.</u> Johnson Thermal Systems Inc.	<u>2/23/12</u> Date

Lessor: Gilbert Family Limited Partnership

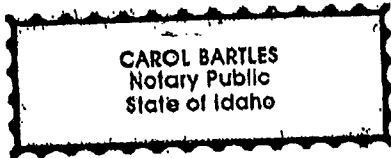
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles  
Notary public for Idaho  
Residing at: Wilder ID  
My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

:ss

County of Canyon)

On this 24 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Teresa Squibb  
Notary Public of Idaho  
Residing at Armpo Wells Inc  
My commission expires: 9-26-2016

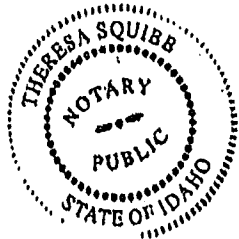


Exhibit A  
"Legal Description"

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

EXCEPTING THEREFROM

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

BEGINNING at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.



**EXHIBIT B**  
(Lease Amendments)

FIRST AMENDMENT

This FIRST AMENDMENT to the COMMERCIAL LEASE AGREEMENT, dated February 10, 2012, for the lease of the Property entered into between GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") and JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), (the "Agreement") is hereby made and entered into by the Lessor and Lessee.

WITNESSETH:

WHEREAS, the parties desire to move the commencement date and amend certain terms set forth in the Lease.

NOW, THEREFORE, in consideration of the covenants set forth herein, the parties agree as follows:

1. Lease commencement date shall be April 1, 2012. However, early access shall be granted to Lessee to do improvements.
2. Lessor shall service the current fire sprinkling system before the commencement date.
3. Lessee shall pay for the monitoring service for the fire sprinkling system.
4. Lessor shall have all personal property removed no later than April 1, 2012.
5. All other terms and conditions of the Agreements, not specifically amended hereby, including but not limited to all dates previously set forth in the Agreements, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Lessee:

By: *Shirley Johnson*

Date: 3/21/12

Lessor:

By: *Adlene Delbert*

Date: 3-26-12



February 14, 2014

JTS will rent the available dirt lot adjacent to its current facility, owned by Gilbert Family Limited Partnership, for a period of six months.

Rent period will be from February 17, 2014 through August 30, 2014, renewal by agreement of both parties on a month by month basis.

Payment will be pre-paid for the initial six month and two-week period. Amount is \$3,250.00. Subsequent months will be paid by the 10<sup>th</sup> of each month.

JTS will be fencing the lot for security and will remove the fencing at the end of the rental period. After the six month period, either JTS or GFLP can end this agreement with a 30 day written notice to the other party.

*JTS will take care of spraying or removing weeds during the period.*

Parties have read, understood and agree to the above terms:

Sheri R. Johnson  
President, JTS

*2/14/14*  
Date

Arlene Gilbert  
Gilbert Family Limited Partnership

*2-17-14*  
Date

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

Recitals

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

Agreement

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

TENANT: Johnson Thermal Systems Inc.

Sign: Arlene Gilbert

Sign: Sheri Johnson for Johnson Thermal Systems Inc.

Print: Arlene Gilbert

Print: Sheri Johnson

Date 4-18-14

Date 4/15/14

**EXHIBIT C**  
**(Notice of Termination)**

VIA E-MAIL AND CERTIFIED MAIL

Johnson Thermal Systems, Inc.  
1505 Industrial Way  
Caldwell, ID 83605  
Attention: Darrell "Gus" Gustavson  
gusg@johnsonthermal.com

Re: NOTICE OF TERMINATION  
1505 Industrial Way, Caldwell, ID

Dear Mr. Gustavson:

This Notice of Termination is given by GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") to JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), with reference to that certain Commercial Lease Agreement, dated February 10, 2012, and the First, Second and Third Amendments thereto (collectively, the "Lease"),

NOTICE IS HEREBY GIVEN that, pursuant to Idaho Code § 55-208, Lessor has the right to terminate the Lease upon written notice to Lessee to remove from the Premises within a period of not less than one (1) month. Accordingly, as of midnight on January 31, 2015, the Lease with Lessee shall TERMINATE and not be renewed or extended, and Lessee shall no longer be entitled to possession of the Premises. Accordingly, Lessee is hereby requested to vacate and surrender possession of the Premises to Lessor on or prior to January 31, 2015, which shall include the Lessee's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Premises in the same condition, reasonable wear and tear excepted, as the Premises were in at the beginning of the Lease.

Please note that pursuant to the Lease and despite Landlord's termination of the Lease, monthly rent will continue to be due and payable if Lessee continues in possession of the Premises. In the event that Lessee holds over and rent payment is not made, Landlord intends to pursue all remedies under the Lease despite Landlord's termination of the Lease as set forth herein. This includes, without limitation, rent pursuant to the Second Amendment, both unpaid and coming due and payable for any further period of possession by Lessee.

Please also note that in the event that Lessor is required to commence a lawsuit for possession of the Premises upon termination of the Lease or otherwise (including, but not limited, to non-payment of rent for all or any part of the Premises), that Lessor will pursue attorneys' fees and costs pursuant to the Lease and/or applicable Idaho Code, including, but not limited to, Idaho Code §§ 6-324, 12-120 and/or 12-121.

The Third Amendment to the Lease provides that Lessee had the option to extend the Lease for an additional period of either six (6) months or on a month to month basis. The Lease provides that any notice given under the terms of the Lease shall be deemed delivered when mailed by certified mail. The Lease further provides that any modification to the Lease must be in a writing by all parties. Lessee did not timely or properly exercise the option.

That the option to extend the Lease was not timely or properly exercised is evidenced by the following:

(i) Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Amendment. No notice of exercise, written or verbal, was ever provided. Rather, Lessee simply continued to hold over upon the Premises and pay monthly rent in the same amount as paid for the last month of the previous extended term.

(ii) Lessee did not obtain a writing signed by all parties that would modify the Lease in any way that would support the payment of rent after the conclusion of the Third Amendment's lease extension as being an effective exercise of the lease extension option.


(iii) Time is of the essence of the Lease, as specifically set forth in the Lease.

(iv) Verbal communication from Lessee to Lessor or its agents after the conclusion of the lease extension under the Third Amendment (i.e. after October 15, 2014) indicated that Lessee intended to vacate the Premises as soon as Lessee completed the construction of a new building, thereby evidencing that Lessee did not intend a six month extension, but intended to hold over for a shorter duration.

Lessor reserves all its right and remedies, whether under the Lease or at law or in equity, whether or not mentioned herein, to terminate the Lease and cause Lessee to vacate the Premises.

Please be guided accordingly.

Sincerely,

  
Arlene Gilbert  
Gilbert Family Limited Partnership  
12-11-14

**EXHIBIT D**

(E-mail from Defendant's Counsel re: August 15, 2015 vacation date)



2/27/2015

---

**From:** kbd@bjorkmandunn.com  
**To:** Graden Jackson  
**Sent:** 1/29/2015 8:49AM  
**Subject:** RE: Peterbilt

Graden,

As I mentioned, Johnson Thermal Systems made its decision upon further reflection. I doubt it helped much that your client filed its lawsuit prior to the date Johnson Thermal Systems was given to vacate the property and notwithstanding its continuing efforts to vacate the property early. Johnson Thermal Systems has offered more than what properties are renting for in the area.

Your client bought this property having caused the current situation and with knowledge of a dispute. You can tell your client there is unexpired term left in the lease and Johnson Thermal Systems has until April 15, 2015 to vacate the property.

Regards,

Kristin

---

Kristin Bjorkman Dunn

bjorkman dunn PLLC

Plaza One Twenty One | 121 N. 9th Street, Suite 300 | Boise, Idaho 83702

(208) 639-1458 office | (208) 330-3700 fax

kbd@bjorkmandunn.com

**CONFIDENTIALITY NOTICE:** This e-mail contains confidential information that is protected by the attorney-client and/or work product privilege. It is intended only for the use of the individual(s) named as recipients. If you are not the intended recipient of this e-mail, please notify the sender, and please do not deliver, distribute or copy this e-mail, or disclose its contents or take any action in reliance on the information it contains.

**EXHIBIT E**  
(Summary of Damages)

**Summary of damages, costs and expenses for Caldwell**

Monthly Rent of 812 W. Laurel Street location	\$3,500.00	
Monthly Property Taxes on 812 W. Laurel Street location	\$480.34	
Total Monthly Rent/Property Tax	<u>\$3,980.34</u>	
Number of months (60 day notice verbal to Valley)	<u>3.00</u>	
<b>Total Rent/Property Tax</b>	<b><u>\$11,941.02</u></b>	<b>\$11,941.02</b>
Monthly Property Tax on 1505 location	\$1,845.41	
Monthly Rental Fee	\$6,200.00	
Total Monthly Rent/Property Tax	<u>\$8,045.41</u>	
Number of months	<u>3.00</u>	
Total Rent/Property Tax	<u>\$24,136.24</u>	
Less January Rent Paid by Johnson Thermal	(\$7,730.00)	
Less February Rent Paid by Johnson Thermal	(\$7,730.00)	
<b>Rent Shortfall</b>	<b><u>\$8,676.24</u></b>	<b>\$8,676.24</b>
Power Bill Monthly Average	\$442.00	
Water Bill	\$181.00	
Total Monthly Utilities	<u>\$623.00</u>	
Number of months	<u>3.00</u>	
Utilities Shortfall	<b><u>\$1,869.00</u></b>	<b>\$1,869.00</b>
Monthly cost of Service Writer Hired	\$2,773.33	
Payroll Taxes and Benefits	\$554.67	
Total Monthly Wages & Benefits	<u>\$3,328.00</u>	
Number of months	<u>2</u>	
Total Wages & Benefits	<b><u>\$6,656.00</u></b>	<b>\$6,656.00</b>
Damage to Building		
Replacement of Electrical Transformer	\$16,000.00	
Other Misc. Items (floor repair, wall repair, etc.)	TBD	
	<u>\$16,000.00</u>	<b>\$16,000.00</b>
Attorneys Fees	<b>\$10,000.00</b>	<b>\$10,000.00</b>
<b>Total Damages, Costs and Expenses</b>		<b><u><u>\$55,142.26</u></u></b>

**FILED**  
A.M. 151 P.M.  
**APR 10 2015**  
CANYON COUNTY CLERK  
T WATKINS, DEPUTY

Rebecca A. Rainey, ISB #7525  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Suite 630  
Boise, Idaho 83702  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Kristin Bjorkman Dunn, ISB # 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>TH</sup> Street, Suite 300  
Boise, Idaho 83702  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

Attorneys for Defendant/Counterclaimant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant/Counterclaimant.

**Case No. CV 15-587**

**ANSWER TO AMENDED  
COMPLAINT  
AND COUNTERCLAIM**

COMES NOW Defendant, Johnson Thermal Systems, Inc. ("Johnson Thermal"), by and through FISHER RAINEY HUDSON and BJORKMAN DUNN PLLC, its attorneys of record, and hereby answers plaintiff's Amended Complaint as follows:

1. Johnson Thermal is without information and knowledge sufficient to form a belief about the truthfulness of the allegations in paragraph 1 of the Amended Complaint and, on that basis, denies the same.

2. Johnson Thermal admits paragraphs 2 and 3 of the Amended Complaint.
3. Answering paragraph 4 of the Amended Complaint, Johnson Thermal admits that jurisdiction is proper pursuant to Idaho Code Section 1-705. Johnson Thermal denies that jurisdiction is proper pursuant to Idaho Code Section 6-305.
4. Johnson Thermal admits paragraph 5 of the Amended Complaint.
5. Answering paragraph 11 of the Amended Complaint, Johnson Thermal is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations contained therein and, on that basis, denies the same.
6. Johnson Thermal admits paragraphs 12 - 13 of the Amended Complaint.
7. Answering paragraph 14 of the Amended Complaint, Johnson Thermal admits that it entered into a commercial lease agreement with the Gilbert Family Limited Partnership and that the document attached as Exhibit A to the Amended Complaint speaks for itself.
8. Answering paragraphs 15 - 20 of the Amended Complaint, Johnson Thermal admits only that the document referenced therein speaks for itself.
9. Answering paragraph 21 of the Amended Complaint, Johnson Thermal admits only that it entered into extension agreements with the Gilbert Family Limited Partnership and the documents attached to the Amended Complaint speak for themselves. Johnson Thermal denies that the document included within Exhibit B and dated February 14, 2014, is related to any of the extension agreements by and between Johnson Thermal and the Gilbert Family Limited Partnership. To the extent not expressly addressed herein, Johnson Thermal denies all other allegations contained within paragraph 21.
10. Answering paragraph 22 of the Amended Complaint, Johnson Thermal admits only that the documents referenced therein speak for themselves.

11. Johnson Thermal denies paragraph 23 of the Amended Complaint.

12. Answering paragraph 24 of the Amended Complaint, Johnson Thermal admits that it entered into discussions with the Prior Owner and denies the allegation that no agreement was formed regarding any six (6) month extension.

13. Answering paragraph 25 of the Amended Complaint, Johnson Thermal admits that the extension was sought in order to accommodate a move into a new facility and that the date of the anticipated move was dependent on external factors outside the control of Johnson Thermal. Johnson Thermal denies any remaining allegations contained in paragraph 25 of the Amended Complaint.

14. Answering paragraph 26 of the Amended Complaint, including subparts a-d, Johnson Thermal answers that the documents referenced therein speak for themselves. Johnson Thermal denies plaintiff's characterization of the conversations contained in paragraph 26, including subparts a-d, as a "representative sample."

15. Johnson Thermal denies paragraph 27 of the Amended Complaint.

16. Answering paragraph 28 of the Amended Complaint, Johnson Thermal admits that it remained in the building after January 31, 2015. Johnson Thermal denies all remaining allegations contained in paragraph 28 of the Amended Complaint.

17. Answering paragraph 29 of the Amended Complaint, Johnson Thermal admits that it paid rent to the proper parties at the rate set forth in its lease agreement during all times it occupied the building. Johnson Thermal denies any other allegations set forth in paragraph 29.

18. Johnson Thermal denies paragraph 30 of the Amended Complaint.

19. Johnson Thermal admits paragraph 31 of the Amended Complaint.

20. Answering paragraph 32 of the Amended Complaint, including subparts a-d,

Johnson Thermal answers that the documents referenced therein speak for themselves.

21. Johnson Thermal admits paragraph 33 of the Amended Complaint.

22. Paragraph 34 of the Amended Complaint calls for a legal conclusion for which a response is not required and, on that basis, Johnson Thermal denies the same.

23. Answering paragraphs 35-37 of the Amended Complaint, Johnson Thermal admits only that following plaintiff's purchase of the building Johnson Thermal attempted to work in good faith with plaintiff to reach a mutually agreeable solution to the dispute regarding the expiration date of the lease. Johnson Thermal denies all other factual allegations contained in paragraph 35-37 of the Amended Complaint.

24. Answering paragraph 38 of the Amended Complaint, Johnson Thermal states only that the document referenced therein speaks for itself.

25. Answering paragraph 39 of the Amended Complaint, Johnson Thermal admits that it did not vacate the property on or before January 31, 2015. Johnson Thermal denies any remaining allegations contained in paragraph 39.

26. Johnson Thermal denies the allegations contained in paragraphs 40 and 41 of the Amended Complaint.

27. Johnson Thermal is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations contained in paragraph 42 of the Amended Complaint and, on that basis, denies the same.

28. Answering paragraph 43 of the Amended Complaint, Johnson Thermal admits only that after being constructively evicted by virtue of being served with the original Complaint, Johnson Thermal assumed risk to itself by moving into its new building which had only a temporary certificate of occupancy and undertook extraordinary efforts to accomplish the move

in the shortest amount of time possible at significant expense to itself. Johnson Thermal further admits that notice of the move was communicated to plaintiff through counsel. Johnson Thermal denies any remaining allegations contained in paragraph 43 of the Amended Complaint.

29. Answering paragraph 44 of the Amended Complaint, Johnson Thermal admits that it vacated the property as of February 12, 2015. Johnson Thermal denies any other factual allegations contained in paragraph 44 of the Amended Complaint.

30. Johnson Thermal denies paragraphs 45 and 46 of the Amended Complaint.

31. Answering paragraph 47 of the Amended Complaint, Johnson Thermal states that the electrical transformer that was removed from the building was a transformer for conveying supplemental power to the building. The transformer was installed by Johnson Thermal to meet its extraordinary power demands and its removal did not cause the building to be without power. Johnson Thermal denies that it placed plastic zip ties on and around the heating apparatus and that such zip-ties were in place the entire time Johnson Thermal was in possession of the building. Johnson Thermal denies all remaining allegations contained in paragraph 47 of the Amended Complaint.

32. Johnson Thermal denies the allegations contained in paragraph 48 of the Amended Complaint.

33. Answering paragraph 49 of the Amended Complaint, Johnson Thermal is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations contained therein and, on that basis, denies the same.

34. Johnson Thermal denies paragraphs 50 - 56 of the Amended Complaint.

**First Claim for Relief**  
**(Unlawful Detainer – Damages)**

35. Answering paragraph 57 of the Amended Complaint, Johnson Thermal hereby



incorporates by reference the answers set forth above in paragraphs 1–34 as if fully set forth herein.

36. Johnson Thermal denies paragraph 58 of the Amended Complaint.

37. Answering paragraph 59 of the Amended Complaint, Johnson Thermal admits that it was provided with a Notice of Termination and that said document speaks for itself. Johnson Thermal denies any remaining factual allegations that may be contained in paragraph 59 of the Amended Complaint.

38. Answering paragraph 60 of the Amended Complaint, Johnson Thermal admits that it represented, through counsel, that it would not vacate the premises on or before January 31, 2015. Johnson Thermal denies any remaining factual allegations that may be contained in paragraph 60 of the Amended Complaint.

39. Johnson Thermal denies paragraphs 61-64 of the Amended Complaint.

**Second Claim for Relief**  
**(Breach of Contract)**

40. Answering paragraph 65 of the Amended Complaint, Johnson Thermal hereby incorporates by reference the answers set forth above in paragraphs 1–39 as if fully set forth herein.

41. Johnson Thermal denies paragraphs 66 – 72 of the Amended Complaint.

**Third Claim for Relief**  
**(Breach of Implied Covenant of Good Faith and Fair Dealing)**

42. Answering paragraph 73 of the Amended Complaint, Johnson Thermal hereby incorporates by reference the answers set forth above in paragraphs 1 – 41 as if fully set forth herein.

43. Johnson Thermal denies paragraphs 74 – 77 of the Amended Complaint.

**Fourth Claim for Relief**  
**(Intentional and Malicious Injury to Property)**

44. Answering paragraph 78 of the Amended Complaint, Johnson Thermal hereby incorporates by reference the answers set forth above in paragraphs 1 – 43 as if fully set forth herein.

45. Johnson Thermal denies paragraphs 79 – 83 of the Amended Complaint.

**PRAYER FOR RELIEF**

To the extent an answer is required, Johnson Thermal denies any and all factual allegations set forth in the prayer for relief section of the Amended Complaint.

**AFFIRMATIVE DEFENSES**

1. Caldwell Land has failed to mitigate its damages.
2. Caldwell Land has unclean hands.
3. The injuries about which Caldwell Land complains were caused by the acts, omissions, or intervening acts of third parties over which Johnson Thermal had no control.

**COUNTERCLAIMS**

Counterclaimant, JOHNSON THERMAL SYSTEMS, INC. an Idaho corporation, by and through FISHER RAINEY HUDSON and BJORKMAN DUNN PLLC, its attorneys of record, complains and alleges as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Johnson Thermal Systems, Inc. is an Idaho corporation (“Johnson Thermal”), with its principal place of business in Caldwell, Idaho.
2. Caldwell Land & Cattle, LLC, a/k/a Caldwell Land & Cattle Company, LLC is an Idaho limited liability company (collectively “Caldwell Land”) doing business in and around Canyon County, Idaho.

3. Caldwell Land owns the real property forming the basis for this action, which property is located at 1505 Industrial Way, Caldwell, Canyon County, Idaho (“Property”).

4. Jurisdiction is proper before this District Court pursuant to Idaho Code § 5-514.

5. Venue is proper before this District Court pursuant to Idaho Code §§ 5-401 and 5-404.

6. The amount in controversy exceeds the jurisdictional amount of ten thousand dollars (\$10,000.00).

### **BACKGROUND**

7. Johnson Thermal leased the Property pursuant to a Commercial Lease Agreement entered into February 10, 2012, by and between Johnson Thermal as Lessee and Gilbert Family Limited Partnership as Lessor (“Commercial Lease”).

8. The Commercial Lease has been amended three times, to wit: that certain First Amendment signed in March 2012 (“First Amendment”), that certain First Amendment signed in March 2013 (“Second Amendment), and that certain Third Lease Amendment dated April 15, 2014 (“Third Amendment”).

9. The Commercial Lease together with the First Amendment, the Second Amendment and the Third Amendment are collectively referred to as the “Lease.” A true and correct copy of the Lease is attached hereto as **Exhibit 1**.

10. Among other things, the Third Amendment extends the term of the Lease until October 15, 2014, and grants the following option:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

a. Six Month Term: Base Rent = \$6,000.00/mo

b. Month to Month Term: Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

11. The Third Amendment is silent regarding the mechanism for exercising such option to extend the term.

12. The Commercial Lease, First Amendment and Second Amendment do not contain any directive for exercising the option contained in the Third Amendment.

13. Upon information and belief, the Lease was prepared by or by agents of Gilbert Family Limited Partnership.

14. Gilbert Family Limited Partnership was aware Johnson Thermal had outgrown the existing building and would eventually move from the Property to new space under construction in Caldwell, Idaho; however, there was no certainty concerning the date the new space would be ready for occupancy.

15. Johnson Thermal occupied the Property continuously since October 15, 2014, at the specified six month term base rent rate of \$6,000.00 per month, thereby extending the Lease for a six month term rather than a month-to-month term.

16. Gilbert Family Limited Partnership manifested its acceptance of the 6-month extension by accepting base rent for November and December in the amount of \$6,000.00 each without any making any communication concerning the term of the Lease or demanding rent at the higher month-to-month rate.

17. On or about December 11, 2014, Gilbert Family Limited Partnership demanded that Johnson Thermal vacate the Property on or prior to January 31, 2015, via a Notice of Termination. A true and correct copy of the Notice of Termination is attached hereto as **Exhibit 2**.

18. Upon information and belief, the Notice of Termination was sent to facilitate the sale of the Property to Caldwell Land.

19. Johnson Thermal countered the Notice of Termination on December 22, 2014, contending that the Lease expires in April 2015 hence any eviction would breach the Lease.

20. Caldwell Land purchased the Property on or about December 31, 2014.

21. Upon information and belief, Caldwell Land made its purchase with full knowledge that Johnson Thermal occupies the Property and contends the term of the Lease does not expire until April 2015.

22. As of the date of filing this Answer and Counterclaim, Johnson Thermal has received a temporary certificate of occupancy for its new space and, based upon the threats and demands received from Caldwell Land, Johnson Thermal has surrendered the Property and moved into the new space under said temporary certificate of occupancy.

23. Johnson Thermal completed its removal of personal property from the Property as of Thursday, February 12, 2015. The following day, on Friday, February 13, 2015, Johnson Thermal returned to the building to make repairs caused by the removal of some of Johnson Thermal's personal property and found that the locks to the building had been changed. Because Johnson Thermal had been denied access to the building, Johnson Thermal was unable to make certain repairs that it intended to make prior to turning possession over to Caldwell Land.

#### **COUNT ONE**

#### **Breach of Contract – Constructive Eviction**

24. Johnson Thermal re-alleges and incorporates paragraphs 1-23 as if fully set forth herein.

25. Johnson Thermal and Gilbert Family Limited Partnership entered into a contract, previously described herein as the Lease.

26. Gilbert Family Limited Partnership assigned its rights and duties under the Lease to Caldwell Land in conjunction with Caldwell Land's purchase of the Property.

27. Caldwell Land has repudiated and breached the Lease by filing the present action for eviction prior to the expiration of the term of the Lease on April 15, 2015.

28. Caldwell Land further constructively evicted Johnson Thermal by changing the locks on the doors and denying Johnson Thermal access to the building as of February 13, 2015.

29. Johnson Thermal was entitled to the benefit of the unexpired term of the Lease, without interference from Caldwell Land.

30. As a result of Caldwell Land's constructive eviction of Johnson Thermal, Johnson Thermal vacated the property prematurely at significant additional cost to itself.

31. As a result of this breach, Johnson Thermal incurred special damages including, but not necessarily limited to, the following amounts, which shall be proven at trial:

- a. Expenses associated with additional labor to accomplish the expedited move:  
\$21,685.31;
- b. Equipment rental required to accomplish the move on an expedited basis:  
\$7,866.90; and
- c. Expenses associated with expedited shipping of shop walls required to occupy the new building: \$1,930.00.

**COUNT TWO**  
**(Refund of Security Deposit)**

32. Johnson Thermal re-alleges and incorporates paragraphs 1-31 as if fully set forth herein.

33. Johnson Thermal made a security deposit in the amount of \$5270.84 at the beginning of the lease term.

34. Idaho Code Section 6-321 provides that within thirty (30) days after the surrender of the premises by the tenant, the security deposit shall be returned to the tenant and any return of the security deposit in amounts other than the full amount of such security deposit shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit.

35. Caldwell Land changed the locks on the doors, thereby preventing and restricting Johnson Thermal's ability to make intended repairs to the building.

36. Caldwell Land has failed to return the full amount of the security deposit to Johnson Thermal and has failed to provide the required itemization.

37. Johnson Thermal is entitled to a full refund of its security deposit.

**COUNT THREE**  
**(Refund of Pro-Rated Share of February 2015 Rent)**

38. Johnson Thermal re-alleges and incorporates paragraphs 1- 37 as if fully set forth herein.

39. Johnson Thermal paid full rent to Caldwell Land at the beginning of February, 2015.

40. As a result of Caldwell Land's constructive eviction of Johnson Thermal, Johnson Thermal vacated the premises on or about February 12, 2015.

41. As of February 13, 2015, Caldwell Land changed the locks on the doors to the building, thereby denying Johnson Thermal any further access to the building.

42. Caldwell Land has retained the full amount of the rent paid by Johnson Thermal for the month of February.

43. Johnson Thermal is entitled to a refund of the amounts of rent paid for the month of February that covered the days on which Johnson Thermal was denied access to the building.

### **ATTORNEYS' FEES AND COSTS**

44. Johnson Thermal re-alleges and incorporates paragraphs 1-43 as if fully set forth herein.

45. Johnson Thermal has been required to employ the services of its attorneys to prosecute and defend this matter.

46. Johnson Thermal has incurred and will continue to incur attorneys' fees and costs in connection with this lawsuit.

47. Johnson Thermal is entitled to recover, and hereby makes a claim for recovery of all reasonable attorney fees, costs, and disbursements incurred herein, pursuant to Idaho Code §§ 12-120(3), 12-121, 6-324, Idaho Rule of Civil Procedure 54, and the express terms of the Lease at page 5 "Enforcement Expenses."

48. In the event Johnson Thermal is granted a default judgment, a reasonable award of attorneys' fees and costs is Fifteen Thousand Dollars (\$15,000.00).

### **PRAYER FOR RELIEF**

WHEREFORE, Johnson Thermal prays for the following relief, namely entry of a judgment:

1. Denying all claims for relief set forth in plaintiff's Amended Complaint;
2. In favor of Johnson Thermal and against Caldwell Land on Johnson Thermal's counterclaims;
3. For damages suffered by Johnson Thermal as a result of Caldwell Land's breach of contract, unlawful retention of Johnson Thermal's security deposition, and unlawful retention of the pro-rata payment of February's rent;
4. For reasonable attorney fees and costs incurred in connection with this lawsuit,



which amount shall be Fifteen Thousand Dollars (\$15,000.00) if Johnson Thermal is granted a default judgment;

5. Such other relief as the Court deems appropriate.

DATED this 10th day of April, 2015.

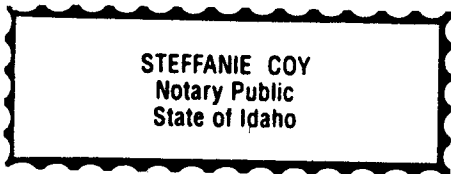
FISHER RAINEY HUDSON

By: Rebecca A. Rainey,  
Rebecca A. Rainey  
Attorneys for Defendant/Counter-Claimant

State of Idaho )  
 ) ss.  
County of Canyon )

Darrell Gustaveson  
Darrell Gustaveson

I, Steffanie Coy, a notary public, do hereby certify that on this 10th day of April, 2015, personally appeared before me Darrell Gustaveson, who, being by me first duly sworn, declared that he is the Chief Financial Officer of Johnson Thermal Systems, Inc., that he signed the foregoing documents as Chief Financial Officer of the corporation, and that the statements therein contained are true.




Steffanie Coy  
NOTARY PUBLIC  
Residing at: Boise  
My Commission Expires: March 28, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10<sup>th</sup> day of April, 2015, I caused a true and correct copy of the foregoing **ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax:(801)596-1508

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

  
Rebecca A. Rainey  
*Attorney for Defendant*

# **Exhibit A**

**COMMERCIAL LEASE AGREEMENT**

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between **GILBERT FAMILY LIMITED PARTNERSHIP** the party of the first part, hereinafter referred to as **LESSOR**, and **JOHNSON THERMAL SYSTEMS, INC.**, the party of the second part, hereinafter referred to as **LESSEE**.

**WITNESSETH:**

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

**Rent Schedule (Initial Term)**

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16

**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statutes, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste

material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contact. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiving or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:

**Lessor**  
**Gilbert Family Limited Partnership**  
**P.O. Box 1064**  
**Caldwell, Idaho 83606**

**Lessee**  
**Johnson Thermal Systems, Inc.**  
**22228 Hoskins**  
**Caldwell, ID 83607**

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

**Commercial Lease Agreement - Page | 5**



**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.

**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.


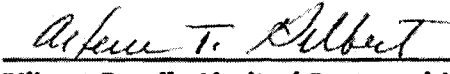
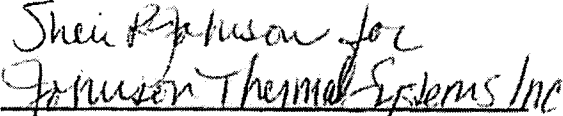
**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**Commercial Lease Agreement - Page | 6**

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

LESSOR:	 _____	<u>2-23-12</u>
	<b>Gilbert Family Limited Partnership</b> Bill Gilbert	Date
	 _____	<u>2-23-12</u>
	<b>Gilbert Family Limited Partnership</b> Arlene T. Gilbert	Date
LESSEE:	 _____	<u>2/23/12</u>
	<b>Johnson Thermal Systems Inc.</b>	Date

Lessor: Gilbert Family Limited Partnership

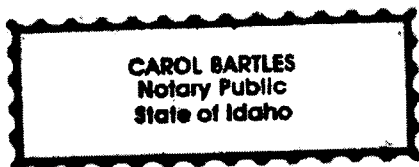
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles  
Notary public for Idaho  
Residing at: Wilder ID  
My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

:SS

County of Canyon)

On this 21 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc

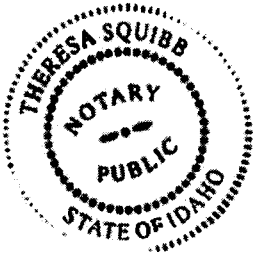
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Theresa Squibb

Notary Public of Idaho

Residing at Idaho

My commission expires: 9.26.2012



**Exhibit A**  
**"Legal Description"**

**Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.**

**EXCEPTING THEREFROM**

**A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.**

**BEGINNING at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence**

**North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence**

**South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence**

**South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence**

**North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.**

**FIRST AMENDMENT**

This FIRST AMENDMENT to the COMMERCIAL LEASE AGREEMENT, dated February 10, 2012, for the lease of the Property entered into between GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") and JOHNSON THERMAL SYSTEMS, INC ("Lessee"), (the "Agreement") is hereby made and entered into by the Lessor and Lessee.

**WITNESSETH:**

WHEREAS, the parties desire to move the commencement date and amend certain terms set forth in the Lease.

NOW, THEREFORE, in consideration of the covenants set forth herein, the parties agree as follows:

1. Lease commencement date shall be April 1, 2012. However, early access shall be granted to Lessee to do improvements.
2. Lessor shall service the current fire sprinkling system before the commencement date.
3. Lessee shall pay for the monitoring service for the fire sprinkling system.
4. Lessor shall have all personal property removed no later than April 1, 2012.
5. All other terms and conditions of the Agreements, not specifically amended hereby, including but not limited to all dates previously set forth in the Agreements, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Lessee:

By: *Sheri Johnson*

Date: *3/21/12*

Lessor:

By: *Arlene Gilbert*

Date: *3-26-12*

FIRST AMENDMENT

This FIRST AMENDMENT to the Lease Agreement, dated February 10, 2012, entered into between Gilbert Family Limited Partnership ("Landlord") and Johnson Thermal Systems, Inc., ("Tenant") concerning the lease of the Property located at 150 Industrial Way, in Caldwell, Idaho is hereby made and entered into by the Landlord and Tenant. *us smj*

WITNESSETH:

WHEREAS, Tenant desire's to exercise its first one (1) year lease renewal option and the Landlord and Tenant desire to set forth the terms for the option as provided in this First Amendment;

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree to amend the Lease as follows:

1. LEASE TERM. The Tenant hereby exercises Tenant's option and the Lease Term is hereby extended for an additional twelve (12) month period from April 15, 2013 to a new expiration date of April 15, 2014 ("Renewal Term").

2. BASE RENT. The Base Rent for the option period shall be as follows:

Rent Schedule

Month	Moithly Rent	Monthly NNN's	Total Monthly Rent	Annual Rent
1-12	\$5,428.97	\$1,729.16	\$7,158.13	\$85,897.56

The Base Rent plus NNN's shall be paid monthly, in advance, in accordance with the terms of the Lease.

3. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Landlord:  
Gilbert Family Limited Partnership

By: *Bill Gilbert*  
Bill Gilbert

Date: Mar, 28, 2013

By: *Arlene T. Gilbert*  
Arlene T. Gilbert

Date: Mar, 28, 2013

Tenant:  
Johnson Thermal Systems, Inc.

By: *Sheri R. Johnson*  
Sheri R. Johnson

Date: 3/28/13

By: \_\_\_\_\_

Date: \_\_\_\_\_

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

Recitals

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

Agreement

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

- 1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
- 2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
- 3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

- 4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

TENANT: Johnson Thermal Systems Inc.

Sign: Arlene Gilbert

Sign: Sheri Johnson for Johnson Thermal Systems Inc.

Print: Arlene Gilbert

Print: Sheri Johnson

Date 4-18-14

Date 4/15/14



# **Exhibit B**

VIA E-MAIL AND CERTIFIED MAIL

Johnson Thermal Systems, Inc.  
1505 Industrial Way  
Caldwell, ID 83605  
Attention: Darrell "Gus" Gustaveson  
gusg@johnsonthermal.com

Re: NOTICE OF TERMINATION  
1505 Industrial Way, Caldwell, ID

Dear Mr. Gustaveson:

This Notice of Termination is given by GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") to JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), with reference to that certain Commercial Lease Agreement, dated February 10, 2012, and the First, Second and Third Amendments thereto (collectively, the "Lease").

NOTICE IS HEREBY GIVEN that, pursuant to Idaho Code § 55-208, Lessor has the right to terminate the Lease upon written notice to Lessee to remove from the Premises within a period of not less than one (1) month. Accordingly, as of midnight on January 31, 2015, the Lease with Lessee shall TERMINATE and not be renewed or extended, and Lessee shall no longer be entitled to possession of the Premises. Accordingly, Lessee is hereby requested to vacate and surrender possession of the Premises to Lessor on or prior to January 31, 2015, which shall include the Lessee's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Premises in the same condition, reasonable wear and tear excepted, as the Premises were in at the beginning of the Lease.

Please note that pursuant to the Lease and despite Landlord's termination of the Lease, monthly rent will continue to be due and payable if Lessee continues in possession of the Premises. In the event that Lessee holds over and rent payment is not made, Landlord intends to pursue all remedies under the Lease despite Landlord's termination of the Lease as set forth herein. This includes, without limitation, rent pursuant to the Second Amendment, both unpaid and coming due and payable for any further period of possession by Lessee.

Please also note that in the event that Lessor is required to commence a lawsuit for possession of the Premises upon termination of the Lease or otherwise (including, but not limited, to non-payment of rent for all or any part of the Premises), that Lessor will pursue attorneys' fees and costs pursuant to the Lease and/or applicable Idaho Code, including, but not limited to, Idaho Code §§ 6-324, 12-120 and/or 12-121.

The Third Amendment to the Lease provides that Lessee had the option to extend the Lease for an additional period of either six (6) months or on a month to month basis. The Lease provides that any notice given under the terms of the Lease shall be deemed delivered when mailed by certified mail. The Lease further provides that any modification to the Lease must be in a writing by all parties. Lessee did not timely or properly exercise the option.

That the option to extend the Lease was not timely or properly exercised is evidenced by the following:

(i) Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Amendment. No notice of exercise, written or verbal, was ever provided. Rather, Lessee simply continued to hold over upon the Premises and pay monthly rent in the same amount as paid for the last month of the previous extended term.

(ii) Lessee did not obtain a writing signed by all parties that would modify the Lease in any way that would support the payment of rent after the conclusion of the Third Amendment's lease extension as being an effective exercise of the lease extension option.

(iii) Time is of the essence of the Lease, as specifically set forth in the Lease.

(iv) Verbal communication from Lessee to Lessor or its agents after the conclusion of the lease extension under the Third Amendment (i.e. after October 15, 2014) indicated that Lessee intended to vacate the Premises as soon as Lessee completed the construction of a new building, thereby evidencing that Lessee did not intend a six month extension, but intended to hold over for a shorter duration.

Lessor reserves all its right and remedies, whether under the Lease or at law or in equity, whether or not mentioned herein, to terminate the Lease and cause Lessee to vacate the Premises.

Please be guided accordingly.

Sincerely,



Arlene Gilbert

Gilbert Family Limited Partnership

12-11-14

MAY 05 2015

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB #8911  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

*Attorneys for Plaintiffs*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Civil No.: CV15-587

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Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or "Plaintiff"), by and thorough counsel of record, Strong and Hanni law firm, submits this Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment in support of its first, second and third claim for relief against Defendant Johnson Thermal Systems, Inc. ("Defendant").

## INTRODUCTION

Defendant breached a commercial lease agreement entered into with Gilbert Family Limited Partnership<sup>1</sup>, the predecessor-in-interest to Caldwell Land, by failing to timely vacate and surrender the property at the expiration of the term of the lease and after receipt of a notice of termination. By failing to vacate the building and property, Defendant is in breach of the lease agreement and liable for unlawful detainer pursuant to Idaho Code § 6-303. As a direct result of Defendant's failure to timely vacate the building, Caldwell Land incurred significant damages, including, damages related to extending the term of its current lease on other commercial property and other business-related damages. Accordingly, summary judgment should be entered in favor of Caldwell Land.

## STATEMENT OF FACTS

1. On or around February 10, 2012, Defendant and the Gilbert Family Limited Partnership ("Prior Owner"), entered into a Commercial Lease Agreement, pursuant to which Prior Owner leased certain real property at 1505 Industrial Way, Caldwell, Idaho (the "Property") for a specified term of thirteen months (the "Lease Agreement"). *See* Verified Amended Complaint ("Verified Compl.") at ¶ 14, Exhibit A; *see also* Answer to Amended Complaint and Counterclaim ("Answer") at ¶ 7.

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<sup>1</sup> On or about December 31, 2014, Plaintiff Caldwell Land purchased the property from the Gilbert Family Limited Partnership, and as a result is entitled to avail itself of, among other rights and obligations related to the property, those afforded in the Lease Agreement, Lease Amendments and Notice of Termination (all defined *infra*).

2. Pursuant to page 3 of the Lease Agreement, under the paragraph titled “Maintenance and Repair,” it is stated, in part, that “[t]he Lessee agrees to maintain the demised [Property] and improvements in good condition and repair, reasonable wear and tear expected.” *Id.* at 16; *Answer* at ¶ 8.

3. Pursuant to page 3 of the Lease Agreement, under the paragraph titled “Improvements,” it is stated, that “[t]he Lessee shall not reconstruct, remodel, or change any part of the [Property] without consent of the Lessor, which consent shall not be unreasonably withheld or delayed.” *Id.* at ¶ 17; *Answer* at ¶ 8.

4. Pursuant to page 5 of the Lease Agreement, under the paragraph titled “Surrender of Premises,” it is stated that:

Upon the expiration of this agreement, the Lessee shall quit and surrender the [Property] in the same state of condition, reasonable wear and tear expected, that the [Property] was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

*Id.* ¶ 18; *Answer* at ¶ 8.

5. The Lease Agreement further provides that “[t]he losing party in any court action brought to enforce any provision of or to collect any sums due under the terms of this Agreement shall pay the prevailing party...a reasonable attorney’s fee...in addition to the costs allowed by law.” *Id.* at ¶ 19; *Answer* at ¶ 8.

6. The Lease Agreement also expressly provides that “[it] may not be amended, modified, or changed except by a writing signed by all parties hereto.” *Id.* at ¶ 20; *Answer* at ¶ 8.

7. In the months and years following the execution of the Lease Agreement, Defendant and the Prior Owner entered into three separate written amendments to the Lease Agreement (the “Lease Amendments”). *Id.* at ¶ 21, Exhibit B; *Answer* at ¶ 9.

8. As a consequence of the Lease Amendments, the amended term of the Lease Agreement expired on October 15, 2014 (the “Lease Expiration Date”). *Id.* at ¶ 23.

9. In the months, leading up to the Lease Expiration Date, Defendant and the Prior Owner, through its leasing agent, engaged in varied discussions regarding a possible six month extension of the Lease Agreement. *Id.* at ¶¶ 24-26(a)-(d); *Answer* at ¶¶ 12-13.

10. However, no oral or written agreement was formed as to any such six month extension of the Lease Expiration Date. *Id.* at ¶¶ 24, 27.

11. By virtue of Defendant’s continued possession of the Property after the expiration, and without any express extension of, the Lease Expiration Date, Prior Owner delivered to Defendant, on or around December 11, 2014, via certified mail and electronic transmission, a Notice of Termination (the “Notice of Termination”). *Id.* at ¶¶ 30-31, Exhibit C; *Answer* at ¶ 19.

12. The Notice of Termination provided, among other things, that:

a. Pursuant to Idaho Code § 55-208, Prior Owner, as the lessor, has the right to terminate the Lease Agreement upon written notice to Defendant to remove from the Premises within a period of not less than one (1) month.

b. That as of midnight on January 31, 2015, the Lease Agreement with Defendant shall terminate and not be renewed or extended, and Defendant shall no longer be entitled to possession of the Building or any other part of the Property.

c. That Defendant is requested to vacate and surrender possession of the Building, together with all other parts of the Property, on or prior to January 31, 2015, which shall include the Defendant's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Building, together with all other parts of the Property, in the same condition, reasonable wear and tear excepted, as the Building and all other parts of the Property were in at the beginning of the lease.

d. That rent will continue to be due and payable so long as Defendant continues in possession of the Building or any other part of the Property, pursuant to the terms of the second of the Lease Amendments.

*Verified Compl.* at ¶ 32(a)-(d), Exh. C; *Answer* at ¶ 20.

13. Notwithstanding its receipt of the Notice of Termination, Defendant remained in possession of the Building after January 31, 2015. *Answer* at ¶ 16.

14. On or around December 31, 2014, Caldwell Land purchased the Property from the Prior Owner (the "Property Purchase Date"). *Verified Compl.* at ¶ 33; *Answer* at ¶ 21.

15. Following Caldwell Land's purchase of the Property, Caldwell Land and Defendant engaged in various discussions regarding Defendant's vacation from the Property, Caldwell Land's plans to immediately relocate its business to the Property, together with the monetary and



other considerations of both parties related to the effect of Defendant's continued possession of the Property past January 31, 2015, the date identified in the Notice of Termination. *Id.* at ¶ 35.

16. In connection with such discussions, Caldwell Land, through counsel, communicated and detailed to Defendant, through counsel, the types and scope of damages, costs, expenses and injuries that Caldwell Land would necessarily suffer if Defendant did not vacate the property by January 31, 2015, the date identified in the Notice of Termination. *Id.* at ¶ 36.

17. Notwithstanding, on or around January 29, 2015, two days prior to the date on which Defendant was required to vacate the property, as identified in the Notice of Termination, Defendant, through counsel, represented to Caldwell Land that it would not comply with the Notice of Termination and would not vacate the Property by January 31, 2015, and, instead, would continue in possession of the Property until April 15, 2015. *Verified Compl.* at ¶¶ 37,38, Exhibit D; *Answer* ¶ 38.

18. Defendant made good on its representations and did in fact fail to vacate the Property by January 31, 2015. *See Verified Compl.* at ¶ 39; *Answer* at ¶ 25.

19. Rather, Defendant did not vacate the property until February 12, 2015. *Answer* at ¶ 29.

20. Upon its departure from the Property, Defendant caused to be removed an electrical transformer from the side of the building on the Property. *Id.* at ¶ 47; *Answer* at 31.

## STANDARD OF REVIEW

Under Rule 56, I.R.C.P., summary judgment shall be granted if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Heinz v. Heinz*, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court “liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997).

Affidavits submitted in support of an in opposition to motions for summary judgment must be made on personal knowledge, set forth facts that would be admissible at trial on the issue addressed, and demonstrate that the affiant is competent to testify to the matters stated therein. I.R.C.P. Rule 56(e)<sup>2</sup>. When a motion for summary judgment is supported by affidavits or deposition testimony, the non-moving party cannot rest on the allegations and/or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. *Arnold v. Diet Center, Inc.* 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987). If the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho

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<sup>2</sup> A verified complaint may be presented to the Court in support of a motion for summary judgment and it will be accorded to probative force of an affidavit if it meets the requirements of Rule 56(e). *Camp v. Jimenez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984).

714, 719, 918 P.2d 583, 588 (1996). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 410, 987 P.2d 300, 313 (1999). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 966 P.2d 303, 306 (2000).

### ARGUMENT

**A. Defendant is Liable for Unlawful Detainer For Failure to Vacate or Surrender the Property after Receiving the Notice of Termination of Lease.**

A tenant is guilty of unlawful detainer where he continues in possession of the premises after termination of the lease term, or where he fails to pay rent. I.C. § 6-303. Additionally, I.C. § 6-316 allows a landlord in an unlawful detainer action to recover, in addition to his possession of his property, damages and rent found due.

Here, there is no dispute that Defendant entered into the Lease Agreement and that the Lease Expiration Date was October 15, 2014. Beyond that, there is no agreement to further extend of the term of the Lease Agreement. *Verified Compl.* at ¶¶ 24, 27. This even after Defendant and Prior Owner engaged in numerous discussions regarding a possible six month extension, to which, ultimately there was no agreement for an extension<sup>3</sup>. *Id.* at ¶¶ 24-26(a)-(d); *Answer* at ¶¶ 12-13. Because there was no extension of the Lease Agreement, Defendant's continued possession of the Property necessarily dictates that Defendant is a tenant at will under Idaho law. Therefore, Prior

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<sup>3</sup> As noted above, the Lease Agreement expressly provides that "[it] may not be amended, modified, or changed except by a writing signed by all parties hereto." *Id.* at ¶ 20; *Answer* at ¶ 8

Owner caused to be served a Notice of Termination on Defendant on December 11, 2014, informing Defendant that it had to vacate and surrender the Property by January 31, 2015. Despite not having extended the Lease Agreement and having received the Notice of Termination, Defendant continued in possession of the Property after January 31, 2015. Defendant has admitted as much. *See Answer* at ¶¶ 25, 29. By virtue of this admission, Defendant is liable for unlawful detainer because it did not vacate or surrender the property by January 31, 2015, the date identified in the Notice of Termination. Therefore, summary judgment should be entered in favor of Caldwell Land.

**B. Defendant Breached the Lease Agreement For Failure to Vacate or Surrender the Property.**

In a suit regarding contract, “the burden of proving the existence of a contract and the fact of its breach is upon the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance.” *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (Idaho 2000). Breach of contract has been defined as:

[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance by part to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

*Hughes v. Idaho State University*, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting BLACK’S LAW DICTIONARY 188 (6<sup>th</sup> ed. 1990)).

In this case, it is undisputed that there is a contract – the Lease Agreement. Defendant, therefore has the burden to prove that its performance of the Lease Agreement is legally excused. Unfortunately for Defendant, it cannot meet this burden. Defendant breached the Lease Agreement in at least three ways, 1) by failing to vacate or surrender the property on January 31, 2015<sup>4</sup>, 2) for failing to maintain the property in good condition and repair and to leave the Property in the same condition that the Property was at the beginning of the Agreement, and 3) for changing the property without consent of the Prior Owner.

There is no dispute that in the months leading up to the end of the Lease Agreement - October 15, 2014 - Defendant and the Prior Owner, engaged in varied discussions regarding a possible six month extension. *Id.* at ¶¶ 24-26(a)-(d); *Answer* at ¶¶ 12-13. However, despite these numerous discussions concerning a *possible* extension to the term of the Lease Agreement, no agreement was reached as there is no written agreement providing an extension.<sup>5</sup> This is made clear in a December 2014 email whereby Prior Owner requested that Defendant provide correspondence or an agreement extending the Lease Agreement beyond October 15, 2014. *Verified Compl.* at ¶ 26(d). Defendant responded that it “did not find any correspondence with [Prior Owner] beyond the 3<sup>rd</sup> Amendment.” *Id.*; *Answer* at ¶ 14. Accordingly, no agreement was

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<sup>4</sup> The date that Defendant’s tenancy at will was terminated by Prior Owner, pursuant I.C. § 55-208 and the Notice of Termination.

<sup>5</sup> *See*, Fn. 3, *supra*.

formed as to any such six month extension of the Lease Expiration Date<sup>6</sup>. *Verified Compl.* at ¶¶ 24, 27.

Without any express extension of the Lease Agreement or the Lease Expiration Date, Defendant was in possession of the Property as a tenant at will. As a result, Prior Owner delivered to Defendant the Notice of Termination which provided that Defendant must vacate and surrender the Property by January 31, 2015. Defendant has admitted it did not vacate the Property on said date but rather continued in possession of the Property until February 12, 2015. *Answer* at ¶¶ 25 and 29.

Additionally, Defendant did not maintain the Property in good condition and repair. For example, Defendant has admitted that they caused to be removed from the Property an electrical transformer conveying power to the Property. *Id.* at ¶ 31. In doing so, Defendant caused significant damage to the Property including damage to siding, duct work, and asphalt. Moreover, while removing certain other equipment from the Property, Defendant caused damage to cement, duct work, and flooring, all of which left the Property in a condition not in conformity with terms of the Lease Agreement. Importantly, the work performed by Defendant to remodel, change, or reconstruct the Property, for example, installing the transformer, among other items, was not

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<sup>6</sup> Not only it is clear that there was no extension of the Lease Agreement, but Defendant's own actions and statements make clear that they were operating as if they were on a month-to-month lease. Specifically, Defendant, in numerous written communications with Prior Owner, made clear that Tenant had not extended the lease for an additional six months. For example, in an email from Defendant on April 10, 2014, Defendant requested an additional six month extension (until October 15, 2014) "*with the option to go month to month for an additional 3-6 months.*" *Verified Compl.* at ¶ 26(a) (emphasis added); *Answer* ¶ 14. Defendant also noted that it was hoping to vacate the Property in December but "it could be January . . . and we are tentatively planning to move in January or February." *See Verified Compl.* ¶ 26(d); *Answer* at ¶ 14. All of which clearly indicates that no six month extension, beyond October 15, 2014, had been agreed to by the parties.

approved by Prior Owner which is also a violation of the Lease Agreement. *See Verified Compl.* at ¶ 17. By damaging the Property as described above and surrendering it in such fashion that it violated the terms of the parties' agreement, Defendant breached the Lease Agreement. Because Defendant has not fulfilled its promises under the Lease Agreement, and has no reason which would legally excuse its nonperformance, Caldwell Land requests that summary judgment be entered in its favor for Defendant's breach of the Lease Agreement.

**C. Breach of Implied Covenant of Good Faith and Fair Dealing**

Under Idaho law, a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract. *First Security Bank of Idaho v. Gage*, 115 Idaho 172, 176, 765 P.2d 683,687 (1998); *see also Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 52 P.3d 848, 855-56 (2002) (The implied covenant of good faith and fair dealing is a covenant implied by law in a party's contract . . . The covenant requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.") (emphasis added) (citation omitted).

In this case, because there is no dispute there is an underlying contract – the Lease Agreement – and as a result of Defendant's breach of the same, as outlined above, Defendant has also breached the implied covenant of good faith and fair dealing. Defendant's breach of the Lease Agreement deprived Caldwell land of the benefits it contracted for when it purchased the Property, namely possession of the Property, and this deprivation is sufficient to meet the requirements of a

breach of the covenant of good faith and fair dealing and summary judgment should therefore be entered in favor of Caldwell Land.

**D. Caldwell Land is Entitled to Recover the Reasonable Costs and Attorneys' Fees Necessary to Prosecute this Action.**

Caldwell Land has been required to pursue this action as a result of Defendant's failure to timely vacate and surrender the Building. The Lease Agreement provides that "[t]he losing party in any court action brought to enforce any provision of or to collect any sums due under the terms of this Agreement shall pay the prevailing party...a reasonable attorney's fee...in addition to the costs allowed by law." *Verified Compl.*, Exh. A, Page 5. Under this provision Caldwell Land is entitled to recover its reasonable attorneys' fees and costs incurred in this matter.

"[W]here there is a valid contract between the parties which contains a provision for an award of attorney fees and costs, the terms of that contractual provision establish a right to an award of attorney fees and costs." *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 568-69, 836 P.2d 511, 514-515 (Idaho 1992); *see also* Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1, 62 (2001) ("[a]ttorney fees can be awarded by the trial court when provided for by contract"). Accordingly, Caldwell Land requests an award of attorney fees and costs in this matter together with summary judgment. The amount of fees and costs can be determined by the later submission of a memorandum of fees and costs or appropriate motion.



**CONCLUSION**

For the foregoing reasons, Caldwell Land respectfully requests that its motion for partial summary judgment on its unlawful detainer, breach of contract and breach of good faith and fair dealing claims be granted.

DATED this 30<sup>th</sup> day of April, 2015.

STRONG & HANNI



Robert L. Janicki  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of April, 2015, a true and correct copy of the foregoing

**MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

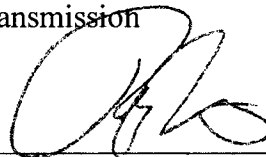
was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock Street, Suite 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission



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FILED  
1025 A.M. L E D P.M.

MAY 05 2015

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB # 8911  
STRONG & HANNI  
9350 S. 150 E., Suite 820  
Sandy, UT 84070  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff/Counter-Defendant*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant/Counterclaimant.

**REPLY  
TO COUNTERCLAIM**

Civil No.: CV15-587

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Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, the "Caldwell Land"), by and through their undersigned counsel Strong & Hanni law firm, hereby provides this *Reply* to the *Counterclaim* filed by Defendant Johnson Thermal Systems, Inc. ("JTS" or "Defendant") as follows:

**REPLY**

**FIRST AFFIRMATIVE DEFENSE**

The *Counterclaim* fails to state any claims against Caldwell Land upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

As to the numbered paragraphs of the *Counterclaim*, Caldwell Land replies as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Upon information and belief, Caldwell Land admits the allegations contained in paragraph 1.

2. Caldwell Land admits the allegations contained in paragraph 2.

3. Caldwell Land admits the allegations contained in paragraph 3.

4. Caldwell Land admits that the Court properly has jurisdiction of this matter.

However, Caldwell Land denies the remaining allegations contained in paragraph 4.

5. Caldwell Land admits that the Court properly has venue over this matter. However, Caldwell Land denies the remaining allegations contained in paragraph 5.

6. Caldwell Land admits the allegations contained in paragraph 6.

**BACKGROUND**

7. Caldwell Land admits that JTS originally leased the Property pursuant to the Commercial Lease, which document speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 7.

8. Caldwell Land admits the that the Commercial Lease was amended by the First Amendment, Second Amendment, and Third Amendment, and further states that the documents comprising such amendments speak for themselves. Caldwell Land denies the remaining allegations contained in paragraph 8.

9. Caldwell Land admits the documents comprising the Lease, as identified in paragraphs 7 and 8, speak for themselves. Caldwell Land denies the remaining allegations contained in paragraph 9.

10. Caldwell Land admits that the Third Amendment speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 10.

11. Caldwell Land admits that the Third Amendment speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 11.

12. Caldwell Land admits that the documents comprising the Lease speaks for themselves. Caldwell Land denies the remaining allegations contained in paragraph 12.

13. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 13 and, therefore, denies the same.

14. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 14 and, therefore, denies the same.

15. Caldwell Land admits JTS occupied the property since October 15, 2014. Caldwell Land denies the remaining allegations contained in paragraph 15.

16. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 16 and, therefore, denies the same.

17. Caldwell Land admits that the Notice of Termination speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 17.

18. Caldwell Land admits that the Notice of Termination speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 18.

19. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 19 and, therefore, denies the same.

20. Caldwell Land admits the allegations contained in paragraph 20.

21. Caldwell Land denies the allegations contained in paragraph 21.

22. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 22 and, therefore, denies the same.

23. Caldwell Land admits that JTS removed certain items from the Property as of February 12, 2015, and that on or after that date Caldwell Land changed the locks to the building located on the Property. Caldwell Land denies the remaining allegations contained in paragraph 23.

**COUNT ONE**  
**(Breach of Contract – Constructive Eviction)**

24. Caldwell Land incorporates all answers, denials, and affirmative allegations set forth in this *Reply* by reference as though fully set forth herein.

25. Caldwell Land admits that the documents comprising the Lease speaks for themselves. Caldwell Land denies the remaining allegations contained in paragraph 25.

26. Caldwell Land admits that it is the successor in interest to the Gilbert Family Limited Partnership's ("GFLP") rights under the documents comprising the Lease. Caldwell Land denies the remaining allegations contained in paragraph 26.

27. Caldwell Land denies the allegations contained in paragraph 27.

28. Caldwell Land denies the allegations contained in paragraph 28.

29. Caldwell Land denies the allegations contained in paragraph 29.

30. Caldwell Land denies the allegations contained in paragraph 30.

31. Caldwell Land denies the allegations contained in paragraph 31.

**COUNT TWO**  
**(Refund of Security Deposit)**

32. Caldwell Land incorporates all answers, denials, and affirmative allegations set forth in this *Reply* by reference as though fully set forth herein.

33. Upon information and belief, Caldwell Land admits that JTS made a security deposit to GFPL in connection with the Lease. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 33 and, therefore, denies the same.

34. Caldwell Land states that Idaho Code Section 6-321 speaks for itself. Caldwell Land denies the remaining allegations contained in paragraph 34.

35. Caldwell Land admits it changed the locks on the building located on the Property following JTS removal of certain items on or around February 12, 2015. Caldwell Land denies the remaining allegations contained in paragraph 35.

36. Caldwell Land denies the allegations contained in paragraph 36.

37. Caldwell Land denies the allegations contained in paragraph 37.

### **COUNT THREE**

#### **(Refund of Pro-Rated Share of February 2015 Rent)**

38. Caldwell Land incorporates all answers, denials, and affirmative allegations set forth in this *Reply* by reference as though fully set forth herein.

39. Caldwell Land denies the allegations contained in paragraph 39.

40. Caldwell Land admits that JTS vacated the Property on February 12, 2015.

Caldwell Land denies the remaining allegations contained in paragraph 40.

41. Caldwell Land admits it changed the locks on the building located on the Property on or around February 12, 2015. Caldwell Land denies the remaining allegations contained in paragraph 41.

42. Caldwell Land admits it has retained rent paid by JTS in the month of February. Caldwell Land denies the remaining allegations contained in paragraph 42.

43. Caldwell Land denies the allegations contained in paragraph 43.

### **ATTORNEYS' FEES AND COSTS**

44. Caldwell Land incorporates all answers, denials, and affirmative allegations set forth in this *Reply* by reference as though fully set forth herein.

45. Upon information and belief, Caldwell Land denies the allegations contained in paragraph 45.

46. Caldwell Land lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 46 and, therefore, denies the same.



47. Caldwell Land denies the allegations contained in paragraph 47.

48. Caldwell Land denies the allegations contained in paragraph 48.

**THIRD AFFIRMATIVE DEFENSE**

As a separate an affirmative defense, Caldwell Land denies each and every allegation of the *Counterclaim* not admitted herein.

**FOUTH AFFIRMATIVE DEFENSE**

JTS has failed to mitigate its damages and to the extent that it has failed to mitigate its damages, such claims are barred.

**FIFTH AFFIRMATIVE DEFENSE**

JTS's claims are barred under the doctrines of laches, estoppel and waiver.

**SIXTH AFFIRMATIVE DEFENSE**

JTS's claims are barred by the doctrine of unclean hands.

**SEVENTH AFFIRMATIVE DEFENSE**

Caldwell Land alleges that to the extent JTS's damages, if any, were caused by third persons, events or conditions not within the control of Caldwell Land, JTS's claims fail.

**EIGHTH AFFIRMATIVE DEFENSE**

JTS's claims are barred in whole or in part to the extent that JTS is in breach of the Lease.

**NINTH AFFIRMATIVE DEFENSE**

JTS's claims are barred in whole or part by virtue of its failure to follow the procedures set forth in, among others, Idaho Code Sections 6-320(d).

**TENTH AFFIRMATIVE DEFENSE**

Caldwell Land hereby reserves the right to assert further and additional affirmative defenses as discovery in this case reveals additional grounds for such defenses.

**PRAYER FOR RELIEF**

WHEREFORE, having replied to the allegations of JTS's *Counterclaim*, Caldwell Land prays that the same be dismissed, with prejudice, that Caldwell Land be awarded judgment in accordance with the prayer of the *Verified Amended Complaint*, for its costs and attorneys' fees in defending against the *Counterclaim*, and for such other and further relief as to the Court seems just.

DATED this 30<sup>th</sup> day of April, 2015.

STRONG & HANNI



---

Robert L. Janicki  
*Attorneys for Plaintiff/Counter-Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of April, 2015, a true and correct copy of the foregoing

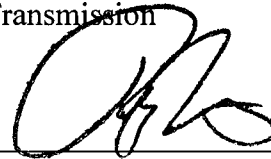
**REPLY TO COUNTERCLAIM** was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
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- Email Transmission

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock Street, Suite 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission



A handwritten signature in black ink, appearing to be 'ABH', is written over a horizontal line.

FILED  
1023 A.M. L E D P.M.

MAY 05 2015

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB #8911  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

*Attorneys for Plaintiffs*

---

**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Civil No.: CV15-587

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Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or "Plaintiff"), by and thorough counsel of record, Strong and Hanni law firm, hereby files this Motion for Partial Summary Judgment (the "Motion"). The Motion is based upon the pleadings and documents on file in this matter, including the *Verified Amended Complaint* (which acts as an affidavit for purposes of summary judgment) and Defendant's answer. By this Motion, Plaintiff

requests that summary judgment be entered granted on its First, Second and Third Causes of Action. Specifically, the Unlawful Detainer, Breach of Contract, and Breach of Implied Covenant of Good Faith and Fair Dealing claims. In support of the Motion, Plaintiff would show that there is no genuine issue of any material fact in this case as to Defendant's failure to surrender and vacate property after proper notice was given and that this failure to vacate surrender property resulted in a breach of the lease agreement. Additionally, damaged caused to the property by Defendant is a further breach of the lease agreement.

Wherefore, Plaintiff requests that the Court enter summary judgment in its favor on these counts. A memorandum in support of the Motion is filed concurrently herewith.

DATED this 30th day of April, 2015.

STRONG & HANNI



---

Robert L. Janicki  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of April, 2015, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
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- CM/ECF Filing
- Email Transmission



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**FILED**  
A.M. 357 P.M.

JUL 02 2015

CANYON COUNTY CLERK  
K CARLTON, DEPUTY

Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
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Boise, ID 83702  
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Facsimile: (208) 330-3700

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Allison Blackman, ISB No. 8686  
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Email: [allison@frhtriallawyers.com](mailto:allison@frhtriallawyers.com)  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC.,  
an Idaho corporation

Defendant.

Case No. CV 15-587

**AFFIDAVIT OF DARRELL  
GUSTAVESON**

STATE OF IDAHO            )  
  ) ss.  
County of Canyon         )

**AFFIDAVIT OF DARRELL GUSTAVESON - 1**

**ORIGINAL**

Darrell Gustaveson, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein. I am the chief financial officer for Johnson Thermal Systems and I am familiar with Johnson Thermal Systems involvement with the Gilbert Family Limited Partnership and I have the authority to make the following statements regarding Johnson Thermal Systems' knowledge and intent regarding the matters contained herein.

2. Consistent with the express written terms of the third lease amendment, Johnson Thermal Systems exercised its option to extend the term of the lease for six months by continuing to pay base rent at the amount of \$6,000.00.

3. The Gilbert Family Limited Partnership accepted, without objection or comment, Johnson Thermal System's payment of base rent at the amount required to extend the term of the lease for six months for the first two months of the extension.

4. The temporary electrical transformer that is referenced in plaintiff's motion for summary judgment was not a permanent addition or change to the building and, as such, Johnson Thermal was not required to seek the landlord's pre-approval to have the temporary electrical transformer installed.

5. The temporary electrical transformer was installed in February 2014. During the entire time it was installed, Johnson Thermal Systems received no objection or comment from the Gilbert Family Limited Partnership regarding the fact that it had been installed.

6. It was Johnson Thermal Systems' intent to make all repairs to bring the building back to the condition that it was at the time Johnson Thermal Systems leased the

**AFFIDAVIT OF DARRELL GUSTAVESON - 2**



premises from the Gilbert Family Limited Partnership. However, Johnson Thermal Systems was precluded from doing so because our access to the premises was restricted and denied when, on or about February 13, 2015, the locks on the doors had been changed.

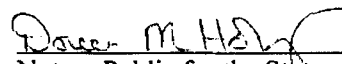
7. Attached hereto as Exhibit A is a true and correct copy of a spreadsheet that I prepared summarizing and calculating the additional expenses incurred by Johnson Thermal Systems as a result of the Gilbert Family Limited Partnership and plaintiffs' insistence that Johnson Thermal Systems vacate the premises before the expiration of the six-month lease extension.

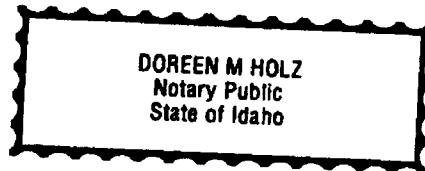
8. Further your affiant sayeth naught.

DATED this 2nd day of July, 2015.

  
Darrell Gustaveson

SUBSCRIBED AND SWORN BEFORE ME this 2nd day of July, 2015.

  
Notary Public for the State of Idaho  
Residing at: CADWELL, ID  
Commission Expires: MARCH 10, 2016



**AFFIDAVIT OF DARRELL GUSTAVESON - 3**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of July, 2015, I caused a true and correct copy of the foregoing **AFFIDAVIT OF DARRELL GUSTAVESON** to be served upon the following individuals in the manner indicated below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801) 596-1508

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

  
Rebecca A. Rainey

# Exhibit A

## JTS Building January & February Expedited Costs

Emp/Vendor	OT Rate	OT Hours	
Eric Chavez	31.50	63.5	2,000.25
Camron Hayes	30.00	68	2,040.00
Steve Halbert	30.00	19	570.00
Robert Burkhart	42.00	18	756.00
Sam Elliot	18.00	67	1,206.00
Russell Hinkley	22.50	108	2,430.00
Karl Jackson	24.00	29	696.00
Wesley Davis	37.50	10	375.00
John Mendiola	30.00	93.5	2,805.00
Mike Knee	18.00	40	720.00
Ward Johns	Salary		3,750.00
Total Labor			17,348.25
Burden	0.25		4,337.06
<b>Total Labor</b>			<b>21,685.31</b>

H & E Equipment		
Scissorlift Rentals	943.40	
Scissorlift Rentals	1,003.10	
Scissorlift Rentals	1,870.90	
Scissorlift Rentals	1,835.20	
Scissorlift Rentals	938.10	
Scissorlift Rentals	1,276.20	
<b>Total Rentals</b>	<b>7,866.90</b>	

Tyco Structural Enterprises		
Shop Walls-Expedite For Occupancy	1,930.00	
<b>Total Tyco</b>	<b>1,930.00</b>	

**FILED**  
A.M. 351 P.M.  
JUL 02 2015  
CANYON COUNTY CLERK  
K CARLTON, DEPUTY

Rebecca Rainey, ISB #7525  
FISHER RAINEY HUDSON  
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Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

Kristin Bjorkman Dunn, ISB #4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Suite 300  
Boise, Idaho 83702  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

Attorneys for Defendant/Counterclaimant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation

Defendant.

**Case No. CV 15-587**

**MEMORANDUM IN OPPOSITION  
TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

COMES NOW defendant Johnson Thermal Systems, Inc., by and through its attorneys of record, and hereby submits this Memorandum in Opposition to Motion for Partial Summary Judgment on Plaintiff's first, second, and third claims for relief.

## INTRODUCTION

Plaintiff's motion for partial summary judgment should be denied in its entirety because the allegations contained therein are not properly supported by competent evidence and, even if they were, there are several genuine issues of material fact that preclude summary judgment. In short, this is simply not the type of case than can be resolved at summary judgment.

### STATEMENT OF DISPUTED AND ADDITIONAL FACTS

1. Johnson Thermal disputes Fact #10 of Plaintiff's statement of facts. The Third Lease Amendment provided:

(3) At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

By this language, the GFLP agreed to allow Johnson Thermal an extension of either six months or month-to-month. By paying base rent at \$6,000/month, Johnson Thermal elected to exercise the six-month extension option. Affidavit of Darrell Gustaveson ("Gustaveson Aff.") at ¶ 2.

2. Johnson Thermal Systems disputes Fact #11 of Plaintiff's statement of facts because it is based upon the incorrect presumption that Johnson Thermal Systems' payment of amounts necessary to exercise the six month extension option did not effectively exercise the six month extension option.

3. GFLP accepted payment of the first two months of rent at the amount required to exercise the six month extension option without objection. Gustaveson Aff. ¶ 3.

4. The electric transformer installed and removed by Johnson Thermal Systems was not a “reconstruction, remodel, or change” to the property and, as such, did not require the GFLP’s prior consent or approval. Gustaveson Aff. ¶ 4.

5. GFLP never objected to the fact that Johnson Thermal Systems installed an electric transformer on the premises. Gustaveson Aff. ¶ 5.

6. Johnson Thermal intended to make all necessary repairs to the building before surrendering the premises, but Johnson Thermal was denied access to the premises as of February 13, 2015, when someone changed the locks. Gustaveson Aff. ¶ 6.

7. Johnson Thermal suffered prejudice in the amount of \$31,482.21 damages as a result of the GFLP’s change in position regarding the six-month lease extension and the extraordinary efforts it had to undertake to vacate the property on short notice and before the expiration of its six month lease extension option. Gustaveson Aff. ¶ 7 and Ex. A.

#### **STANDARD OF REVIEW**

Under Idaho Rules of Civil Procedure, summary judgment shall be granted if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). When considering a motion for summary judgment, the court must liberally construe the “record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). All reasonable inferences, which can be made upon facts on the record, must be construed in favor of the non-moving party. *Tusch Enters. v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1026 (1987). “If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied.” *Kline*

v. *Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). All doubts must be construed against the moving party, and if facts exist on the record to which reasonable people may result in different outcomes, the motion must be denied. *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

### DISCUSSION

1. **As a matter of law, Johnson Thermal had a six-month extension and, alternatively, there are genuine issues of material fact regarding whether the course of dealing between Johnson Thermal and the GFLP created a six month extension.**

Plaintiff's motion for summary judgment rests on the legally and factually unsupported conclusion that there was not a six month extension between Johnson Thermal and the prior owner—the Gilbert Family Limited Partnership (“the GFLP”). Because the documentary evidence establishes, as a matter of law, that the parties agreed to a six month extension, Plaintiff is not entitled to summary judgment for any claim that rests upon the premise that Johnson Thermal Systems did not timely vacate: specifically, its claims for breach of contract, breach of the covenant of good faith and fair dealing, and wrongful detainer. Alternatively, there are genuine issues of material fact regarding the six month extension that would preclude entry of summary judgment on Plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and wrongful detainer.

- i. **The third lease amendment's option clause did not contemplate or require an additional writing.**

Plaintiff's claim that there was no six month extension rests on the fact that there was not a written agreement, separate and apart from the third lease amendment, that specifically acknowledged a six month extension. However, under its express terms, the third lease amendment did not require a separate written acknowledgement of the six-month extension.



Rather, the six-month extension existed solely by virtue of Johnson Thermal paying the amount agreed upon for the six-month extension.

The differences between the option clause contained in the original lease agreement and the option clause in the third lease amendment make it clear that the GFLP did not require a separate written notification from Johnson Thermal as a precondition to exercising the extension option rights expressly granted in the third lease amendment. Specifically, the option language contained in the original lease agreement expressly required that Johnson Thermal give 60 days' written notice to the landlord in order to have the option rights set forth therein:

OPTION TO RENEW: Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew....

In the third lease amendment, the option was a right given upon the expiration of the lease term without any prior notice requirements:

(3) At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

The GFLP drafted both contracts. In the original lease agreement, the GFLP required sixty days written notice to exercise the option rights. In the third lease amendment, the GFLP did not require any written notice to exercise the option. Rather, in the third lease amendment, the GFLP provided that the option term was available, automatically, at the expiration of the lease agreement and that the length of the option depended upon the monthly base rent paid by Johnson Thermal. Accordingly, per the language of the third lease agreement, Johnson Thermal was to elect the length of the option agreement by paying either the six month rate or the month-

to-month rate. And, the undisputed evidence shows, Johnson Thermal paid the rate for the six month extension term. Statement of Disputed and Additional Facts (SDAF) ¶ 1.

The differences between these two lease agreements strongly support Johnson Thermal's position that a separate written notification was not required in order for Johnson Thermal to choose between the month-to-month or six month option. First, the drafting differences show that the GFLP was well aware of how to expressly require written notification of exercise of an extension option and it did so in the original lease agreement and chose not to do so in the third lease amendment. Second, the drafting differences indicate that language requiring all modification to be in writing was not intended to apply to the exercise of an option right.

It makes sense that the "no oral modification, amendment, or change" language upon which Caldwell Land & Cattle, LLC relies is inapplicable to the exercise of an option because the exercise of an option is not a "modification, amendment, or change" to the original agreement. Rather, the exercise of an option is the exercise of an express right contained within the written agreement, which is to be performed (if at all) in accordance with its terms. The original lease agreement provides that "[it] may not be amended, modified, or changed except by a writing signed by all the parties hereto." The third lease amendment provides as follows:

[3] At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

The third lease amendment is clear in its expression of what options are available to Johnson Thermal and how those options are to be exercised.

Johnson Thermal's actions and current position do not constitute an "amendment, modification, or change" to the third lease amendment and, therefore, did not require a separate

writing. The undisputed evidence shows that Johnson Thermal exercised its option to extend the third lease amendment by acting in accordance with the terms of the option clause expressly set forth in the third lease amendment: paying base rent of \$6,000.00—the rate agreed upon for the six month extension. SDAF ¶ 1.

The GFLP and its successor in interest, not Johnson Thermal, are the parties attempting to “amend, modify, or change” the third lease amendment by adding to it the requirement of an additional writing as a pre-condition to exercising the extension option. It is non-sensical, however, to require a writing that confirms actions in accordance with the contract are intended to be performance of the contract in accordance with its terms. Because Johnson Thermal’s actions and current position do not constitute an “amendment, modification, or change” to the third lease amendment, there is no justifiable basis for Johnson Thermal to believe that it needed to enter into another writing agreeing to do what the prior writing already said the parties would do. Plaintiff’s position is not supported by the express terms of the lease agreements between the GFLP and Johnson Thermal and, as such, should be rejected.

**ii. There are genuine issues of material fact regarding whether the parties intended a six month extension by their course of conduct.**

Even if the catch-all language regarding modifications to the contract does apply to the exercise of the six month extension option, there is still a genuine issue of material fact regarding whether the parties’ course of conduct manifested an intent to exercise such option. “A written contract may be modified or waived by a subsequent oral agreement.” *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App. 1997) (citing *Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (Ct. App. 1983)). “The modification of an agreement ‘may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.’” *Id.* (quoting *Ore-*

*Ida Potato Products Inc. v. Larsen*, 83 Idaho 290, 296, 362 P.2d 384, 387 (1961)). And even provisions of a contract that mandate all modifications be made in writing can, indeed, be modified by oral agreement or conduct of the parties:

“We have found no reason why a clause requiring contract modifications be in writing ... may not be waived. Further, a waiver need not be express but may be implied from conduct. More specifically, an implied waiver occurs where a party’s neglect to insist upon enforcing a right results in prejudice to another party.”

*Rule Sales and Service, Inc. v. U.S. Bank Nat. Ass’n*, 133 Idaho 669, 675-76, 991 P.2d 857, 863-64 (1999) (quoting *Idaho Migrant Council, Inc. v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 806, 718 P.2d 1242, 1244 (Ct. App. 1986)). The question of whether such modification exists is one for the trier of fact. *Dennett*, 130 Idaho at 26, 936 P.2d at 224. (citing *Strate v. Cambridge Tel. Co. Inc.*, 118 Idaho 157, 161, 795 P.2d 319, 323 (Ct. App. 1990)).

In this case, the trier of fact would be asked to decide whether the parties’ course of conduct modified that contractual provision that all modifications be in writing. The evidence that the trier of fact can rely on to reach that conclusion is: (i) subsequent to the first lease agreement, the parties entered into a written agreement that changed the manner and means by which the six month extension option could be exercised; (ii) Johnson Thermal systems performed that six month extension option in accordance with the terms of the third modification (SDAF ¶ 1); (iii) the GFLP accepted Johnson Thermal’s performance of the six month extension option for two months, without comment or objection (SDAF ¶ 2).

After having accepted performance of the extension agreement in accordance with its terms (SDAF ¶ 1), and without comment or objection from the GLFP (SDAF ¶ 2), the GFLP, in an effort to facilitate the sale of the property to Plaintiffs, changed positions and insisted that the lease term was month-to-month and insisted that Johnson Thermal vacate the property not later

than January 31, 2015. Johnson Thermal was materially prejudiced by the alleged “termination of lease” in that it had (i) to defend itself in the present lawsuit and (ii) invoke extraordinary resources at significant cost and expense to itself in order to vacate the premises as quickly as possible. SDAF ¶ 7. On the present motion for summary judgment, these facts are to be taken in the light most favorable to the non-moving party and, as such, Plaintiff’s motion for summary judgment should be denied.

**2. Plaintiffs failed to establish that Johnson Thermal needed to seek pre-approval for installing the transformer and failed to put on competent evidence that the GFLP did not approve of the installation of the transformer.**

Plaintiff’s complaint regarding the installation of the electrical transformer does not meet the standards for a summary judgment motion. On page 11-12 of Plaintiff’s Memorandum in Support of its Motion for Summary Judgment (“Plaintiff’s Memo.”), Plaintiff argues:

Importantly, the work performed by Defendant to remodel, change, or reconstruct the Property, for example, installing the transformer, among other items, was not approved by the Prior Owner which is also a violation of the Lease Agreement.

(citing *Verified Compl.* at ¶ 17). Plaintiff has not established, by evidence, argument, or authority, that the electrical transformer is the type of “improvement” that requires prior approval and authorization from the landlord. Johnson Thermal Systems did not “remodel, reconstruct, or change” the premises in any way when it had Idaho Power install the transformer (SDAF ¶ 4)—indeed, the installation of the transformer was no more cumbersome upon the premises than Johnson Thermal’s trade fixtures.

Second, and perhaps more importantly, Plaintiff has presented no evidence that the landlord was of the mind that the transformer needed to be pre-approved and did not approve the installation of the electrical transformer. Rather, the only evidence cited by Plaintiff is paragraph 17 of the Amended Complaint that contains nothing more than a recitation of a particular

contract term. Plaintiff has not presented anyone with authority to speak on behalf of the GFLP with personal knowledge of the facts to support its claim. Indeed, the fact that the transformer existed on the property for nearly a year without objection from the landlord (SDAF ¶ 5) is very strong evidence that the landlord did not view the act of installing the transformer as a breach of the lease agreement.

Plaintiff's position regarding installation of the electric transformer fails to meet the requirements of Idaho Rule of Civil Procedure 56(e). Because this point is not supported by an affidavit made on personal knowledge, setting forth facts that would be admissible in evidence, and showing affirmatively that the affiant is competent to testify to the matters therein, Johnson Thermal is not under a duty to rebut this conclusory and unsupported allegation. Nevertheless, by the affidavit filed contemporaneously herewith, the undisputed evidence shows that the electrical transformer did not "remodel, reconstruct, or change" the premises and Johnson Thermal Systems did not breach the lease agreement by either installing or removing the electrical transformer.

**3. Plaintiff constructively evicted Johnson Thermal from the premises, thereby preventing Johnson Thermal from making the repairs about which Plaintiff now complains.**

In support of its breach of contract claim, Plaintiff argues briefly that Johnson Thermal "caused damage to cement, duct work, and flooring, all of which left the Property in a condition not in conformity with terms of the Lease Agreement." Plaintiff's Memo. p. 11. Plaintiff has not cited to any evidence that supports this contention. However, to the extent that there was any unrepaired damage to the property, such unrepaired damage existed because on or about February 13, 2015, someone—presumably Plaintiff—changed the locks on the building, thereby effectively preventing Johnson Thermal from accessing the property to make any necessary

repairs. SADF ¶ 6. Accordingly, genuine issues of material fact exist regarding (i) what alleged damage to the building might have existed, (ii) whether those damages were the fault of Johnson Thermal such that a duty to repair arose, and (iii) whether the changing of the locks was an improper act that effectively prevented Johnson Thermal from making any necessary repairs to the building.

**4. Any judgment regarding attorney's fees is premature.**

Plaintiff's claims for attorney's fees are premature because, as the foregoing demonstrates, Plaintiff has not established that it is entitled to judgment as a matter of law regarding any of its claims. The Lease Agreement provides, "[t]he losing party in any court action brought to enforce . . . or . . . collect any sums due under the terms of this Agreement shall pay the prevailing party . . . a reasonable attorney's fee . . . in addition to the costs allowed by law." See *Verified Complaint*, Ex. A, Page 5. Additionally, "where there is a valid contract between the parties which contains a provision for an award of attorney fees and costs, the terms of that contractual provision establish a right to an award of attorney fees and costs." *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 568-569, 836 P.2d 511, 514-515 (Idaho 1992). Unless and until a party prevails, a judgment awarding attorney's fees is inappropriate.

**CONCLUSION**

For the foregoing reasons, Johnson respectfully requests the court deny the motion for Partial Summary Judgment on unlawful detainer, breach of contract and breach of good faith and fair dealing and Plaintiff's request for attorney's fees.

DATED this 2<sup>nd</sup> day of July, 2015.

FISHER RAINEY HUDSON



Rebecca Rainey – of the firm  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of July, 2015, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801) 596-1508

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Email

  
Rebecca A. Rainey



**F I L E D**  
A.M. 12 P.M.

**JUL 10 2015**

**CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY**

Robert L. Janicki, ISB #8911  
STRONG & HANNI  
102 South 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

*Attorneys for Plaintiffs*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**REPLY MEMORANDUM IN SUPPORT  
OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Civil No.: CV15-587

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Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or

“Plaintiff”), by and thorough counsel of record, Strong and Hanni law firm, submits this Reply Memorandum filed in support of its previously filed Motion for Partial Summary Judgment in support of its first, second and third claim for relief against Defendant Johnson Thermal Systems, Inc. (“Defendant”).

### INTRODUCTION

Despite conceding that there is no written or oral agreement to extend the term of the Lease<sup>1</sup> beyond October 15, 2014, Defendant argues that because it continued its monthly rent payments beyond the Lease Expiration Date that it somehow exercised an option to extend the Lease an additional six months. That is simply not true. The express terms of the Lease state that the Lease cannot be amended, modified, or changed except by a writing. There is no writing extending the Lease beyond October 15, 2014, and therefore, as a matter of law, Defendant continued as a month-to-month tenant. Additionally, the parties’ course of dealing demonstrates that all previous amendments, additions, extensions, or changes to the Lease had always been in writing. Because Defendant’s claimed exercise of the option to extend was not in writing and because Defendant failed to timely vacate and surrender the property at the expiration of the notice of termination, Defendant is in breach of the lease agreement and liable for unlawful detainer pursuant to Idaho Code § 6-303. Accordingly, summary judgment should be entered in favor of Caldwell Land.

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<sup>1</sup> Unless otherwise noted, all capitalized terms shall have the same meaning as in Plaintiff’s Memorandum in Support.

### RESPONSE TO DEFENDANT'S ADDITIONAL FACTS

1. Caldwell Land disputes Fact #3 of Defendant's statement of additional facts because while GFLP may have accepted Defendant's first two months of rent after the Lease Expiration Date it was not with the understanding that Defendant had exercised an option to extend the Lease but rather as continued payment under the lease terms as a month-to-month tenant. This based on numerous communications between the parties' attempting to negotiate and extension of the Lease but ultimately failing to do so.

2. Caldwell Land disputes Defendant's Fact #4 because pursuant to express terms of the Lease, Defendant was prohibited from "reconstructing, remodeling, or changing any part of the [Property] without consent of [GFLP]" and Defendant's installation and subsequent removal of the electrical transformer was a change to the Property and Plaintiff is unaware of any permission or consent given by GFLP.

3. Caldwell Land disputes Defendant's Fact #5 because it implies that GFLP knew Johnson Thermal installed the electrical transformer and there is no evidence to suggest that GFLP did know or gave permission or consent to carry-out the installation.

4. Caldwell Land disputes Defendant's Fact #6 because it implies that changing the locks on the building actually prevented Johnson Thermal from making all necessary repairs to the building. Since vacating the building Johnson Thermal has requested and been granted permission to complete necessary repairs on the building but they have refused and/or declined to make the repairs.

## ARGUMENT

**A. Defendant did not exercise the option extend the Lease an additional six months but rather continued making payments as a month-to-month tenant.**

Defendant's claim that it exercised the option to extend the Lease rests upon only one fact – that it continued to make monthly payments on the Lease after the Lease Expiration Date. However, this does not create a genuine issue of material fact that would prevent this Court from entering summary judgment in favor of Caldwell Land because Defendant admittedly did not execute a written amendment beyond the Third Lease Amendment and Defendant's continued payments were therefore made under the previous terms of the Lease which simply extended the Lease on a month-to-month basis. The lack of a written agreement is evidenced by the fact that Defendant and GFLP, through numerous written communications, did not agree to extend the Lease for an additional six months. Specifically,

- Defendant, in an email to the leasing agent on 4/10/14 stating “it would like to do a 6 month lease with the *option to go month to month for an additional 3-6 months. If that's amenable to [GLFP], get it drawn up and we'll sign*” (emphasis added).
- In an email from Defendant on 8/18/14 discussing Defendant's anticipated vacation date from the property “*we are still hoping on the December move in the new building, but it could be January*” (emphasis added).
- Email from leasing agent to Defendant on 9/26/2014 stating “I have convinced [GLFP] that you staying on the property is fine and would benefit her . . . *Please*

*also keep me informed on your planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup> [2014]” (emphasis added).*

- Email exchange from leasing agent to Defendant on 12/8/14 in which the former states “[i]f you were able to locate correspondence between you and [GFLP] in October extending your lease please provide such documentation as [GLFP] doesn’t have any documentation other than the 3<sup>rd</sup> lease amendment that I provided . . . Per our previous correspondence and latest discussions on Friday [12/5/14] you stated that you thought you could be out of 1505 Industrial by the end of January,” and to which Defendant responds as follows “. . . I did not find any correspondence with [GFLP] beyond the 3<sup>rd</sup> Amendment . . .”

True and correct copies of these emails are attached hereto as Exhibits 1a-1d.

It is plainly clear from Defendant’s own words that Defendant did not want or intend to lock itself into a six month lease extension. Numerous written representations were made that it only planned to in the Property a couple of months beyond the Lease Expiration Date. Defendant has no basis to claim that it exercised the option and is simply making arguments and taking positions that are convenient at the moment. This is apparent based on an email exchange between counsel for the Parties dated January 29, 2015, two days prior to the date on which Defendant was required to vacate the Property, as identified in the Notice of Termination, wherein Defendant expressed its refusal to comply with the Notice of Termination and, instead, would continue in possession of the Property until April 15, 2015. *See*, January 29, 2015, email attached hereto as

Exhibit 2. Despite this representation, however, Defendant vacated the property less than two weeks later on February 12, 2015. *See*, Answer at ¶ 31.

It is nonsensical for Defendant to say that it would vacate the premises by December, then decide to stay, and then again completely change its position and argue that it exercised the option to extend despite numerous communications that it did not intend to stay on the Property beyond December and did not execute a written extension as required by the express terms of the Lease. Thus, based on the evidence before the Court it is clear that Defendant did not exercise its option to extend the Lease, based on the lack of a written agreement to do so, and based upon Defendant's own statements and admissions that it only intended to stay in the building for two to three months past the Lease Expiration Date. Accordingly, summary judgment should be granted in favor of Caldwell Land.

**B. The course of dealing between GFLP and Defendants demonstrate that there was no extension of the Lease.**

The course of dealing between GFLP and Defendant illustrates that any amendments, changes, and revisions to the Lease, no matter how small or seemingly inconsequential, were always made in writing. For example, in the First Amendment to the Lease, dated March 13, 2012, the parties reduced to writing Defendant's desire to exercise its first one year lease renewal option. A true and correct copy of the First Amendment to the Lease is attached hereto as Exhibit 3. The First Amendment specifically provides that "the tenant hereby exercises Tenant's option and the Lease term is extended. . ." This First Amendment is consistent with the Lease terms that require

all amendments, changes and revisions to be in writing. Additionally, the Third Lease Amendment, which extended the Lease an additional six months, was also reduced to writing consistent with the Lease terms and the parties' previous practices. A true and correct copy of the Third Amended Lease is attached hereto as Exhibit 4. The parties also executed a second amendment to the Lease, which was based upon Defendant's desire to rent a dirt lot adjacent to the Property and GLFP's desire that Defendant maintain the lot free of any weeds during the lease period. This agreement was also subsequently reduced to writing again consistent with the parties' previous practices, as the "Second Lease Amendment". A true and correct copy of this Second Lease Amendment is attached hereto as Exhibit 5.

Markedly different from this consistent course of dealing is the fact that there is no written or oral agreement as to any six-month extension of the Lease Expiration Date. Indeed, while the parties have many discussions regarding a six-month extension it was admittedly never agreed upon by the parties or reduced to writing. *See, Exhibits 1a-1b*. If Defendant and GFLP had actually intended and agreed to extend the Lease an additional six-months it would have been reduced to writing consistent with the parties' previous practices. However, it was not, and as a result Defendant was operating as a month-to-month tenant after the Lease Expiration Date.

Finally, the express terms of the Third Amended Lease provide that "[a]ll other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect." *See, Exhibit 4*. Thus, the original condition of the Lease that "[it] may not be amended, modified, or changed except by a writing signed by all parties hereto" remained in full force and


effect and any amendment or change to the lease, such as the option to extend six months, must have been made in writing, which it was not. Accordingly, Defendant's continued payment under the Lease amounted to an extension of the Lease on a month-to-month basis not a six-month extension of the Lease.

**CONCLUSION**

For the foregoing reasons, and those stated in its initial memorandum, Caldwell Land respectfully requests that its motion for partial summary judgment on its unlawful detainer, breach of contract and breach of good faith and fair dealing claims be granted.

DATED this 9<sup>th</sup> day of July, 2015.

STRONG & HANNI

  
Ryan C. Bullock  
*Attorneys for Plaintiff*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of July, 2015, a true and correct copy of the foregoing

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY**

**JUDGMENT** was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock Street, Suite 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission

Shonda Walker

# EXHIBIT 1a

---

**From:** "Lincoln Hagood" <Lincoln.Hagood@colliers.com>  
**Date:** Friday, April 11, 2014 12:21 PM  
**To:** "Sheri Johnson" <sherij@johnsonthermal.com>  
**Subject:** RE: 1505 Industrial Way Lease Renewal Terms

Sheri,

Sorry about Arlene calling this morning. Feel free to work directly through me. I will have the lease amendment draft over to you shortly.

Thanks,  
Lincoln Hagood  
Brokerage Services | Nampa  
Dir +1 208 472 1667 | Mobile +1 208 703 7916  
Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International  
5660 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)



**From:** Sheri Johnson [mailto:sherij@johnsonthermal.com]  
**Sent:** Thursday, April 10, 2014 1:22 PM  
**To:** Lincoln Hagood  
**Subject:** RE: 1505 Industrial Way Lease Renewal Terms

Lincoln,  
Sorry for the delay. I was out of the office and am now trying to unbury myself!

★ We would like to do a 6 month lease with the option to go month to month for an additional 3-6 months. If that's amenable to the Arlene, get it drawn up and we'll sign.

Did the principals of Kemper Refrigeration get in touch with you regarding their interest in the building?

Thanks,

Sheri Johnson  
 JOHNSON  
THERMAL  
SYSTEMS  
T 208-453-1000 | F 866-266-2691  
1505 Industrial Way | Caldwell, Idaho 83605  
[www.JohnsonThermal.com](http://www.JohnsonThermal.com)

**From:** Lincoln Hagood [mailto:Lincoln.Hagood@colliers.com]  
**Sent:** Tuesday, April 01, 2014 1:09 PM

JTS 0137  
6/1/2015

# EXHIBIT 1b

---

**From:** "Sheri Johnson" <sherij@johnsonthermal.com>  
**Date:** Monday, August 18, 2014 5:12 PM  
**To:** "Lincoln Hagood" <Lincoln.Hagood@colliers.com>  
**Cc:** "Darrell "Gus" Gustavson" <gusg@johnsonthermal.com>; "Jeff Johnson" <jeffj@johnsonthermal.com>  
**Subject:** RE: Industrial Way and New Building

Lincoln,

I apologize that we didn't get back to you sooner. We are still hoping on the December move in on the new building, but it could be January.

I have cc'd our CFO, Gus, on this. He is more 'in the loop' on the building and will be your contact on anything regarding our lease going forward. Gus is out of the office this week, but hopefully will be able to provide you with more detail for your conversation with Arlene.

Gus, can you please give Lincoln a date based on what you know? He has an uphill battle trying to appease Arlene, so the more info the better!

Sheri Johnson



Johnson Thermal Systems Inc.  
T 208-453-1000 | F 208-453-1001  
1505 Industrial Way | Caldwell, Idaho 83605  
[www.JohnsonThermal.com](http://www.JohnsonThermal.com)

**From:** Lincoln Hagood [mailto:Lincoln.Hagood@colliers.com]  
**Sent:** Friday, August 15, 2014 4:42 PM  
**To:** Sheri Johnson  
**Subject:** Industrial Way and New Building

Sheri,

If you are any closer to knowing a date by which you might occupy your new facility and therefore vacate Arlene's building it would help me in my attempts with Arlene. I am going to try and sit down with her at her house next week to smooth everything over.

Thanks,  
Lincoln Hagood  
Brokerage Services | Nampa  
Dir +1 208 472 1667 | Mobile +1 208 703 7916  
Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

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[www.colliers.com](http://www.colliers.com)



JTS 0144  
6/1/2015

# EXHIBIT 1c

Sheri

----- Original message -----

From: Lincoln Hagood  
Date: 09/26/2014 5:00 PM (GMT-07:00)  
To: Sheri Johnson  
Subject: 1505 Industrial Update

Sheri,

I think I have convinced Arlene that you staying on the property is fine and would benefit her. She wants me to make sure and let you know that if you keep occupying the excess land that you need to keep paying on it. She has asked me to remind you to keep the property clean, patch any holes in the asphalt (if any), take down any fences, and clean up any weeds on the property. Please also keep me informed on your planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup>. I'd be happy to talk in more detail if you want to call me on my cell 703-7916. Also we will be signing a listing agreement with Arlene this next week so we will be coming out to install a For Sale sign along the freeway boundary side of the property.

Thanks,  
Lincoln Hagood  
Cell: 703-791-6167 | Home: 1-206-707-7916  
Dir: 1-208-472-1667 | Mobile: 1-206-707-7916  
Email: 1-208-472-3000 | Fax: 1-208-489-1120  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International  
2500 Franklin, Suite 100 | Hanford, ID 83667 | USA  
[www.colliers.com](http://www.colliers.com)



ISIG: 54260bd9456918415201291

JTS\_0143  
6/1/2015

# EXHIBIT 1d



Dir +1 208 472 1667 | Mobile +1 208 703 7916  
Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International  
5660 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)

**From:** Darrell "Gus" Gustaveson [<mailto:gusg@johnsonthermal.com>]  
**Sent:** Monday, December 08, 2014 4:10 PM  
**To:** Lincoln Hagood  
**Cc:** [dave@ib-usa.com](mailto:dave@ib-usa.com); Jeff Johnson  
**Subject:** Re: City of Caldwell and New Building Timeframe

Lincoln,

Would you like to sit down and talk about this?

Darrell "Gus" Gustaveson  
CFO

Johnson Thermal Systems Inc.  
208-453-1000 ext 311 Office  
208-230-1675 cell

---

**From:** Lincoln Hagood <[Lincoln.Hagood@colliers.com](mailto:Lincoln.Hagood@colliers.com)>  
**Sent:** Monday, December 8, 2014 2:09 PM  
**To:** Darrell "Gus" Gustaveson  
**Subject:** City of Caldwell and New Building Timeframe

Gus,

Per our conversation last week and my email to you about speaking with the City of Caldwell, I have just heard back from Steve Fultz that the City of Caldwell is more than willing to work with you on your temporary occupancy permit on your new building. They have stated that Rob McDonald, the city engineer, is the one handling your paperwork and the City of Caldwell has agreed to give you more than the 6 week time period from your initial occupancy of the space in order to allow you an adequate amount of time to get your areas paved. The wording that was relayed to me was they would be fine with allowing the extra time until the asphalt batch plants are opened. Rob with the city is available to discuss this and may be reached at 455-4682. Hopefully this will help you with some of your concerns.

JTS 0017

If you were able to locate correspondence between you and the Gilberts in October extending your lease please provide such documentation as Arlene doesn't have any documentation other than the 3<sup>rd</sup> lease amendment that I provided. As you are aware the current buyer for your current building, Peterbilt Trucking, is wanting you to vacate the building immediately and they have been very persistent on this. I want to find a solution that will accommodate you. Per our previous correspondence and latest discussions on Friday you stated that you thought you could be out of 1505 Industrial by the end of January. If you would please provide a firm date in January that you can be off of the 1505 Industrial site as this would be very helpful.

Thanks,

**Lincoln Hagood**

Brokerage Services | Nampa

Dir +1 208 472 1667 | Mobile +1 208 703 7916

Main +1 208 472 1660 | Fax +1 208 489 1520

[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

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[www.colliers.com](http://www.colliers.com)

!SIG:548679db103631060215283!

JTS 0018

# EXHIBIT 2

7/09/2015

---

**From:** kbd@bjorkmandunn.com  
**To:** Graden Jackson  
**Sent:** 1/29/2015 8:49AM  
**Subject:** RE: Peterbilt

Graden,

As I mentioned, Johnson Thermal Systems made its decision upon further reflection. I doubt it helped much that your client filed its lawsuit prior to the date Johnson Thermal Systems was given to vacate the property and notwithstanding its continuing efforts to vacate the property early. Johnson Thermal Systems has offered more than what properties are renting for in the area.

Your client bought this property having caused the current situation and with knowledge of a dispute. You can tell your client there is unexpired term left in the lease and Johnson Thermal Systems has until April 15, 2015 to vacate the property.

Regards,

Kristin

---

Kristin Bjorkman Dunn

bjorkman dunn PLLC

Plaza One Twenty One | 121 N. 9th Street, Suite 300 | Boise, Idaho 83702

(208) 639-1458 office | (208) 330-3700 fax

kbd@bjorkmandunn.com

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# EXHIBIT 3

FIRST AMENDMENT

This FIRST AMENDMENT to the Lease Agreement, dated February 10, 2012, entered into between Gilbert Family Limited Partnership ("Landlord") and Johnson Thermal Systems, Inc., ("Tenant") concerning the lease of the Property located at 1504 Industrial Way, in Caldwell, Idaho is hereby made and entered into by the Landlord and Tenant. *vs S17*

WITNESSETH:

WHEREAS, Tenant desire's to exercise its first one (1) year lense renewal option and the Landlord and Tenant desire to set forth the terms for the option as provided in this First Amendment;

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree to amend the Lease as follows:

1. LEASE TERM. The Tenant hereby exercises Tenant's option and the Lease Term is hereby extended for an additional twelve (12) month period from April 15, 2013 to a new expiration date of April 15, 2014 ("Renewal Term").

2. BASE RENT. The Base Rent for the option period shall be as follows:

Rent Schedule

Month	Mohtly Rent	Monthly NNN's	Total Monthly Rent	Annual Rent
1-12	\$5,428.97	\$1,729.16	\$7,158.13	\$85,897.56

The Base Rent plus NNN's shall be paid monthly, in advance, in accordance with the terms of the Lease.

3. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Landlord:  
Gilbert Family Limited Partnership

By: *[Signature]*  
Bill Gilbert

Date: Mar. 28, 2013

By: *[Signature]*  
Arlene T. Gilbert

Date: Mar. 28, 2013

Tenant:  
Johnson Thermal Systems, Inc.

By: *[Signature]*  
Sheri R. Johnson

Date: 3/28/13

By: \_\_\_\_\_

Date: \_\_\_\_\_

# EXHIBIT 4

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

Recitals

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

Agreement

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

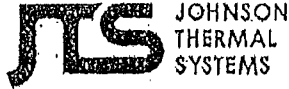
Sign: Arlene Gilbert  
 Print: Arlene Gilbert  
 Date: 4-18-14

TENANT: Johnson Thermal Systems Inc.

Sign: Sheri Johnson for Johnson Thermal Systems Inc.  
 Print: Sheri Johnson  
 Date: 4/15/14



# EXHIBIT 5



February 14, 2014

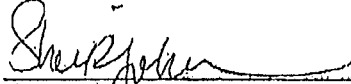
JTS will rent the available dirt lot adjacent to its current facility, owned by Gilbert Family Limited Partnership, for a period of six months.

Rent period will be from February 17, 2014 through August 30, 2014, renewal by agreement of both parties on a month by month basis.

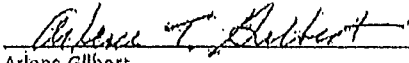
Payment will be pre-paid for the initial six month and two-week period. Amount is \$3,250.00. Subsequent months will be paid by the 10<sup>th</sup> of each month.

JTS will be fencing the lot for security and will remove the fencing at the end of the rental period. After the six month period, either JTS or GFLP can end this agreement with a 30 day written notice to the other party.

*JTS will take care of spraying or removing weeds during the period.*  
Parties have read, understood and agreed to the above terms:

  
\_\_\_\_\_  
Sherl R. Johnson  
President, JTS

*2/14/14*  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Arlene Gilbert  
Gilbert Family Limited Partnership

*2-17-14*  
\_\_\_\_\_  
Date

1505 Industrial Way • Caldwell, Idaho 83605  
Phone (208) 453-1000 • Fax (208) 453-1001  
[www.johnsonthermal.com](http://www.johnsonthermal.com)

JTS 0134

F I L E D  
A.M. 105 P.M.

AUG 14 2015

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND AND CATTLE, LLC,	)	Case No.: CV-2015-587
	)	
Plaintiff,	)	
	)	
vs.	)	<b>MEMORANDUM DECISION AND</b>
	)	<b>ORDER DENYING PLAINTIFF'S</b>
JOHNSON THERMAL SYSTEMS, INC,	)	<b>MOTION FOR PARTIAL</b>
	)	<b>SUMMARY JUDGMENT</b>
Defendant.	)	
	)	
	)	

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This matter came before the Court on July 16, 2015, for hearing on Caldwell Land and Cattle, LLC's ("Plaintiff") motion for partial summary judgment on its first, second, and third claims for relief. Graden Jackson appeared on behalf of Plaintiff. Rebecca Rainey and Kristin Bjorkman-Dunn appeared on behalf of Johnson Thermal Systems, Inc. ("Defendant").

**I. Undisputed Facts**

On or about February 10, 2012, Plaintiff's predecessor in interest, Gilbert Family Trust Partnership ("Gilbert"), and Defendant entered into a commercial lease agreement ("first lease agreement") whereby Gilbert leased real property located at 1505 Industrial Way in Caldwell, Idaho, to Defendant for a 13-month term. The real property generally consists of a 16,475 square foot building ("building") and minimally improved surrounding land.

The first lease agreement had a renewal option that required Defendant to give written notice of its intent to renew at least 60 days prior to the lease expiration date. It also required that all amendments, modifications, or changes to the lease must be in writing.

In the following months and years, Gilbert and Defendant made three separate written amendments to the lease. The third amendment extended the term of the lease to October 15, 2014. It included an option to renew that provided:

(3) At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

In 2014 Defendant had a new building under construction. Defendant was not certain when it would be completed, but believed it would be done by late 2014 to early 2015. Consequently, in the months leading up to the October 15<sup>th</sup> expiration date, Gilbert and Defendant discussed extending the lease beyond October 15<sup>th</sup>. The parties did not execute any additional written agreements extending the lease. Defendant paid rent to Gilbert in the amount of \$6,000/month for November and December, 2014. Gilbert accepted those rent payments.

On December 11<sup>th</sup> Gilbert sent a written notice of termination to Defendant, terminating the lease and requesting that Defendant vacate and surrender possession of the property, including removing its trade fixtures, fencing, and personal property, by January 31, 2015.

On December 31<sup>st</sup> Plaintiff purchased the property from Gilbert. On January 29, 2015, Defendant's counsel informed Plaintiff that it would not vacate the property until April 15<sup>th</sup>. Defendant vacated the property on or around February 12<sup>th</sup>. When Defendant vacated the property, it removed an electrical transformer that Defendant installed in February 2014. Defendant made no repairs to the building after it vacated the property.

Plaintiff filed this lawsuit on January 22, 2015. In its Verified Amended Complaint, Plaintiff alleges four claims for relief: unlawful detainer; breach of contract; breach of the implied covenant of good faith and fair dealing; and intentional and malicious injury to property.

## II. Standard of review

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). The burden of proving the absence of a material fact rests at all times upon the moving party. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514 (1991). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of their claim does exist. *Navarrete v. City of Caldwell*, 130 Idaho 849 (Ct.App.1997). The adverse party may not rest upon mere allegations in the pleadings, but must set forth by deposition, affidavit, or otherwise, specific facts showing there is a genuine issue for trial. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104 (2013). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238 (2005). The Court liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. *Brooks v. Logan*, 130 Idaho 574, 576 (1997). "If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833 (1990).

### III. Analysis and Discussion

#### A. Lease term extension

Plaintiff's claims for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing all turn on the issue of whether there was a six-month extension of the lease.

The parties base their arguments on different interpretations of the lease agreement. Plaintiff argues that the parties needed to execute an additional written agreement to extend the lease. Defendant argues that the third amendment created the option and that the option term was available, automatically, at the expiration of the lease agreement. Thus, the only requirement to exercise the option and extend the term for six-months was for Defendant to pay the \$6,000/month rent rate. Alternatively, Defendant argues that there are issues of fact regarding the parties' intent, conduct, and possible waiver or modification.

The conflicting interpretations raise an ambiguity issue. The Court could only grant summary judgment if the contract is unambiguous (in Plaintiff's favor) and there are no questions of fact as noted in Defendant's alternative argument in opposition.

A provision in a contract that requires modifications to be in writing can be avoided by the parties to the contract where their words, acts or conduct amount to a waiver, modification, rescission or abandonment of that provision or where the owner by his acts or conduct is estopped to rely on it. *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass'n.*, 133 Idaho 669, 675 (Ct. App. 1999). Such a waiver or modification of the agreement "may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other." *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717 (2014) (quoting *Ore-Ida Potato Products Inc. v. Larsen*, 83 Idaho 290, 296 (1961)); see also *Idaho Migrant Council, Inc. v. Northwestern Mut.*

*Life Ins. Co.*, 110 Idaho 804, 806 (Ct.App.1986) (“[A]n implied waiver occurs where a party’s neglect to insist upon enforcing a right results in prejudice to another party.”) The question of whether such a modification has been proven is one for the trier of fact. *Pocatello Hosp., LLC*, 156 Idaho at 718; *Dennett v. Kuenzli*, 130 Idaho 21, 26 (Ct. App. 1997). “Waiver is foremost a question of intent.” *Pocatello Hosp., LLC*, 156 Idaho at 719. Questions of intent are factual questions which, when in dispute, cannot be resolved on summary judgment. *Porter v. Bassett*, 146 Idaho 399, 405 (2008).

Even assuming, *arguendo*, that Plaintiff’s interpretation is correct,<sup>1</sup> the evidence in the record, when viewed in a light most favorable to Defendant, is sufficient to raise fact questions that preclude summary judgment, including: variations between the renewal provisions in the first lease agreement and the third amendment; discussions about extending the lease, possibly up to six-months, and Defendant’s stated intention to exercise the six-month option; no additional written agreement; Defendant’s \$6,000/month rent payments for November and December, 2014; Gilbert’s acceptance of those rent payments; and prejudice to Defendant. Therefore, the Court cannot grant summary judgment on this theory.

#### B. Installation of the electrical transformer and other damages

In its second claim for relief, Plaintiff alleges that Defendant breached the lease by installing the electric transformer without Gilbert’s consent. Plaintiff relies on the “Improvements” paragraph, which states that “[t]he Lessee shall not reconstruct, remodel, or change any part of the [property] without the consent of the Lessor, which consent shall not be unreasonably withheld or delayed.” The parties dispute whether the installation constituted a reconstruct, remodel, or change under this provision. Again, even assuming, *arguendo*, that

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<sup>1</sup> The Court is not making a decision on which interpretation is correct or whether ambiguity exists

Plaintiff's interpretation is correct, Plaintiff has failed to provide evidence that Gilbert did not consent to the installation. Thus, the Court cannot grant summary judgment on this theory.

Plaintiff alleges that Defendant breached the lease by damaging the property, however genuine issues of fact preclude summary judgment on this theory, including whether there were any unrepaired damages and/or whether Defendant was denied access to the property to make any repairs.

C. Covenant of Good Faith and Fair Dealing

Finally, because the Court cannot grant summary judgment on Plaintiff's breach claim, it cannot grant summary judgment on the breach of the implied covenant of good faith and fair dealing claim. See *Raedlien v. Boise Cascade Corp.*, 129 Idaho 627 (1996) (Without a breach of contract, there can be no breach of the implied covenant of good faith and fair dealing).


D. Conclusion

For the reasons set forth above, the Court cannot grant Plaintiff's motion for partial summary judgment. The Court will not award attorney fees at this stage.

**ORDER**

**IT IS HEREBY ORDERED** that Plaintiff's motion for partial summary judgment is **DENIED**.

DATED: August 14, 2015

  
Chris Nye  
District Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14 day of August, 2015, a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

Robert Janicki  
Strong & Hanni  
102 South, 200 East, Suite 800  
Salt Lake City, Utah 84111

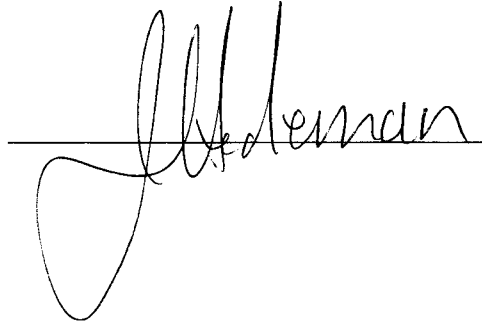
U.S. Mail, postage prepaid  
 Hand-delivered  
 Facsimile (801) 596-1508

Rebecca Rainey  
Fisher Rainey Hudson  
950 W. Bannock Street, Suite 630  
Boise, Idaho 83702

U.S. Mail, postage prepaid  
 Hand-delivered  
 Facsimile

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
121 N. 9<sup>th</sup> Street, Suite 300  
Boise, Idaho 83702

U.S. Mail, postage prepaid  
 Hand-delivered  
 Facsimile



Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702  
Email: [kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

Rebecca A. Rainey, ISB No. 7525  
Allison Blackman, ISB No. 8686  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: [rar@frhtriallyawyers.com](mailto:rar@frhtriallyawyers.com)  
Email: [allison@frhtriallyawyers.com](mailto:allison@frhtriallyawyers.com)  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**FILED**  
A.M. *11* P.M.

**FEB 12 2016**

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

**Case No. CV 15-587**

**AFFIDAVIT OF REBECCA A. RAINEY  
IN SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO            )  
  ) ss.  
County of Ada             )

Rebecca A. Rainey, being first duly sworn, deposes and states as follows:

**AFFIDAVIT OF REBECCA A. RAINEY IN SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 1**

**ORIGINAL**

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for the Defendant and I have personal knowledge of the matters contained herein.

3. Attached hereto as **Exhibit A** is a true and correct copy of the Commercial Lease Agreement between the Gilbert Family Limited Partnership and Johnson Thermal Systems, Inc., entered into on February 23, 2012, bates numbered CALD0040-0049.

4. Attached hereto as **Exhibit B** is a true and correct copy of relevant portions of the deposition of Arlene Gilbert taken on February 9, 2016.

5. Attached hereto as **Exhibit C** is a true and correct copy of relevant portions of the deposition of Sheri Johnson taken on November 17, 2015.

6. Attached hereto as **Exhibit D** is a true and correct copy of relevant portions of the deposition of Lincoln Hagood taken on November 17, 2015.

7. Attached hereto as **Exhibit E** is a true and correct copy of the first extension agreement between Gilbert Family Limited Partnership and Johnson Thermal Systems, Inc. extending the lease an additional 12 months from April 15, 2013, through April 15, 2014, bates numbered JTS0126.

8. Attached hereto as **Exhibit F** is a true and correct copy of the second extension agreement entitled "Third Lease Amendment" between the Gilbert Family Limited Partnership and Johnson Thermal Systems, Inc., entered into on April 15, 2014, bates numbered CALD0039.


9. Attached hereto as **Exhibit G** is a true and correct copy of an email dated February 26, 2014, from Sheri Johnson to Devin Ogden and Jeff Johnson, bates numbered COLIERSDO 00078-00079.

10. Attached hereto as **Exhibit H** is a true and correct copy of an email dated September 26, 2014, from Lincoln Hagood to Sheri Johnson, bates numbered COLLIERSLHS 00726.

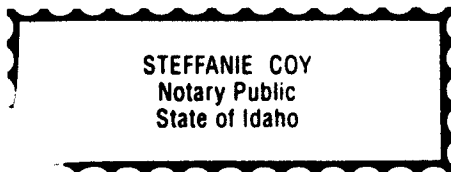
11. Attached hereto as **Exhibit I** is a true and correct copy of relevant portions of the deposition of Darrel "Gus" Gustaveson taken on November 18, 2015.

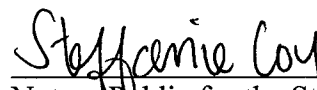
12. Further your affiant sayeth naught.

DATED this 12th day of February, 2016.

  
Rebecca A. Rainey

SUBSCRIBED AND SWORN BEFORE ME this 12th day of February, 2016.



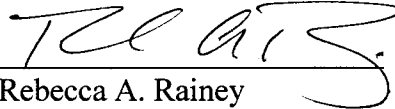
  
Notary Public for the State of Idaho  
Residing at: BOISE  
Commission Expires: MARCH 28, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12th day of February, 2016, I caused a true and correct copy of the foregoing **AFFIDAVIT OF REBECCA A. RAINEY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801) 596-1508

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Email

  
Rebecca A. Rainey

# **Exhibit A**

## COMMERCIAL LEASE AGREEMENT

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between **GILBERT FAMILY LIMITED PARTNERSHIP** the party of the first part, hereinafter referred to as **LESSOR**, and **JOHNSON THERMAL SYSTEMS, INC.**, the party of the second part, hereinafter referred to as **LESSEE**.

### WITNESSETH:

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

Rent Schedule (Initial Term)

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16

**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statutes, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste



material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contract. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiving or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:

**Lessor**  
**Gilbert Family Limited Partnership**  
**P.O. Box 1064**  
**Caldwell, Idaho 83606**

**Lessee**  
**Johnson Thermal Systems, Inc.**  
**22228 Hoskins**  
**Caldwell, ID 83607**

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.


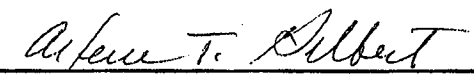
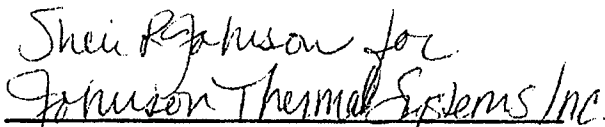
**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.

**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

<b>LESSOR:</b>		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Bill Gilbert</b>	<b>Date</b>
		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Arlene T. Gilbert</b>	<b>Date</b>
<b>LESSEE:</b>		2/23/12
	<b>Johnson Thermal Systems Inc.</b>	<b>Date</b>

Lessor: Gilbert Family Limited Partnership

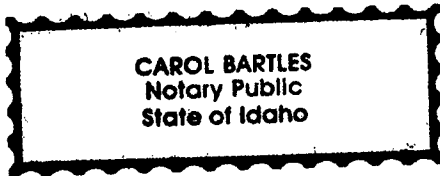
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles

Notary public for Idaho

Residing at: Wilder ID

My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

:SS

County of Canyon)

On this 21 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc.

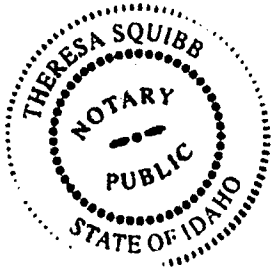
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Theresa Squibb

Notary Public of Idaho

Residing at ampa, Idaho

My commission expires: 9-26-2016



**Exhibit A**  
**"Legal Description"**

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

**EXCEPTING THEREFROM**

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

**BEGINNING** at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.



# **Exhibit B**



1 A I don't remember.

2 Q And I'm just asking whether you had a phone  
3 conversation with Lincoln around this time?

4 A I don't remember. I don't remember.

5 Q And with your daughter being present doesn't kind  
6 of refresh your recollection?

7 A I would have to look at the calendar. No. I  
8 don't remember. I don't remember.

9 Q So, do you dispute that there was a discussion  
10 about whether the lease had been extended?

11 A I don't remember. I don't know. I don't know. I  
12 just plain don't know.

13 Q Okay. Don't know whether the lease had been  
14 extended or whether there was a dispute?

15 A Both. I don't remember anything. Like I said,  
16 look at the date. No.

17 MR. BULLOCK: Can we take a break for a minute?  
18 (Whereupon, a brief recess was taken.)

19 BY MR. BULLOCK:

20 Q I might just have a few more questions for you,  
21 Miss Gilbert. Then, when I am done, Miss Rainey may have  
22 some for you as well.

23 I understand that you have referred to this  
24 timeframe in December quite a bit. I understand that time,  
25 that's when your husband was, was he --

1 A Well, he passed away.

2 Q He passed away in December of 2014, correct?

3 A Yeah.

4 Q And leading up to that, I'm sure you were dealing  
5 with --

6 A Everything.

7 Q -- a lot of issues and hard times during that. I  
8 can understand that. And I just want to see if you can  
9 recall any discussions that you may have had with Lincoln  
10 regarding the sale of the property or discussions regarding  
11 Johnson Thermal during that timeframe?

12 A You know, I don't. I don't remember anything. I  
13 really truly don't. It's kind of a blur.

14 Q Is that because of the condition of your husband  
15 at that time?

16 A Well, that. And I gave, I just said to Lincoln,  
17 deal with it. And, you know. I expected him to deal with  
18 whatever issues came up. I expected him to deal with it.

19 Q Sure. And do you agree that he did deal with it?

20 A Best he could, yes.

21 Q And you approved all the decisions that he made  
22 then?

23 A I guess, yes.

24 Q For example, selling the building?

25 A Yes.

1 Q Sending out the notice of termination?

2 A He was a realtor. I expected realtors to do their  
3 job. And I presumed that's what he did.

4 Q Okay. And you don't have any problems with the  
5 way that he did his job?

6 A I don't.

7 Q Okay. You don't disagree with any of the steps  
8 that were taken to allow my clients to purchase the  
9 building?

10 A I don't.

11 MR. BULLOCK: Okay. No further questions at this  
12 time.

13 EXAMINATION

14 BY MR. RAINEY:

15 Q All right. Mrs. Gilbert, I have a few questions  
16 for you. It shouldn't be that many. How long were you  
17 married?

18 A Twenty years.

19 Q Okay.

20 A Twenty something.

21 Q Okay. During the time of the sale, the December  
22 timeframe, is it an accurate depiction of that timeframe  
23 that you relied exclusively on Lincoln to handle this  
24 transaction for you?

25 A I did.

1 Q Okay. I want you to look for a minute, if you  
2 would, at that Exhibit 6 that's been marked already. That's  
3 the Notice of Termination that went out. Can you tell me,  
4 if you know, who drafted Exhibit 6?

5 A I would presume, I don't know.

6 Q Okay.

7 A I don't know. But I would presume that Lincoln  
8 and the Colliers did.

9 Q Okay. Is it accurate to say that the content of  
10 Exhibit 6 came to you from Colliers, Colliers provided this  
11 document to you for your review and signature?

12 A Yes.

13 Q Okay. At any time during that November/December  
14 timeframe of 2014, did you hire your own attorney to help  
15 you maneuver this transaction at all?

16 A No.

17 Q Okay. Can you tell me how, at any time during the  
18 Gilbert Family Limited Partnership, how did you and Bill  
19 maintain records?

20 A Casually.

21 Q Okay. Fair enough. I want to get a little bit  
22 more specific. With respect to this 1505 Industrial Way  
23 property, did the tenant, Johnson Thermal Systems, ever  
24 communicate to you directly with you in writing or did that  
25 typically go through Lincoln?

1 A Went through Lincoln.  
 2 Q Okay. Do you recall any occasion where the  
 3 Gilbert Family Limited Partnership received written notice  
 4 of anything directly from Johnson Thermal Systems?  
 5 A No.  
 6 Q I want you to look, if you would, at Exhibit 5.  
 7 That's the Third Lease Amendment that we have been talking  
 8 about. We have talked a lot about what these documents say.  
 9 And we have, you know, counsel has read the documents and  
 10 said did you read that correctly. I want to talk to you  
 11 about what you think or thought that they meant. If you  
 12 look at Exhibit 5 and paragraph 3, paragraph 3 has two  
 13 different lease rates: A six month term with a base rate of  
 14 \$6,000. And a month-to-month term with a base rate of  
 15 \$6,250. Do you see that?  
 16 A I do.  
 17 Q If you received from Johnson Thermal a check for  
 18 \$6,000, what would that mean to you, Arlene Gilbert sitting  
 19 there today?  
 20 A What would it mean to me?  
 21 Q Yeah. If they wrote you -- in November of 2014,  
 22 if you received a \$6,000 check from them, what would that  
 23 mean to you?  
 24 A Well, it says month-to-month term. It says base  
 25 rent, 6,000. That's what it would mean.

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57

1 Q Okay. So, if you received the \$6,000, would you  
 2 think that was the month-to-month term or the six month  
 3 term?  
 4 A Well, it looks to me like it's a month-to-month.  
 5 It says B is month-to-month \$6,250.  
 6 Q Okay. And I am asking you about the \$6,000. If  
 7 you received 6,000 from them, what would that mean to you?  
 8 A Okay. Well, it would mean a term of six months at  
 9 \$6,000 a month. Isn't that correct?  
 10 Q Do you have any idea as you sit here today why  
 11 there is a difference in those two term rates?  
 12 A Time.  
 13 Q Explain to me what you mean by time.  
 14 A Well, if you signed a six month lease, it's six  
 15 months. If it's month-to-month, it's time. It's straight  
 16 forward.  
 17 Q Okay. And so, on -- did you, as the landlord,  
 18 have a preference as to whether or not they did the six  
 19 month at \$6,000 a month versus the month-to-month at 6,250 a  
 20 month?  
 21 A What was the question?  
 22 Q Did you have a preference as to which of those two  
 23 they chose?  
 24 A I don't remember.  
 25 Q Fair enough. Okay. Fair enough. And I think he

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58

1 asked you this previously. But do you recall back in April  
 2 of 2014 when this third amendment agreement was being  
 3 negotiated, do you recall any of the discussions that you  
 4 had with Lincoln around that April timeframe when you were  
 5 in negotiations?  
 6 A I do not.  
 7 Q Okay. During any of the time that Johnson Thermal  
 8 Systems was the tenant on this property, did you personally  
 9 ever participate in drafting the lease agreement documents?  
 10 A No.  
 11 Q And do you have a recollection of participating at  
 12 all in negotiating the terms of those lease documents?  
 13 A No, sir.  
 14 MR. RAINEY: I don't have any more questions for  
 15 you.  
 16 A Thank you.  
 17 FURTHER EXAMINATION  
 18 BY MR. BULLOCK:  
 19 Q Just a couple of quick follow-up questions for  
 20 you, Miss Gilbert. If you go back to that Third Lease  
 21 Amendment there? That top one? Yep. If you look at  
 22 paragraph 2 there, it says, Commencing April 16, 2014, the  
 23 monthly rent shall be \$6,000 per month. Is that the rent  
 24 amount that you were receiving from Johnson Thermal after  
 25 April 16th, 2014?

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59

1 A I don't remember.  
 2 Q And did they pay, were they regular in making  
 3 their monthly payments?  
 4 A Very.  
 5 Q Paid regular?  
 6 A Very regular.  
 7 Q Okay. And if the lease says that they paid \$6,000  
 8 per month, would you agree with that?  
 9 A If that's what the lease said.  
 10 Q Okay. And so, would you agree that the payment on  
 11 the lease from April 16th until August -- excuse me,  
 12 October 15th, 2014 would be \$6,000 per month?  
 13 A Triple net.  
 14 Q Triple net?  
 15 A Yeah.  
 16 Q The base rate would be 6,000 plus triple net?  
 17 A True.  
 18 Q And Miss Rainey was referring to the extension in  
 19 the six month term here in paragraph A. Do you see that?  
 20 A Right.  
 21 Q That's no different than the payment that was  
 22 originally being made under the lease agreement, right,  
 23 excuse me, under the Third Lease Amendment?  
 24 A You mean difference in amount?  
 25 Q Right.

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60

# **Exhibit C**

**DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

**CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )**

) Civil Action No.

Plaintiff, ) CV15-587

vs. )

**JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )**

) Defendant. )

---

**DEPOSITION OF SHERI JOHNSON**

**Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho**

**Tuesday, November 17, 2015  
Beginning at 2:10 p.m.**

**QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR**

354

**P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.**

com

**(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)  
DEPOSITION OF SHERI JOHNSON (11.17.2015)**

1 signing it?

2 A. I don't think so.

3 Q. Let's go to page two, "Option to Renew." It  
4 says:

5 "Upon Lessor's receipt of written notice by  
6 the Lessee at sixty days prior to the  
7 expiration of this Lease Agreement..."

8 It goes on to explain the option. Did Johnson  
9 Thermal ever exercise the option to renew the lease  
10 beyond the original term of thirteen months?

11 A. Yes.

12 Q. Do you know when that occurred?

13 A. I don't have the specific date. I would assume  
14 it was prior to the thirteen months or right around  
15 there.

16 Q. How did that extension come about?

17 A. Typically, we would get an e-mail from Lincoln  
18 or Devin saying, "Do you plan on staying? Yes or no?"

19 The answer was always, "Yes."

20 They would do the renewal and send it to me.

21 It was usually right around the expiration date. We  
22 weren't very timely about it.

23 Q. Did you have any input on negotiating new terms  
24 to the extensions?

25 A. Yes.

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 "This agreement may not be amended,  
2 modified or changed except by writing signed by  
3 all parties hereto."

4 You were aware of that term of this  
5 agreement?

6 A. Yes.

7 (Exhibit 2 was referenced.)

8 Q. BY MR. BULLOCK: If you could, look at Exhibit  
9 2. This is an exhibit that has been produced as the  
10 first amendment to the lease agreement. It looks like  
11 the parties are the Gilbert Family Limited Partnership  
12 and Johnson Thermal Systems.

13 Have you seen this document before?

14 A. Yes.

15 Q. Is that your signature down there at the  
16 bottom?

17 A. Yes.

18 Q. Did you have any input on any portion of this  
19 lease, on this amendment to the lease?

20 A. I don't recall.

21 Q. Did you have any input on the amount of -- I  
22 mean, did you negotiate -- I guess that is the better  
23 question.

24 Did you negotiate the monthly rent amount with  
25 the Gilbert Family Limited Partnership prior to entering  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 Q. What were those? What input did you provide?

2 A. Just typical negotiation of -- actually, let me  
3 think about that a minute. I don't -- I think, on these  
4 renewals -- I don't remember. I don't remember if we  
5 negotiated on this or if it was the -- I don't remember.

6 Q. Were there any terms that were important for  
7 Johnson Thermal to have? What were the most important  
8 terms for Johnson Thermal to have in the commercial  
9 lease agreement?

10 MS. RAINEY: Object to foundation.

11 THE WITNESS: Price and term.

12 Q. BY MR. BULLOCK: That was the most important?

13 A. Price is always the most important when you are  
14 negotiating -- or it was for us. It was when I was  
15 there.

16 Q. Let's go to page three on the exhibit there.  
17 Do you recall reading the paragraph entitled  
18 "Improvements," down there at the bottom, prior to  
19 signing the agreement?

20 A. Yes.

21 Q. What about on page five? On page five --

22 A. What about page five?

23 Q. "Modification."

24 A. Uh-huh.

25 Q. It says:

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 into the agreement?

2 A. I don't recall.

3 Q. Do you know if this was a higher amount or a  
4 lower amount than the original lease agreement?

5 A. It appears to be higher, based on the previous  
6 document we looked at.

7 Q. What is the difference?

8 A. A little less than \$200, if I'm doing my math  
9 correctly.

10 Q. How long was this extension of the lease --  
11 this first amendment?

12 A. It appears to be twelve months.

13 Q. For a period ending April 15, 2014; correct?

14 A. Correct.

15 Q. Why was the amendment necessary on the lease  
16 agreement?

17 A. I have no idea. This is what they told me to  
18 do to extend our lease.

19 Q. It was necessary, then, in order to extend the  
20 lease --

21 A. Correct.

22 Q. -- an additional twelve-month period?

23 A. Correct.

24 Q. Do you know why it was reduced to a writing,  
25 put in writing?

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 question.  
2 **Q. BY MR. BULLOCK: The original lease amendments**  
3 **extended the lease an additional year on each term?**

4 A. Correct.

5 **Q. This third amendment was only six months. If I**  
6 **am understanding correctly, is that because Johnson**  
7 **Thermal was constructing a new building and wasn't sure**  
8 **when that building would be done, and so they didn't**  
9 **want to commit to an additional one-year term?**

10 A. No. This was negotiated because we knew we  
11 needed for sure the six months. We didn't know how much  
12 of a second six months we would need. So it was  
13 negotiated so that the six months was taken care of.

14 If we thought we were going to need an  
15 additional four to six months before the building was  
16 ready, we'd just do another six-month term. If we  
17 thought we only needed a month, we could negotiate that.

18 **Q. And go on a month-to-month term? You could**  
19 **exercise either option A or option B? Is that what**  
20 **you're saying?**

21 A. Correct.

22 **Q. When did discussions arise between Johnson**  
23 **Thermal and the Gilbert Family on whether Johnson**  
24 **Thermal would extend beyond the October 2014 date?**

25 MS. RAINEY: Object to foundation.  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 THE WITNESS: I wasn't working at the company  
2 then.

3 MS. RAINEY: Object to form. Foundation.

4 **Q. BY MR. BULLOCK: What was the original time**  
5 **frame for the building to be completed that Johnson**  
6 **Thermal was going to move into?**

7 MS. RAINEY: Object to foundation.

8 THE WITNESS: Am I supposed to be answering?

9 MS. RAINEY: Yes, you can answer.

10 THE WITNESS: Based on my recollection, it was  
11 supposed to be sometime in April of 2015.

12 **Q. BY MR. BULLOCK: That is when it was supposed**  
13 **to be done?**

14 A. Yes. Well, move-in ready, yes.

15 **Q. Was that always the target date, or had it**  
16 **changed from when you began construction?**

17 MS. RAINEY: Object to foundation.

18 THE WITNESS: It had changed. It was a  
19 construction project. It changed. I mean, when we  
20 first spoke with the Gilberts, the process hadn't been  
21 started yet.

22 **Q. BY MR. BULLOCK: Were you a part of the company**  
23 **when the process began to build the building?**

24 A. Yes.

25 **Q. And when did that process begin?**  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 THE WITNESS: I never spoke with the Gilbert  
2 Family about it. It was all with Lincoln.

3 **Q. BY MR. BULLOCK: When did you first have**  
4 **conversations with Lincoln about that?**

5 A. I don't remember the exact date.

6 **Q. Did Lincoln approach you, wondering when**  
7 **Johnson Thermal would be --**

8 A. Yes.

9 **Q. -- leaving the building?**

10 A. Yes.

11 **Q. Do you recall when that was?**

12 A. No.

13 **Q. Was it prior to October of 2014 or after? Do**  
14 **you know if the term had expired already or if it was**  
15 **after the expiration?**

16 MS. RAINEY: Object to foundation.

17 THE WITNESS: I don't remember.

18 **Q. BY MR. BULLOCK: If you need to take a break,**  
19 **feel free to let me know at any time.**

20 A. I'm fine. I have kids to pick up. The sooner  
21 we finish, the better.

22 **Q. On the six-month extension, was there any time**  
23 **after October 2014 when Johnson Thermal expressed its**  
24 **desire to exercise the option on the lease?**

25 MS. RAINEY: Objection.

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 A. If I'm remembering correctly -- and I don't  
2 remember for certain -- it was sometime at the end of  
3 2013, early 2014. But I don't remember exactly.

4 **Q. That's fine.**

5 **Did you have a broker looking to buy land for**  
6 **you or find land for you? Were you looking for an**  
7 **existing building? How did that process go when you**  
8 **decided to build?**

9 A. Both.

10 **Q. You found the property. Is it near the**  
11 **location of 1505 Industrial Way -- the new building that**  
12 **you're at?**

13 A. Yes.

14 **Q. That was brought to you by your broker?**

15 A. No.

16 **Q. How did you find that property where you're**  
17 **at?**

18 A. The city owned it, and I knew people at the  
19 city, in part of city economic development. We heard  
20 about it from them. Urban Renewal owned it.

21 **Q. You purchased it from the city?**

22 A. From Urban Renewal. The city, yes. The City  
23 of Caldwell, yes.

24 **Q. The City of Caldwell. Okay.**

25 A. That's what I'm remembering. I wasn't involved  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)



1 in that part of it, in the purchase part.

2 **Q. So at the time that the third lease was entered**  
3 **into, the third lease amendment, Exhibit 3, you were**  
4 **still part of Johnson Thermal? You were still acting in**  
5 **some capacity for Johnson Thermal?**

6 A. Yes.

7 **Q. Do you know what capacity you were acting in at**  
8 **that time?**

9 A. President.

10 **Q. How long were you president?**

11 A. I don't remember.

12 **Q. More than a year?**

13 A. Yes.

14 **Q. Did you have any personal interactions with**  
15 **Arlene Gilbert regarding the extension of this third**  
16 **lease?**

17 A. Not to my recollection.

18 **Q. How did you get information from the Gilberts?**  
19 **Typically, how did you receive that information from**  
20 **them?**

21 A. Through Lincoln and Colliers.  
22 (Exhibit 10 was marked.)

23 **Q. BY MR. BULLOCK: Have you seen this e-mail**  
24 **before?**

25 A. It appears I have.

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 **MS. RAINEY: Object to foundation.**

2 **THE WITNESS: I have no idea.**

3 **Q. BY MR. BULLOCK: The response is:**

4 "We are still hoping on the December  
5 move-in on the new building, but it could be  
6 January."

7 Are you aware if, at this point, when this  
8 e-mail was sent, Johnson Thermal exercised its option to  
9 extend the lease agreement beyond October of 2014?

10 **MS. RAINEY: Object to form and foundation.**

11 **THE WITNESS: I don't know. I wasn't working**  
12 **in the company anymore. I wasn't president at this**  
13 **point.**

14 **Q. BY MR. BULLOCK: But you were still having**  
15 **interactions?**

16 A. I had gotten an e-mail from Lincoln, and I  
17 replied to his e-mail. As you can see, I handed it off  
18 to Gus because I was no longer working in that capacity.

19 **MR. BULLOCK: Can we take a five-minute break?**

20 **MS. RAINEY: Yes.**

21 (Break taken.)

22 **Q. BY MR. BULLOCK: During your time as president**  
23 **of Johnson Thermal or your employment with Johnson**  
24 **Thermal, were there any discussions about Johnson**  
25 **Thermal purchasing the building at 1505 Industrial Way?**

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 **Q. It looks like it's an e-mail between you -- at**  
2 **least the top part is -- well, I guess both of them are.**  
3 **It is Bates-stamped down at the bottom JTS 0144. That**  
4 **is just so that we can identify the document at a later**  
5 **time. The question to you from Lincoln:**

6 "If you are any closer to knowing a date by  
7 which you might occupy your new facility and  
8 therefore vacate Arlene's building, it would  
9 help me in my attempts with Arlene."

10 What was going on at this point?

11 "I am going to try to sit down with her at  
12 her house next week to smooth everything over."

13 What was going on at this point with Arlene  
14 that necessitated the need for him to smooth everything  
15 over?

16 **MS. RAINEY: Object to foundation.**

17 **THE WITNESS: I have no idea.**

18 **Q. BY MR. BULLOCK: Do you recall having this**  
19 **conversation?**

20 A. Uh-huh.

21 **Q. This e-mail with Lincoln?**

22 A. (Nods head affirmatively.)

23 **Q. Do you know why he was trying to -- what was**  
24 **the importance of knowing a date for Johnson Thermal to**  
25 **leave the building?**

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 A. Yes.

2 **Q. Were you a part of those conversations?**

3 A. Yes.

4 **Q. Who did you have those conversations with?**

5 A. It could have been any number of people --  
6 Lincoln, Devin. Through the negotiating process before  
7 we moved into the building, we thought we may want to  
8 purchase it. Once we moved into it, we were pretty sure  
9 it wasn't going to work for us long term.

10 **Q. During the time that you were in the**  
11 **building -- during the lease agreement, I guess I should**  
12 **say, were you actively searching for a new building or a**  
13 **new plot of land to purchase during that entire time; or**  
14 **was there a specific time frame that Johnson Thermal**  
15 **began the process of looking for a new building or**  
16 **purchasing land?**

17 A. I don't think we were doing it the entire time  
18 we were in there, no. We always knew we were going to  
19 have to find a new property for our business needs.

20 **Q. Had you expressed an interest after entering**  
21 **into the third lease agreement, Exhibit 3 there -- did**  
22 **you express an interest to purchase the property, after**  
23 **this time, to the Gilbert Family?**

24 A. No, not to my knowledge. I did not, no.

25 **Q. You did not?**

DEPOSITION OF SHERI JOHNSON (11.17.2015)

DEPOSITION OF SHERI JOHNSON (11.17.2015)

# **Exhibit D**

**DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

**CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )**

) Civil Action No.

Plaintiff, ) CV15-587

vs. )

**JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )**

) Defendant. )

---

**DEPOSITION OF LINCOLN HAGOOD**

**Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho**

**Tuesday, November 17, 2015  
Beginning at 12:00 p.m.**

**QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR**

354

**P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.**

com

**(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)  
DEPOSITION OF LINCOLN HAGOOD (11.17.2015)**

1 Q. Peterbilt was questioning whether the lease had  
2 been extended beyond October?

3 A. I believe so, yes.

4 Q. And the response -- if you would, look at the  
5 first page -- from Gus back to you:

6 "I did not find any correspondence with  
7 Arlene beyond the third amendment."

8 A. Uh-huh.

9 Q. In your experience with Arlene, if there was  
10 any amendment or change to the lease, was that usually  
11 reduced to writing, put into writing?

12 MS. RAINEY: Object to form and foundation.

13 THE WITNESS: No.

14 Q. BY MR. BULLOCK: It wasn't?

15 A. No.

16 Q. Was the original lease ever amended, that you  
17 know of, besides these two that I have shown you, the  
18 first lease amendment and the third lease amendment?

19 A. I believe so.

20 Q. Were those also reduced to writing -- those  
21 amendments?

22 A. I believe that one was.

23 Q. Let me just show you this. This is also called  
24 "First Amendment." Do you recognize that document?

25 MS. RAINEY: Can we mark that as an exhibit?

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 MR. BULLOCK: Sure.  
2 (Exhibit 6 was marked.)

3 Q. BY MR. BULLOCK: Have you seen that document  
4 before?

5 A. Yes.

6 Q. To me, it just looks like soon after the lease  
7 was entered that they just changed the commencement date  
8 of the lease; is that correct?

9 A. Yes.

10 Q. Were there any amendments to the lease that  
11 were not in writing?

12 A. I don't know.

13 Q. Do you know of any other amendments besides  
14 these three here?

15 A. Yes.

16 Q. What's that other amendment?

17 A. It's a second amendment document.  
18 (Exhibit 7 was marked.)

19 Q. BY MR. BULLOCK: Do you know what that relates  
20 to?

21 A. I was not involved in that one. I believe it  
22 relates to an addition of excess ground that was on the  
23 property.

24 Q. That's what people refer to as the second  
25 amendment of the lease?

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 A. Yes.

2 Q. Take a look at that. Is that what you are  
3 referring to?

4 A. Yes.

5 Q. So beyond the first amendment and this, what we  
6 are calling the second amendment, the other first  
7 amendment and the third amendment, was there any other  
8 amendment to the lease agreement that you are aware of?

9 A. Not that I am aware of.

10 Q. Did the Gilberts instruct you to get these  
11 amendments in writing?

12 A. No.

13 Q. How come they were reduced to writing?

14 A. To clarify, you asked about all of them?

15 Q. Sure.

16 A. The first and the third one I was instructed to  
17 put into writing.

18 Q. Because?

19 A. Because the Gilberts wanted to make sure they  
20 were paid.

21 Q. If you would, look at the first lease, the  
22 original lease agreement, page five.

23 MS. RAINEY: You are referring to Exhibit 1;  
24 correct?

25 MR. BULLOCK: Yes, Exhibit 1.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. BY MR. BULLOCK: Under the line that says  
2 "Modification" -- do you see that there?

3 A. Uh-huh.

4 Q. Can you read that for me?

5 A. "This agreement may not be amended, modified or  
6 changed except by a writing signed by all parties  
7 hereto."

8 Q. So pursuant to the terms of the original lease,  
9 it says, "This agreement may not be amended, modified or  
10 changed except by a writing signed by all parties  
11 hereto;" correct?

12 A. That's what the lease says.

13 Q. Do you know if that's why the amendments were  
14 put into writing to extend the lease -- I guess, all of  
15 the amendments were reduced to writing?

16 MS. RAINEY: Objection. Foundation.

17 THE WITNESS: My understanding is the most  
18 important reason for the amendments was to make sure  
19 that the lease payments were in writing -- the amount.

20 Q. BY MR. BULLOCK: That was a concern of the  
21 Gilberts?

22 A. A very large concern.

23 Q. First and foremost?

24 A. Yes.

25 Q. Did they have any concern or did they express

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 to provide her with comps so that she could see where  
 2 the market rates were. She usually asked for higher  
 3 than whatever those were.  
 4 **Q. If you would, flip back quickly to Exhibit 2.**  
 5 A. Yes.  
 6 **Q. You see here on Exhibit 2 the monthly rent, the**  
 7 **monthly base rent, was \$5,428.97; correct?**  
 8 A. Correct.  
 9 **Q. So the \$6,000 that we see in Exhibit 3 was**  
 10 **actually an increase over what had previously been paid;**  
 11 **right?**  
 12 A. Correct.  
 13 **Q. Look down now at paragraph three.**  
 14 A. Of Exhibit 2?  
 15 **Q. Exhibit 3. Pardon me. I'm switching back on**  
 16 **you.**  
 17 A. Okay.  
 18 **Q. On Exhibit 3, paragraph three, that numbered**  
 19 **paragraph that you said you included –**  
 20 A. Yes.  
 21 **Q. – how did you come about the contents of**  
 22 **paragraph three?**  
 23 A. Communication with Johnson Thermal relating to  
 24 when their building would be done. They were uncertain  
 25 whether or not it would be done and ready to occupy at  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 A. I believe it was the end of September.  
 2 **Q. When it was marketed, did you market it to the**  
 3 **public as having a tenant or not having a tenant? What**  
 4 **representations were made in the process of marketing**  
 5 **this property for sale?**  
 6 A. I believe that we marketed it as having a  
 7 tenant that wasn't staying, that would eventually  
 8 vacate.  
 9 **Q. Did you make any specific representations in**  
 10 **your marketing materials as to when that tenant would**  
 11 **vacate?**  
 12 A. I don't believe so, no.  
 13 **Q. Does Colliers and do you, as an agent of**  
 14 **Colliers, save the marketing materials that are used for**  
 15 **a particular transaction for any length of time?**  
 16 A. We should, yes.  
 17 **Q. Do you know what that length of time is?**  
 18 A. I have no idea.  
 19 **Q. When Caldwell Land & Cattle or Peterbilt – we**  
 20 **will refer to them as Peterbilt, if that's okay with**  
 21 **you.**  
 22 A. Yes.  
 23 **Q. It's a little more efficient.**  
 24 **When Peterbilt came to you – or when**  
 25 **Peterbilt's agent came to you, what discussions do you**  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 the end of the initial six months.  
 2 So they wanted a clause added in there that  
 3 allowed them to do either a six-month term or a  
 4 month-to-month term.  
 5 **Q. How did you come up with a base rent amount for**  
 6 **the two different options, the \$6,000 versus the \$6,250?**  
 7 A. Arlene wanted more money for a month-to-month  
 8 option because that gave her uncertainty as to when the  
 9 building would be vacated.  
 10 **Q. Is it accurate to say, based upon your**  
 11 **conversations with Arlene, you came to an understanding**  
 12 **that Arlene felt a little more secure, more certain, if**  
 13 **she had a tenant in there for an additional six months**  
 14 **rather than on a month-to-month basis?**  
 15 A. Yes.  
 16 **Q. As I am looking at Exhibit 3, one thing that I**  
 17 **don't see any indication of is that, in order to**  
 18 **exercise this option, there needs to be any sort of a**  
 19 **written amendment or modification or anything like that.**  
 20 **Do you recall having discussions along those**  
 21 **lines with Arlene?**  
 22 A. No.  
 23 **Q. When you marketed the property – tell me**  
 24 **again – did you put this on the market for sale in**  
 25 **October of 2014?**  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 **recall having with them about their concerns about**  
 2 **Johnson Thermal occupying the property?**  
 3 A. I don't believe it was raised as a concern when  
 4 we first talked.  
 5 **Q. You say that it wasn't raised as a concern when**  
 6 **you first talked?**  
 7 A. Yeah.  
 8 **Q. What was the nature of the discussion when you**  
 9 **first talked?**  
 10 A. It's usually about purchase price and building  
 11 size.  
 12 **Q. At what point do you recall it becoming a**  
 13 **concern in the negotiations with Peterbilt?**  
 14 A. When we toured the building for the first  
 15 time.  
 16 **Q. When do you recall –**  
 17 A. Let me rephrase that.  
 18 **Q. Fair enough.**  
 19 A. I'm not sure that it was a concern, but that  
 20 was the first time that we discussed it.  
 21 **Q. Do you have a recollection as to when your**  
 22 **first tour of the building occurred?**  
 23 A. It was sometime in October, I believe.  
 24 **Q. Sometime in October with –**  
 25 A. Sorry.  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

# **Exhibit E**

FIRST AMENDMENT

This FIRST AMENDMENT to the Lease Agreement, dated February 10, 2012, entered into between Gilbert Family Limited Partnership ("Landlord") and Johnson Thermal Systems, Inc., ("Tenant") concerning the lease of the Property located at 1505 Industrial Way, in Caldwell, Idaho is hereby made and entered into by the Landlord and Tenant. *vs SJ*

WITNESSETH:

WHEREAS, Tenant desire's to exercise its first one (1) year lease renewal option and the Landlord and Tenant desire to set forth the terms for the option as provided in this First Amendment;

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree to amend the Lease as follows:

1. LEASE TERM. The Tenant hereby exercises Tenant's option and the Lease Term is hereby extended for an additional twelve (12) month period from April 15, 2013 to a new expiration date of April 15, 2014 ("Renewal Term").

2. BASE RENT. The Base Rent for the option period shall be as follows:

Rent Schedule

Month	Mothly Rent	Monthly NNN's	Total Monthly Rent	Annual Rent
1-12	\$5,428.97	\$1,729.16	\$7,158.13	\$85,897.56

The Base Rent plus NNN's shall be paid monthly, in advance, in accordance with the terms of the Lense.

3. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties excute this First Amendment to be effective as of the date of the last party to sign.

Landlord:  
Gilbert Family Limited Partnership

By: *[Signature]*  
Bill Gilbert

Date: May 28, 2013

By: *[Signature]*  
Arlene T. Gilbert

Date: May 28, 2013

Tenant:  
Johnson Thermal Systems, Inc.

By: *[Signature]*  
Sheri R. Johnson

Date: 3/28/13

By: \_\_\_\_\_

Date: \_\_\_\_\_

# **Exhibit F**



**THIRD LEASE AMENDMENT**

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

**Recitals**

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

**Agreement**

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

TENANT: Johnson Thermal Systems Inc.

Sign: Arlene Gilbert

Sign: Sheri Johnson, for Johnson Thermal Systems Inc.

Print: Arlene Gilbert

Print: Sheri Johnson

Date: 4-18-14

Date: 4/15/14

# **Exhibit G**

## Devin Ogden

---

**From:** Sheri Johnson <sherij@johnsonthermal.com>  
**Sent:** Wednesday, February 26, 2014 9:35 AM  
**To:** Devin Ogden; Jeff Johnson  
**Subject:** RE: Industrial Building

Hi Devin,

All is well here. We are working on obtaining a piece owned by CEURA within Sky Ranch. I'll let you know if things fall through and need assistance finding other options. I have already mentioned to Arlene that we'd like to negotiate a six month renewal with it going month to month in the remaining 6 months of the lease agreement. Much depends on whether or not the piece we are looking at comes together; should know that in the next week or so.

I'd heard about this Caxton warehouse coming available. Unfortunately not anything that would work for us but good to know!

Thanks,

Sheri Johnson



T 208-453-1000 | F 866-266-2691  
1505 Industrial Way | Caldwell, Idaho 83605  
[www.JohnsonThermal.com](http://www.JohnsonThermal.com)

---

**From:** Devin Ogden [<mailto:Devin.Ogden@colliers.com>]  
**Sent:** Wednesday, February 26, 2014 9:03 AM  
**To:** Jeff Johnson; Sheri Johnson  
**Subject:** Industrial Building

Hi Jeff and Sheri,

Hope your family is doing well. Attached is a property that just came on the market. I understand that you are in the process of securing land to build across the freeway. Is that squared away or are you still searching for options? Will you need to exercise your last one year renewal at your current building (lease expires April 15)?

Enjoy your Wednesday,

**Devin Ogden, CCIM**  
Associate Broker | Boise  
Dir +1 208 472 1668 | Mobile +1 208 284 6885  
Main +1 208 345 9000 | Fax +1 208 493 5111  
[devin.ogden@colliers.com](mailto:devin.ogden@colliers.com)

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!SIG:530e17d4178882455290849!

# **Exhibit H**

---

**From:** Lincoln Hagood  
**Sent:** Friday, September 26, 2014 5:59 PM  
**To:** Sheri Johnson  
**Subject:** 1505 Industrial Update

Sheri,

I think I have convinced Arlene that you staying on the property is fine and would benefit her. She wants me to make sure and let you know that if you keep occupying the excess land that you need to keep paying on it . She has asked me to remind you to keep the property clean, patch any holes in the asphalt (if any), take down any fences, and clean up any weeds on the property. Please also keep me informed on your planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup>. I'd be happy to talk in more detail if you want to call me on my cell 703-7916. Also we will be signing a listing agreement with Arlene this next week so we will be coming out to install a For Sale sign along the freeway boundary side of the property.

Thanks,

**Lincoln Hagood**

Brokerage Services | Nampa  
Dir +1 208 472 1667 | Mobile +1 208 703 7916  
Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

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5660 Franklin, Suite 110 | Nampa, ID 83687 | USA  
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# **Exhibit I**

**FILED**  
A.M. P.M.

JUL 02 2015

CANYON COUNTY CLERK  
K CARLTON, DEPUTY

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*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC.,  
an Idaho corporation

Defendant.

Case No. CV 15-587

**AFFIDAVIT OF DARRELL  
GUSTAVESON**

STATE OF IDAHO            )  
                                  ) ss.  
County of Canyon         )

**AFFIDAVIT OF DARRELL GUSTAVESON - 1**

**COPY**



Darrell Gustaveson, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein. I am the chief financial officer for Johnson Thermal Systems and I am familiar with Johnson Thermal Systems involvement with the Gilbert Family Limited Partnership and I have the authority to make the following statements regarding Johnson Thermal Systems' knowledge and intent regarding the matters contained herein.

2. Consistent with the express written terms of the third lease amendment, Johnson Thermal Systems exercised its option to extend the term of the lease for six months by continuing to pay base rent at the amount of \$6,000.00.

3. The Gilbert Family Limited Partnership accepted, without objection or comment, Johnson Thermal System's payment of base rent at the amount required to extend the term of the lease for six months for the first two months of the extension.

4. The temporary electrical transformer that is referenced in plaintiff's motion for summary judgment was not a permanent addition or change to the building and, as such, Johnson Thermal was not required to seek the landlord's pre-approval to have the temporary electrical transformer installed.

5. The temporary electrical transformer was installed in February 2014. During the entire time it was installed, Johnson Thermal Systems received no objection or comment from the Gilbert Family Limited Partnership regarding the fact that it had been installed.

6. It was Johnson Thermal Systems' intent to make all repairs to bring the building back to the condition that it was at the time Johnson Thermal Systems leased the

**AFFIDAVIT OF DARRELL GUSTAVESON - 2**

premises from the Gilbert Family Limited Partnership. However, Johnson Thermal Systems was precluded from doing so because our access to the premises was restricted and denied when, on or about February 13, 2015, the locks on the doors had been changed.

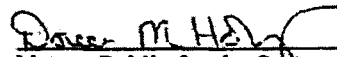
7. Attached hereto as Exhibit A is a true and correct copy of a spreadsheet that I prepared summarizing and calculating the additional expenses incurred by Johnson Thermal Systems as a result of the Gilbert Family Limited Partnership and plaintiffs' insistence that Johnson Thermal Systems vacate the premises before the expiration of the six-month lease extension.

8. Further your affiant sayeth naught.

DATED this 2nd day of July, 2015.

  
\_\_\_\_\_  
Darrell Gustaveson

SUBSCRIBED AND SWORN BEFORE ME this 2nd day of July, 2015.

  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at: CALDWELL, ID  
Commission Expires: MARCH 10, 2016



**AFFIDAVIT OF DARRELL GUSTAVESON - 3**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2nd day of July, 2015, I caused a true and correct copy of the foregoing **AFFIDAVIT OF DARRELL GUSTAVESON** to be served upon the following individuals in the manner indicated below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801) 596-1508

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

  
Rebecca A. Rainey

# **Exhibit A**

**JTS Building January & February Expedited Costs**

Emp/Vendor	OT Rate	OT Hours	
Eric Chavez	31.50	63.5	2,000.25
Camron Hayes	30.00	68	2,040.00
Steve Halbert	30.00	19	570.00
Robert Burkhart	42.00	18	756.00
Sam Elliot	18.00	67	1,266.00
Russell Hinkley	22.50	108	2,430.00
Karl Jackson	24.00	29	696.00
Wesley Davis	37.50	10	375.00
John Mendiola	30.00	93.5	2,805.00
Mike Knee	18.00	40	720.00
Ward Johns	Salary		3,750.00
Total Labor			17,348.25
Burden	0.25		4,337.06
<b>Total Labor</b>			<b>21,685.31</b>

**H & E Equipment**

Scissorlift Rentals	943.40
Scissorlift Rentals	1,003.10
Scissorlift Rentals	1,870.90
Scissorlift Rentals	1,835.20
Scissorlift Rentals	938.10
Scissorlift Rentals	1,276.20
<b>Total Rentals</b>	<b>7,866.90</b>

**Tyco Structural Enterprises**

Shop Walls-Expedite For Occupancy	1,930.00
<b>Total Tyco</b>	<b>1,930.00</b>

Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702  
Email: [kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

Rebecca A. Rainey, ISB No. 7525  
Allison Blackman, ISB No. 8686  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: [rar@frhtriallawyers.com](mailto:rar@frhtriallawyers.com)  
Email: [allison@frhtriallawyers.com](mailto:allison@frhtriallawyers.com)  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**FILED**  
A.M. 4:10 P.M.

**FEB 12 2016**

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC.,  
an Idaho corporation

Defendant.

**Case No. CV 15-587**

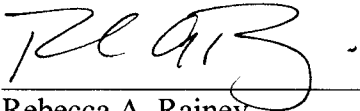
**MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

COMES NOW, the above-entitled Defendant Johnson Thermal Systems, Inc., by and through its attorney of record, Fisher Rainey Hudson, and moves this Court pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, for partial summary judgment

entering an order finding that Johnson Thermal Systems, Inc. effectively exercised its option to extend the lease term for an additional six months beyond October 15, 2014.

DATED this 12th day of February, 2016.

FISHER RAINEY HUDSON

A handwritten signature in black ink, appearing to read 'R. A. Rainey', written over a horizontal line.

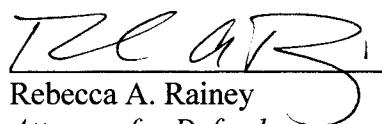
Rebecca A. Rainey  
*Attorney for Defendant  
Johnson Thermal Systems*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12th day of February, 2016, I caused a true and correct copy of the foregoing **MOTION FOR PARTIAL SUMMARY JUDGMENT** below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801) 596-1508

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Email

  
Rebecca A. Rainey  
*Attorney for Defendant*



Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
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Allison Blackman, ISB No. 8686  
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Facsimile: (208) 514-1900

*Attorneys for Defendant*

**FILED**  
A.M. 11 P.M.

**FEB 12 2016**

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE COMPANY,  
LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

**Case No. CV 15-587**

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

COMES NOW defendant Johnson Thermal Systems, Inc. ("Johnson Thermal"), by and through its attorneys of record, and hereby submits this Memorandum in Support of Motion for Partial Summary Judgment.

## I. INTRODUCTION

This case involves Caldwell Land & Cattle, LLC (“CLC”), successor in interest to a lease agreement by and between Johnson Thermal and the Gilbert Family Limited Partnership (“GFLP”), attempting to impose conditions on Johnson Thermal that are contrary to the express language of the agreements between Johnson Thermal and GFLP and contrary to the intent and course of dealing of the contracting parties. Specifically, CLC constructively evicted Johnson Thermal from the premises on the grounds that Johnson Thermal failed to effectively exercise its right to extend its lease agreement for a six-month term beyond October 15, 2014. Johnson Thermal contends that its actions were effective to extend the lease agreement for an additional six-month term beyond October 15, 2015 and, at this time, Johnson Thermal seeks an order granting summary judgment on that discrete issue.

The specific issue to be decided on the present motion for partial summary judgment is whether Johnson Thermal’s payment of \$6,000.00 base rent, as contemplated by the Third Lease Amendment between Johnson Thermal and GFLP, was an effective exercise of its right to extend the lease for a six-month term. Because the third lease agreement is clear and unambiguous regarding this issue, this Court can and should decide the issue as a matter of law.

It is anticipated that CLC will argue that because Johnson Thermal did not first provide the GFLP at least 60 days written notice of its intent to extend the lease term for another six months the \$6,000 payment did not effectively extend the lease term for those six months. However, the requirement of an additional writing was done away with in the Third Lease Amendment and, moreover, the undisputed evidence shows a course of dealing where GFLP and Johnson Thermal wholly ignored the requirement of a writing that was contained in the original Commercial Lease Agreement.

Because there are no disputed material facts on these issues, Johnson Thermal respectfully requests that this Court enter partial summary judgment and enter a finding that Johnson Thermal's payment of \$6,000.00 for two months, without objection or comment by GFLP and/or Colliers, constituted an effective exercise of its right to remain on the leased premises for an additional six months.

## II. STATEMENT OF UNDISPUTED FACTS

1. Johnson Thermal and the GLFP entered into a commercial lease agreement for the property located at 1505 Industrial Way, Caldwell, Idaho on or about February 23, 2012 ("Commercial Lease Agreement"). Affidavit of Rebecca A. Rainey in Support of Motion for Summary Judgment ("Rainey Aff.") Ex. A (CALD 0040-0049).

2. The Commercial Lease Agreement contained an option to renew that read as follows:

Upon Lessor's receipt of written notice by the Lessee at least (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

Rainey Aff., Ex. A (Commercial Lease Agreement at 2).

3. The Commercial Lease Agreement provided that all notices given pursuant to the lease were required to be made in writing to the addresses specified in the Commercial Lease Agreement. Rainey Aff., Ex. A (Commercial Lease Agreement at 4-5).

4. GFLP never received written notices from Johnson Thermal regarding anything related to the lease (Rainey Aff., Ex. B (Deposition of Arlene Gilbert taken February 9, 2016 ("Gilbert Depo.") 57:2-5); rather, communications regarding the lease would typically go

through Lincoln Hagood at Colliers (“Hagood”), agent for GFLP (Rainey Aff., Ex. B (Gilbert Depo. 56:21-57:5) and Ex. C (Deposition of Sheri Johnson taken November 17, 2015 (“S. Johnson Depo.”) 24:22-25:2; 28:14-21)).

5. Hagood testified that it was his experience with GFLP that amendments or changes to the lease were not usually reduced to writing. Rainey Aff. Ex. D (Deposition of Lincoln Hagood taken November 17, 2015 (“Hagood Depo.”) 33:9-15). Rather, it was Hagood’s understanding that the most important reason to reduce any amendment to writing was to make sure that the amount of the lease payments were in writing. Rainey Aff., Ex. D (Hagood Depo. 36:8-24).

6. Pursuant to the option to renew contained in the Commercial Lease Agreement, Johnson Thermal and GFLP extended the lease for a one year term from April 15, 2013 through April 15, 2014. Rainey Aff., Ex. E (JTS 0126).

7. Prior to entering into that written extension agreement, Johnson Thermal did not give GFLP written notice at least 60 days prior to the expiration of the lease. Rainey Aff., Ex. C (S. Johnson Depo. 16:16-22).

8. Rather, sometime at or near the lease expiration date, Colliers (either Hagood or Devin Ogden) would send an inquiry to Johnson Thermal asking if it intended to renew and, shortly thereafter, provide renewal paperwork. Rainey Aff., Ex. C (S. Johnson Depo. 16:3-22).

9. Pursuant to the option to renew contained in the Commercial Lease Agreement, Johnson Thermal and GFLP entered into a second extension agreement dated April 15, 2014 (“Third Lease Amendment”). Rainey Aff., Ex. F (CALD 0039).

10. Similar to the first extension agreement, Johnson Thermal did not give GFLP written notice at least 60 days prior to the extension agreement. Rather, similar to the first

extension, at or near the expiration date, Devin Ogden of Colliers reached out to Johnson Thermal to determine whether it was interested in extending the term of the lease. Rainey Aff., Ex. C (S. Johnson Depo. 16:16-22) and Ex. G (ColliersDO 0078-79).

11. The second extension was for an initial six-month term, which term expired on October 15, 2014, with options to extend past that initial six months for either another six months (at \$6,000/month base rent) or on a month-to-month basis (at \$6,250/month base rent). Rainey Aff. Ex. F (CALD 0039).

12. The reason the rates were set at \$6,000.00 for six months and \$6,250 for month-to-month was because Arlene Gilbert, member of GFLP, appreciated that there would be more certainty and, therefore, more security if Johnson Thermal remained on the property for six-months rather than electing the month-to-month option. Rainey Aff., Ex. D (Hagood Depo. 53:18–54:15).

13. On or about September 26, 2014, Lincoln Hagood sent an e-mail to Sheri Johnson advising her “I have spoken with Arlene and convinced her that it will be OK for you to remain on the property....” and, further, “Please keep me informed on your planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup>.” Rainey Aff. Ex. H (Collierslhs00726)

14. Johnson Thermal paid, and GFLP accepted without comment or objection, the first two months of the extension rent at the \$6,000.00 amount required to exercise the six-month extension option. Rainey Aff., Ex. I (Affidavit of Darrell Gustaveson filed July 2, 2015 (“Gustaveson Aff.”), ¶ 3).

### III. STANDARD OF REVIEW

Under Idaho Rules of Civil Procedure, summary judgment shall be granted if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). When considering a motion for summary judgment, the court must liberally construe the “record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). All reasonable inferences, which can be made upon facts on the record, must be construed in favor of the non-moving party. *Tusch Enters. v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1026 (1987). “If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied.” *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). All doubts must be construed against the moving party, and if facts exist on the record to which reasonable people may result in different outcomes, the motion must be denied. *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

Notably, when the trial court is sitting as the trial of fact, summary judgment may be entered even if conflicting inference could be drawn from the undisputed evidence “because the court alone will be responsible for resolving the conflict between those inferences.” *Riverside Dev. Co. v. Ritchie*, 650 P.2d 657, 661 (Idaho 1982) (citing *Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981); *Hollandsworth v. Cottonwood Elevator Co.*, 95 Idaho 468, 471, 511 P.2d 285, 288 (1973); *Angleton v. Angleton*, 84 Idaho 184, 198, 370 P.2d 788, 796 (1962)).

#### IV. DISCUSSION

**A. As a matter of law the Third Lease Agreement is clear and unambiguous.**

As a matter of law the contract between JTS and GFLP is clear and unambiguous and should be given its plain meaning: payment of \$6,000.00 effectively extended the lease for a term of six-months; no additional writing was required. “When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning.” *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005) (citing *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185–86, 75 P.3d 743, 746–47 (2003)) (internal citations omitted).

“The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole.” *Bakker*, 141 Idaho at 190, 108 P.3d at 337. “For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term or it must be nonsensical.” *Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (internal citations omitted). “Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.” *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454-455, 259 P.3d 595, 600-01 (2011) (citing *Potlatch Education Ass’n v. Potlatch School District No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)).

The contract between Johnson Thermal and GFLP clearly and unambiguously provided that, at the conclusion of the lease extension, Johnson Thermal could choose to extend for an additional six months or on a month-to-month basis. The express terms of the third lease amendment did not require a separate written acknowledgement, agreement, or any other type of writing or notice in order for JTS to choose between the two options:

(3) At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

a. Six Month Term: Base Rent = \$6,000/mo.

b. Month to Month Term: Base Rent = \$6,250/mo.

Rainey Aff. Ex. F. This clear, unambiguous language provides two different options from which Johnson Thermal could choose: it could either pay \$6,000 and extend the lease for six months, or it could pay an increased rate of \$6,250 and extend the lease on a month-to-month basis. The undisputed facts show that Johnson Thermal paid \$6,000.00—the rate associated with the six-month extension—for the first two months into the six month extension period.<sup>1</sup> Rainey Aff., Ex. I (Gustaveson Aff., ¶ 3). Because the third lease agreement is clear and unambiguous, Johnson Thermal's payment of the \$6,000.00 was effective, as a matter of law, to exercise its right to choose the six-month extension option contained in the Third Lease Amendment.

**B. Additional written notice was not required in order for Johnson Thermal to exercise its right to choose the six-month extension option.**

CLC will likely argue that the 60-day written notice required to exercise the extension options contained in the original Commercial Lease Agreement also applied to the Third Lease Amendment and, based thereon, argue further that Johnson Thermal did not effectively choose the six-month extension option under the Third Lease Amendment because Johnson Thermal did not give GFLP 60-days written notice. CLC's argument should be rejected because it requires an interpretation of the lease agreements and amendments that is contrary to their express terms.

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<sup>1</sup> It should be noted that Johnson Thermal paid the agreed upon \$6,000 base rent for each month they were in possession of the premises during the disputed lease term. The first two payments are focused on in this memorandum because those payments were accepted by GFLP without objection. It was not until CLC expressed an interest in closing the sale on the property only if it was not occupied by a tenant that issues arose regarding whether Johnson Thermal effectively elected the six-month extension option. Because those details are not relevant to the issue to be resolved on this motion for summary judgment, they have been provided here for background context only.



The differences between words used in the option clause contained in the original Commercial Lease Agreement and the extension choices contained in the Third Lease Amendment make it clear that the GFLP did not require a separate written notification from Johnson Thermal as a precondition to exercising the extension rights expressly granted in the Third Lease Amendment. Specifically, the option language contained in the original Commercial Lease Agreement expressly required that Johnson Thermal give 60-days written notice to the landlord in order to have the option rights set forth therein:

OPTION TO RENEW: Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration of this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

Rainey Aff., Ex. A (Commercial Lease Agreement at 2). Conversely, under the express terms of the Third Lease Amendment, two extension choices existed automatically upon the expiration of the lease term:

(3) At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

a. Six Month Term: Base Rent = \$6,000/mo.

b. Month to Month Term: Base Rent = \$6,250/mo.

Rainey Aff., Ex. F. No prior writing was required. *See, generally*, Rainey Aff., Ex. F.

Unlike the original Commercial Lease Agreement, which required a writing to trigger negotiations for an extended lease term, the Third Lease Amendment memorialized the two choices and the parties had already agreed to the terms of each choice. There was nothing more to negotiate. These choices were available, automatically, at the conclusion of the lease

extension. There was no requirement that Johnson Thermal do anything in order to make a selection between the two choices other than pay the appropriate rate: that is to say, the length of the additional extension depended solely upon the monthly base rent paid by Johnson Thermal.

Accordingly, per the language of the Third Lease Agreement, Johnson Thermal was to elect the length of the option agreement by paying either the six-month rate or the month-to-month rate. And, the undisputed evidence shows, Johnson Thermal paid the rate for the six-month extension term and GFLP accepted the rate for the six-month extension without comment or objection. Rainey Aff., Ex. I (Gustaveson Aff., ¶ 3). Since the Third Lease Amendment was clear and unambiguous and Johnson Thermal performed under the contract by paying the rate the parties agreed on to extend for a six-month term, this Court should find, as a matter of law, that Johnson Thermal had a right to occupy the property for an additional six months.

**C. Even if the express language of the third lease amendment did not do away with the requirement of written notification to select the extension term, the parties' prior course of dealing made it clear that written notification was neither expected nor required.**

Even if there is some merit to CLC's claim that the 60-day notice provision required by the original Commercial Lease Agreement somehow applied to the two extension choices contained in the Third Lease Amendment, the parties' course of dealing shows that such written notice provision was wholly ignored for their entire relationship. Therefore, the 60-day notice provision cannot and should not be belatedly enforced by CLC, a successor in interest to that contract.

Prior to the six-month extension that is at issue in this case, Johnson Thermal and GFLP had extended the Commercial Lease Agreement on two other occasions. Rainey Aff., Exs. E & F. Though the prior two extensions were governed by the language contained in the Option to Renew clause set forth in the original Commercial Lease Agreement, both extensions were

completed without the 60-day prior written notice. Rather, in lieu of the required sixty days written notice, one of the Colliers agents would reach out to Johnson Thermal and ask whether they wanted to extend

Q: How did that extension come about?

A: Typically, we would get an e-mail from Lincoln or Devin saying, “Do you plan on staying” Yes or no?” The answer was always, “Yes.” They would do the renewal and send it to me. It was usually right around the expiration date. We weren’t very timely about it.

Rainey Aff., Ex. C (S. Johnson Depo. 16:16-22) and Ex. G (ColliersDO 0078-79).

With respect to the six-month extension at issue in this case, on September 26, 2014, just weeks before the October 15, 2014 expiration of the existing lease extension, Lincoln Hagood wrote to Shari Johnson and advised her “I think I have convinced Arlene that you staying on the property is fine and would benefit her.”<sup>2</sup> Rainey Aff., Ex. H (ColliersLHS00726). Hagood then went on to say, “please keep me informed on your planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup>.” Rainey Aff., Ex. H (ColliersLHS00726).

Thereafter, Johnson Thermal made two payments in the amount of \$6,000.00. Rainey Aff., Ex. I (Gustaveson Aff., ¶ 3). Those payments were accepted by GFLP without comment or objection. Rainey Aff., Ex. I (Gustaveson Aff., ¶ 3). Under the express terms of the third

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<sup>2</sup> Hagood testified that it was not unusual for GFLP to deal with amendments to the lease rather informally:

Q: In your experience with Arlene, if there was any amendment or change to the lease, was that usually reduced to writing, put into writing?

A: No.

Q: It wasn’t?

A: No.

Rainey Aff., Ex. D (Hagood Depo. 33:9-15). Rather, in Hagood’s view, the most important reason to document any changes in term was to “make sure that the lease payments were in writing – the amount.” Rainey Aff., Ex. D (Hagood Depo. 36:17-19).

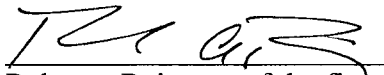
extension agreement, if Johnson Thermal wanted a month-to-month extension it was required to pay \$6,250; conversely, a single payment of \$6,000.00 obligated Johnson Thermal to a six-month lease term. Given that the parties had previously extended the lease agreement without sixty days prior written notice and that Lincoln confirmed to Johnson Thermal just weeks before the expiration of the lease agreement that GFLP consented to Johnson Thermal remaining at the property, this Court should find as a matter of law that Johnson Thermal systems was not required to provide any additional written notification—beyond the payment of the rate specified in the contract—that it had elected the six-month lease extension option.

#### V. CONCLUSION

For the foregoing reasons, Johnson Thermal respectfully requests the Court grant its motion for Partial Summary Judgment and enter an order finding that Johnson Thermal effectively exercised its option to extend the lease term for an additional six months beyond October 15, 2014.

DATED this 24<sup>th</sup> day of February, 2016.

FISHER RAINEY HUDSON

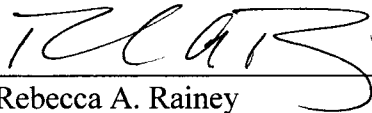
  
Rebecca Rainey – of the firm  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the <sup>12<sup>th</sup></sup> day of February, 2016, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

Robert L. Janicki  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Fax:(801)

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Email  
596-1508

  
Rebecca A. Rainey

F I L E D  
A.M. 2:40 P.M.

MAR 28 2016

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p>Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p>Defendant.</p>	<p><b>AFFIDAVIT OF RYAN C. BULLOCK IN SUPPORT OF OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION</b></p> <p>Civil No.: CV15-587</p> <p>Judge Nye</p>
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STATE OF UTAH            )  
  ):ss  
COUNTY OF SALT LAKE )

COMES NOW your affiant, Ryan C. Bullock, who first being duly sworn, deposes and  
sates as follows:

1. I am over the age of 21 and am competent in every respect to make this affidavit.

2. I am an attorney of record for Plaintiff and have personal knowledge of the matters contained herein.

3. Attached hereto as **Exhibit A** is a true and correct copy of relevant portions of the deposition of Lincoln Hagood taken on November 17, 2015.

4. Attached hereto as **Exhibit B** is a true and correct copy of relevant portions of the deposition of Arlene Gilbert taken on February 9, 2016.

5. Attached hereto as **Exhibit C** is a true and correct copy of relevant portions of the deposition of Darrell "Gus" Gustaveson taken on November 17, 2015.

6. Attached hereto as **Exhibit D** is a true and correct copy of the Commercial Lease Agreement entered into between the Gilbert Family Limited Partnership and Johnson Thermal Systems Inc. on or about February 23, 2012, and bates numbered as CALD0040-0049.

7. Attached hereto as **Exhibits E1-4** are true and correct copies of four separate written amendments to the Commercial Lease Agreement executed on or about the following dates: March 26, 2012, March 28, 2013, February 17, 2014, and April 18, 2014, bates numbered as CALD0037, JTS0126, CALD0038, CALD0039, respectively.

8. Attached hereto as **Exhibit F** is a true and correct copy of an email dated April 10-11, 2014, between Sheri Johnson and Lincoln Hagood and bates numbered JTS0137-39.

9. Attached hereto as **Exhibit G** is a true and correct copy of an email dated August 18, 2014 between Sheri Johnson and Lincoln Hagood and bates numbered JTS0144.

10. Attached hereto as **Exhibit H** is a true and correct copy of an email dated December 8, 2014, between Darrell "Gus" Gustaveson Lincoln Hagood, Dave Erlebach and Jeff Johnson, with the subject line "Re: City of Caldwell and New Building Timeframe."

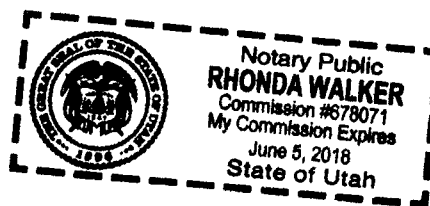
11. Attached hereto as **Exhibit I** is Notice of Termination from the Gilbert Family Limited Partnership to Johnson Thermal Systems, dated December 11, 2014, and bates numbered as CALD0117-0118.

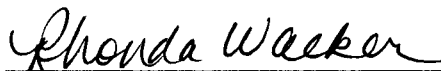
12. Further you affiant sayeth naught.

DATED this 23rd day of March, 2016.

  
Ryan C. Bullock

SUBSCRIBED AND SWORN BEFORE ME this 23rd day of March, 2016.



  
Notary Public State of Utah



**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of March, 2016, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock St., Ste. 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email



# EXHIBIT "A"

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
) Civil Action No.  
Plaintiff, ) CV15-587  
)  
vs. )  
)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
)  
Defendant. )

DEPOSITION OF LINCOLN HAGOOD

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 12:00 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting

com

(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)  
DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

Page 2

APPEARANCES

FOR THE PLAINTIFF:  
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Fax: 801.596.1508  
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FOR THE DEFENDANT:  
Ms. Rebecca Rainey  
Attorney at Law  
FISHER RAINEY HUDSON  
950 West Bannock Street  
Suite 630  
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Phone: 208.345.7000  
Fax: 208.514.1900  
Email: rar@frhtriallawyers.com  
and  
Ms. Kristin Bjorkman Dunn  
Attorney at Law  
BJORKMAN DUNN PLLC  
225 North Ninth Street  
Suite 810  
Boise, Idaho 83702  
Phone: 208.639.1458  
Fax: 208.330.3700  
Email: kbd@bjorkmandunn.com

ALSO PRESENT:  
Mr. Darrell "Gus" Gustavson  
Johnson Thermal Systems, Inc.

Mr. George Iliif  
Colliers International

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

Page 35

A. Yes.

Q. Take a look at that. Is that what you are referring to?

A. Yes.

Q. So beyond the first amendment and this, what we are calling the second amendment, the other first amendment and the third amendment, was there any other amendment to the lease agreement that you are aware of?

A. Not that I am aware of.

Q. Did the Gilberts instruct you to get these amendments in writing?

A. No.

Q. How come they were reduced to writing?

A. To clarify, you asked about all of them?

Q. Sure.

A. The first and the third one I was instructed to put into writing.

Q. Because?

A. Because the Gilberts wanted to make sure they were paid.

Q. If you would, look at the first lease, the original lease agreement, page five.

MS. RAINEY: You are referring to Exhibit 1; correct?

MR. BULLOCK: Yes, Exhibit 1.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

Page 37

any concern to you after October 2014 that there was not an extension to the lease agreement?

A. Only when it was brought to our attention by Peterbilt that there wasn't.

Q. They continued to accept payments from Johnson Thermal after October of 2014?

A. Correct.

Q. Do you know the amount of those payments?

A. I do not know the exact payments.

Q. I guess, was it just a continuation? Did they continue with the same payments they were making prior to the lease?

A. I didn't help with payments.

Q. The payments didn't go through you?

A. No.

Q. In your experience, was Ms. Gilbert familiar with the language of the lease agreement?

MS. RAINEY: Object to foundation.

THE WITNESS: No.

Q. BY MR. BULLOCK: When was the first time that you became aware that Johnson Thermal claimed to have extended the lease agreement beyond October of 2014?

A. I believe, in December.

Q. December of 2014?

A. Uh-huh.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 to provide her with comps so that she could see where  
2 the market rates were. She usually asked for higher  
3 than whatever those were.

4 Q. If you would, flip back quickly to Exhibit 2.

5 A. Yes.

6 Q. You see here on Exhibit 2 the monthly rent, the  
7 monthly base rent, was \$5,428.97; correct?

8 A. Correct.

9 Q. So the \$6,000 that we see in Exhibit 3 was  
10 actually an increase over what had previously been paid;  
11 right?

12 A. Correct.

13 Q. Look down now at paragraph three.

14 A. Of Exhibit 2?

15 Q. Exhibit 3. Pardon me. I'm switching back on  
16 you.

17 A. Okay.

18 Q. On Exhibit 3, paragraph three, that numbered  
19 paragraph that you said you included --

20 A. Yes.

21 Q. -- how did you come about the contents of  
22 paragraph three?

23 A. Communication with Johnson Thermal relating to  
24 when their building would be done. They were uncertain  
25 whether or not it would be done and ready to occupy at

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 the end of the initial six months.

2 So they wanted a clause added in there that  
3 allowed them to do either a six-month term or a  
4 month-to-month term.

5 Q. How did you come up with a base rent amount for  
6 the two different options, the \$6,000 versus the \$6,250?

7 A. Arlene wanted more money for a month-to-month  
8 option because that gave her uncertainty as to when the  
9 building would be vacated.

10 Q. Is it accurate to say, based upon your  
11 conversations with Arlene, you came to an understanding  
12 that Arlene felt a little more secure, more certain, if  
13 she had a tenant in there for an additional six months  
14 rather than on a month-to-month basis?

15 A. Yes.

16 Q. As I am looking at Exhibit 3, one thing that I  
17 don't see any indication of is that, in order to  
18 exercise this option, there needs to be any sort of a  
19 written amendment or modification or anything like that.

20 Do you recall having discussions along those  
21 lines with Arlene?

22 A. No.

23 Q. When you marketed the property -- tell me  
24 again -- did you put this on the market for sale in  
25 October of 2014?

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

# EXHIBIT "B"

UTAH COURT REPORTING, INC.  
P.O. Box 417  
Cedar City, Utah 84721  
utahcourtreportinginc.com

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR CANYON COUNTY, STATE OF IDAHO

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
Plaintiff, ) Case No. CV15-587  
vs. ) Judge Meyer  
JOHNSON THERMAL SYSTEMS, INC., )  
an Idaho corporation, )  
Defendant. )

**DEPOSITION OF ARLENE GILBERT**

Taken at the offices of:

SNOW, CHRISTENSEN & MARTINEAU  
555 South Bluff St., Ste. 301  
St. George, Utah 84770

On Tuesday, February 09, 2016  
At 11:00 a.m.

Reported by: Russel D. Morgan, CSR

Arlene Gilbert 2.9.16

A P P E A R A N C E S

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STRONG & HANNI  
3 TRIAD CENTER  
Suite 500  
Salt Lake City, Utah 84180  
801.532.7080 - Fax 801.596.1508

For the Defendant:

Rebecca A. Rainey  
FISHER RAINEY HUDSON  
950 West Bannock Street, Ste. 630  
Boise, Id 83702  
208.345.7000 - Fax 208.514.1900

Kristin Bjorkman Dunn (via telephone)  
BJORKMAN DUNN PLLC  
121 N. 9th Street, Ste. 300  
Boise, ID 83702

For the Witness Arlene Gilbert:

Steve Beckstrom  
SNOW, CHRISTENSEN & MARTINEAU  
555 South Bluff St., Ste. 301  
St. George, Utah 84770  
435.673.8288 - Fax 435.673.1444

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435.868.8562

2

Arlene Gilbert 2.9.16

1 A Yes.  
2 Q And did you have discussions with Lincoln about  
3 any of the provisions of this agreement?  
4 A I don't remember.  
5 Q You didn't have any discussions with him about the  
6 rent amount?  
7 A I don't -- no, I don't think so.  
8 Q Okay. He just came to you and said --  
9 A This is it.  
10 Q -- this is the amount that they will pay, and you  
11 agreed to that?  
12 A Yes.  
13 Q Are you aware of any additional amendments or  
14 modifications to this original lease agreement?  
15 A No.  
16 Q Okay. Are you aware of any oral modifications to  
17 this lease agreement? Did you have any oral agreements with  
18 Johnson Thermal to amend that lease agreement?  
19 A No.  
20 Q Okay. So, now I would like to talk a little bit  
21 about, do you agree that the Third Lease Amendment here, the  
22 term of the lease ended on October 15th, 2014, correct?  
23 MR. RAINEY: Object to form and foundation.  
24 A I don't know.  
25

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33

Arlene Gilbert 2.9.16

1 ever come back to you and say we have a lease? You can't  
2 evict us?  
3 A I don't know.  
4 Q Did Lincoln ever express that to you?  
5 A No.  
6 Q He didn't?  
7 A No. That I know of. I don't know. I don't know.  
8 Q Okay.  
9 (Exhibit No. 8 was marked for identification.)  
10 BY MR. BULLOCK:  
11 Q Okay. We marked this as Exhibit 8. So, this,  
12 what I have marked as Exhibit 8 is an email from Lincoln  
13 Hagood to George Iliff, dated Monday, December 22nd, 2014.  
14 Do you see that at the top there?  
15 A Yeah, I do.  
16 Q Okay. And Lincoln is saying to George: "George,  
17 Arlene just called me back. She said the Johnsons are just  
18 being difficult and they never told her they wanted to  
19 extend. And they are just making stuff up now." Do you  
20 recall that conversation with Lincoln?  
21 A No. But I must have.  
22 Q Do you recall having a conversation with Lincoln  
23 about whether Johnson Thermal had extended the lease that  
24 he's referring to in this email?  
25 A What did you say?

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48

1 A Well, he passed away.  
 2 Q He passed away in December of 2014, correct?  
 3 A Yeah.  
 4 Q And leading up to that, I'm sure you were dealing  
 5 with --  
 6 A Everything.  
 7 Q -- a lot of issues and hard times during that. I  
 8 can understand that. And I just want to see if you can  
 9 recall any discussions that you may have had with Lincoln  
 10 regarding the sale of the property or discussions regarding  
 11 Johnson Thermal during that timeframe?  
 12 A You know, I don't. I don't remember anything. I  
 13 really truly don't. It's kind of a blur.  
 14 Q Is that because of the condition of your husband  
 15 at that time?  
 16 A Well, that. And I gave, I just said to Lincoln,  
 17 deal with it. And, you know. I expected him to deal with  
 18 whatever issues came up. I expected him to deal with it.  
 19 Q Sure. And do you agree that he did deal with it?  
 20 A Best he could, yes.  
 21 Q And you approved all the decisions that he made  
 22 then?  
 23 A I guess, yes.  
 24 Q For example, selling the building?  
 25 A Yes.

1 Q Sending out the notice of termination?  
 2 A He was a realtor. I expected realtors to do their  
 3 job. And I presumed that's what he did.  
 4 Q Okay. And you don't have any problems with the  
 5 way that he did his job?  
 6 A I don't.  
 7 Q Okay. You don't disagree with any of the steps  
 8 that were taken to allow my clients to purchase the  
 9 building?  
 10 A I don't.  
 11 MR. BULLOCK: Okay. No further questions at this  
 12 time.  
 13 EXAMINATION  
 14 BY MR. RAINEY:  
 15 Q All right. Mrs. Gilbert, I have a few questions  
 16 for you. It shouldn't be that many. How long were you  
 17 married?  
 18 A Twenty years.  
 19 Q Okay.  
 20 A Twenty something.  
 21 Q Okay. During the time of the sale, the December  
 22 timeframe, is it an accurate depiction of that timeframe  
 23 that you relied exclusively on Lincoln to handle this  
 24 transaction for you?  
 25 A I did.

# EXHIBIT "C"



DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.  
Plaintiff, ) CV15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
)  
Defendant. )

DEPOSITION OF DARRELL "GUS" GUSTAVESON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Wednesday, November 18, 2015  
Beginning at 9:00 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.

com

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DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

Page 2

A P P E A R A N C E S

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FOR THE DEFENDANT:

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Suite 630  
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a n d

Ms. Kristin Bjorkman Dunn  
Attorney at Law  
BJORKMAN DUNN PLLC  
225 North Ninth Street  
Suite 810  
Boise, Idaho 83702  
Phone: 208.639.1458  
Fax: 208.330.3700  
Email: kbd@bjorkmandunn.com

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

Page 18

A. Yes.

Q. When did the original lease term end?

MS. RAINEY: Object to form and foundation.

THE WITNESS: The original commercial lease?

Q. BY MR. BULLOCK: Correct. The first lease.

A. According to this document, it ended on April  
15, 2013.

Q. From April 15, 2013, was it extended an  
additional time frame?

A. Yes.

Q. How long was that? Do you know?

A. I believe that was one year.

Q. Until October 15th -- excuse me -- April 15,  
2014?

A. Correct.

Q. Are you aware of a reason why this lease was  
extended only six months rather than an additional  
one-year term?

A. We were hopeful to be in our building by the  
fall.

Q. At this time, Johnson Thermal was constructing  
a new building?

A. We had not yet actually secured the property at  
the time that this lease was extended.

Q. You were hoping to find a place?

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

Page 20

A. Three years.

Q. It's a three-year lease?

A. (Nods head affirmatively.)

Q. With an option to renew, as well?

A. Yes.

Q. At the end of this third lease amendment in  
October of 2014, were you involved in any discussions on  
whether Johnson Thermal intended to extend the lease or  
exercise an option to extend the lease?

A. We did exercise an option to extend the  
lease.

Q. How did you do that?

A. We continued to make the payments as specified  
in the third lease amendment for the six-month base  
rent.

Q. Did you have any communications with the  
landlord, Arlene Gilbert, regarding the option to  
extend?

A. Just the check that we send every month.

Q. You never communicated to her in writing or  
orally that you had exercised the option to extend the  
lease?

A. No.

MS. RAINEY: Objection. Foundation.

Q. BY MR. BULLOCK: How many additional payments

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 Q. Had you ever communicated a date? Are you  
2 aware of any date that was communicated to Peterbilt  
3 about the time when Johnson Thermal would leave the  
4 building?

5 A. Not specifically. There were a range of dates  
6 that we offered.

7 Q. What are some of those dates?

8 A. March 1st. March 15th.

9 Q. Who communicated those to Peterbilt?

10 A. I did.

11 Q. You did?

12 A. (Nods head affirmatively.)

13 Q. Who did you communicate with at Peterbilt?

14 A. Actually, at that point, I think we were  
15 communicating through our attorneys.

16 Q. Prior to that, had you given dates to George or  
17 Lincoln? Any other dates that were a potential for  
18 leaving the building?

19 A. Same ranges. Of course, April 15th was our end  
20 date.

21 Q. But you didn't stay until March 1st either;  
22 correct?

23 A. No. We did pay rent to March 1st, though.

24 Q. I thought you only paid rent until January?

25 MS. RAINEY: Object to foundation.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 reason why Johnson Thermal had extended the lease was  
2 because it continued to make payments, the same payments  
3 as it had made prior to October of 2014; correct?

4 A. We continued to make the payments for the  
5 tenant option to extend that lease at the base rent of  
6 \$6,000.

7 Q. That was the same amount as the previous rent  
8 amount?

9 A. Correct.

10 Q. And you indicated that you did not communicate  
11 with Arlene Gilbert or anyone at the Gilbert Family  
12 Limited Partnership on your desire to extend the lease  
13 an additional six months?

14 MS. RAINEY: Object to foundation.

15 THE WITNESS: Except by virtue of that check,  
16 yes.

17 Q. BY MR. BULLOCK: Do you disagree or disagree  
18 that no notice of exercise, written or verbal, was ever  
19 provided?

20 MS. RAINEY: Object to foundation.

21 THE WITNESS: We believe that the third  
22 amendment gave us the right to exercise that option, and  
23 we did.

24 Q. BY MR. BULLOCK: Your position is that you  
25 exercised the option by continuing to make the

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 worked overtime to get the building finished so that we  
2 could have a temporary certificate of occupancy.

3 We just accelerated all of our plans which cost  
4 us a lot of money. It cost us disruption in our current  
5 plan because we had to maintain -- in our original plan,  
6 there was a spot there where we had planned to stop  
7 production, to be able to facilitate the move.

8 In the accelerated plan, we had to still  
9 deliver our commitments to our customers. So we had to  
10 figure out a way to pre-build a whole bunch of frames,  
11 pre-build a whole bunch of assemblies, and then be able  
12 to move those over and still use those in construction  
13 while we were setting up our equipment.

14 Again, the catastrophic risk of the bullying  
15 tactics that Peterbilt employed frightened us. You  
16 know, we had to accelerate it.

17 Q. When did Johnson Thermal know that it would be  
18 able to leave the building by the middle of February?

19 A. About February 9th.

20 Q. Do you know when the exact date was that they  
21 left the building?

22 A. If I had a calendar --

23 MS. RAINEY: Do you want me to get you a  
24 calendar?

25 THE WITNESS: It's going to be that week -- I

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 believe there's a Friday on February 12th or 13th.

2 MS. RAINEY: Here is February.

3 THE WITNESS: We were out on the 12th of  
4 February.

5 Q. BY MR. BULLOCK: That's a Friday?

6 MS. RAINEY: No.

7 THE WITNESS: No.

8 Q. BY MR. BULLOCK: Sorry. When is that?

9 A. That's a Wednesday. We were planning on going  
10 back that weekend to repair the building.

11 Q. And did you go back?

12 A. We did.

13 Q. Were you able to make repairs to the  
14 building?

15 A. No. The locks had been changed.

16 Q. And you went back during the weekend? Would  
17 that have been on Saturday or Sunday?

18 A. It would have been Friday, the 14th.

19 Q. The 14th?

20 A. Yes.

21 Q. Do you know who changed the locks?

22 A. I do not.

23 Q. Did you have any communications with Peterbilt  
24 after February 12, 2015?

25 A. Through our attorney.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

7/26/2015

**From:** kbd@bjorkmandunn.com  
**To:** Graden, Jackson  
**Sent:** 1/29/2015 8:46AM  
**Subject:** RE: Peterbilt

Graden,

As I mentioned, Johnson Thermal Systems made its decision upon further reflection. I doubt it helped much that your client filed its lawsuit prior to the date Johnson Thermal Systems was given to vacate the property and notwithstanding its continuing efforts to vacate the property early, Johnson Thermal Systems has offered more than what properties are renting for in the area.

Your client bought this property having caused the current situation and with knowledge of a dispute. You can tell your client there is unexpired term left in the lease and Johnson Thermal Systems has until April 15, 2015 to vacate the property.

Regards,

Kristin

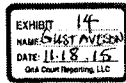
Kristin Bjorkman Dunn

bjorkman dunn PLLC

Plaza One Twenty One | 121 N. 9th Street, Suite 300 | Boise, Idaho 83702

(208) 639-1458 office | (208) 330-3700 fax

kbd@bjorkmandunn.com



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# EXHIBIT "D"

**COMMERCIAL LEASE AGREEMENT**

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between **GILBERT FAMILY LIMITED PARTNERSHIP** the party of the first part, hereinafter referred to as **LESSOR**, and **JOHNSON THERMAL SYSTEMS, INC.**, the party of the second part, hereinafter referred to as **LESSEE**.

**WITNESSETH:**

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

**Rent Schedule (Initial Term)**

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16

**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statutes, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste

material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contact. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiving or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:



**Lessor**  
**Gilbert Family Limited Partnership**  
**P.O. Box 1064**  
**Caldwell, Idaho 83606**

**Lessee**  
**Johnson Thermal Systems, Inc.**  
**22228 Hoskins**  
**Caldwell, ID 83607**

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.


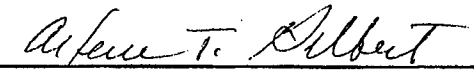
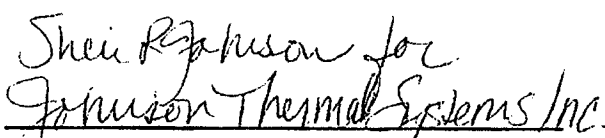
**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.

**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

<b>LESSOR:</b>		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Bill Gilbert</b>	<b>Date</b>
		2-23-12
	<b>Gilbert Family Limited Partnership</b> <b>Arlene T. Gilbert</b>	<b>Date</b>
<b>LESSEE:</b>		2/23/12
	<b>Johnson Thermal Systems Inc.</b>	<b>Date</b>

Lessor: Gilbert Family Limited Partnership

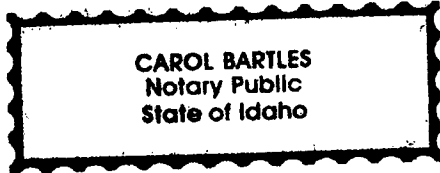
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles  
Notary public for Idaho  
Residing at: Wilder ID  
My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

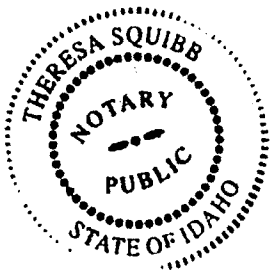
:ss

County of Canyon)

On this 21 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Teresa Squibb  
Notary Public of Idaho  
Residing at Nampa Idaho  
My commission expires: 9.26.2016



**Exhibit A**  
**"Legal Description"**

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

**EXCEPTING THEREFROM**

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

**BEGINNING** at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.

# EXHIBIT "E1-4"

**FIRST AMENDMENT**

This FIRST AMENDMENT to the COMMERCIAL LEASE AGREEMENT, dated February 10, 2012, for the lease of the Property entered into between GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") and JOHNSON THERMAL SYSTEMS, INC ("Lessee"), (the "Agreement") is hereby made and entered into by the Lessor and Lessee.

**WITNESSETH:**

WHEREAS, the parties desire to move the commencement date and amend certain terms set forth in the Lease.

NOW, THEREFORE, in consideration of the covenants set forth herein, the parties agree as follows:

1. Lease commencement date shall be April 1, 2012. However, early access shall be granted to Lessee to do improvements.
2. Lessor shall service the current fire sprinkling system before the commencement date.
3. Lessee shall pay for the monitoring service for the fire sprinkling system.
4. Lessor shall have all personal property removed no later than April 1, 2012.
5. All other terms and conditions of the Agreements, not specifically amended hereby, including but not limited to all dates previously set forth in the Agreements, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

**Lessee:**

By: *Sheri Johnson*

Date: 3/21/12

**Lessor:**

By: *Arlene Delbert*

Date: 3-26-12



FIRST AMENDMENT

This FIRST AMENDMENT to the Lease Agreement, dated February 10, 2012, entered into between Gilbert Family Limited Partnership ("Landlord") and Johnson Thermal Systems, Inc., ("Tenant") concerning the lease of the Property located at 150~~5~~ Industrial Way, in Caldwell, Idaho is hereby made and entered into by the Landlord and Tenant. *us sj*

WITNESSETH:

WHEREAS, Tenant desire's to exercise its first one (1) year lease renewal option and the Landlord and Tenant desire to set forth the terms for the option as provided in this First Amendment;

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree to amend the Lease as follows:

- 1. LEASE TERM. The Tenant hereby exercises Tenant's option and the Lease Term is hereby extended for an additional twelve (12) month period from April 15, 2013 to a new expiration date of April 15, 2014 ("Renewal Term").
- 2. BASE RENT. The Base Rent for the option period shall be as follows:

Rent Schedule

Month	Mothly Rent	Monthly NNN's	Total Monthly Rent	Annual Rent
1-12	\$5,428.97	\$1,729.16	\$7,158.13	\$85,897.56

The Base Rent plus NNN's shall be paid monthly, in advance, in accordance with the terms of the Lease.

- 3. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this First Amendment to be effective as of the date of the last party to sign.

Landlord:  
Gilbert Family Limited Partnership

By: *Bill Gilbert*  
Bill Gilbert

Date: Mar 28, 2013

By: *Arlene T. Gilbert*  
Arlene T. Gilbert

Date: Mar. 28, 2013

Tenant:  
Johnson Thermal Systems, Inc.

By: *Sheri R. Johnson*  
Sheri R. Johnson

Date: 3/22/13

By: \_\_\_\_\_

Date: \_\_\_\_\_

February 14, 2014

JTS will rent the available dirt lot adjacent to its current facility, owned by Gilbert Family Limited Partnership, for a period of six months.

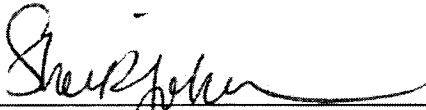
Rent period will be from February 17, 2014 through August 30, 2014, renewal by agreement of both parties on a month by month basis.

Payment will be pre-paid for the initial six month and two-week period. Amount is \$3,250.00. Subsequent months will be paid by the 10<sup>th</sup> of each month.

JTS will be fencing the lot for security and will remove the fencing at the end of the rental period. After the six month period, either JTS or GFLP can end this agreement with a 30 day written notice to the other party.

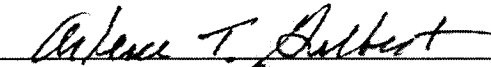
*JTS will take care of spraying or removing weeds during the period.*

Parties have read, understood and agree to the above terms:



Sheri R. Johnson  
President, JTS

*2/14/14*  
Date



Arlene Gilbert  
Gilbert Family Limited Partnership

*2-17-14*  
Date

**THIRD LEASE AMENDMENT**

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

**Recitals**

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

**Agreement**

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

Sign: Arlene Gilbert

Print: Arlene Gilbert

Date 4-18-14

TENANT: Johnson Thermal Systems Inc.

Sign: Sheri Johnson for Johnson Thermal Systems Inc.

Print: Sheri Johnson

Date 4/15/14

# EXHIBIT "F"

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**From:** "Lincoln Hagood" <Lincoln.Hagood@colliers.com>  
**Date:** Friday, April 11, 2014 12:21 PM  
**To:** "Sheri Johnson" <sherij@johnsonthermal.com>  
**Subject:** RE: 1505 Industrial Way Lease Renewal Terms

Sheri,

Sorry about Arlene calling this morning. Feel free to work directly through me. I will have the lease amendment draft over to you shortly.

Thanks,  
**Lincoln Hagood**  
Brokerage Services | Nampa  
Dir +1 208 472 1667 | Mobile +1 208 703 7916  
Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International  
5600 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)



**From:** Sheri Johnson [mailto:sherij@johnsonthermal.com]  
**Sent:** Thursday, April 10, 2014 1:22 PM  
**To:** Lincoln Hagood  
**Subject:** RE: 1505 Industrial Way Lease Renewal Terms

Lincoln,  
Sorry for the delay. I was out of the office and am now trying to unbury myself!

We would like to do a 6 month lease with the option to go month to month for an additional 3-6 months. If that's amenable to the Arlene, get it drawn up and we'll sign.

Did the principals of Kemper Refrigeration get in touch with you regarding their interest in the building?

Thanks,

Sheri Johnson  
The logo for Johnson Thermal Systems (JTS), featuring the letters "JTS" in a large, bold, stylized font with "JOHNSON THERMAL SYSTEMS" written in smaller text below it.  
T 208-453-1000 | F 866-266-2691  
1505 Industrial Way | Caldwell, Idaho 83605  
[www.JohnsonThermal.com](http://www.JohnsonThermal.com)

**From:** Lincoln Hagood [mailto:Lincoln.Hagood@colliers.com]  
**Sent:** Tuesday, April 01, 2014 1:09 PM

**To:** Sheri Johnson  
**Subject:** 1505 Industrial Way Lease Renewal Terms

Sheri,

I have spoken with Arlene and with her husband's current health conditions she has asked me to work with you to negotiate the lease renewal terms for the building at 1505 Industrial Way. Steve Fultz has shared with me that you plan to build a new facility in SkyRanch within the next year. Sounds exciting. Arlene also said you may have a tenant/buyer who would be interested in taking the space over from you once you leave. We certainly appreciate your forward thinking in this matter. I happen to have two other Buyers also interested in the building upon your leaving the space so I think the Gilbert's feel confident that they will be able to find someone else to take the space upon your vacating it.

It's become apparent that industrial space with freeway visibility has become even more valuable since you signed the lease with the Gilberts a couple of years ago based on the level of interest we have received on the property without even marketing it as available. Because of this I'm afraid rates are likely to go up. The Gilbert's would prefer a longer lease or a purchase over a month to month lease, but I've been able to convince them to put together multiple options for you to consider. The Gilberts would agree to extend your lease under the following terms. I have also summarized your current lease situation for easy reference..

Current Rent Situation

Monthly - \$5,428.97/mo plus NNN's  
 Annual - \$65,417.64/year plus NNN's  
 NNN's estimated at \$1,729.16/mo  
 NNN's estimated at \$20,749.92/year

Renewal Terms

*Month to Month Lease*

15% rent increase  
 $\$5,428.97 \times 115\% = \$6,243.31/\text{mo}$

*6 Month Lease*

10% rent increase  
 $\$5,428.97 \times 110\% = \$5,971.86/\text{mo}$

*1 year Lease*

3% rent increase  
 $\$5,428.97 \times 103\% = \$5,591.83$

I would be happy to discuss any questions you may have regarding this matter. I am usually available anytime during the day to discuss other than between 3pm-5pm when I Coach Track and Field at Columbia High School. I believe you are involved in YoungLife with my Assistant Coach Dawn Kinnaman.

Thanks,

Lincoln Hagood

Brokerage Services | Nampa  
 Dir +1 208 472 1667 | Mobile +1 208 703 7916  
 Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International

5660 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)



!SIG:5346ef5f205661017594969!

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# EXHIBIT "G"



**From:** "Sheri Johnson" <sherij@johnsonthermal.com>  
**Date:** Monday, August 18, 2014 5:12 PM  
**To:** "Lincoln Hagood" <Lincoln.Hagood@colliers.com>  
**Cc:** "Darrell "Gus" Gustavson" <gusg@johnsonthermal.com>; "Jeff Johnson" <jeffj@johnsonthermal.com>  
**Subject:** RE: Industrial Way and New Building

Lincoln,

I apologize that we didn't get back to you sooner. We are still hoping on the December move in on the new building, but it could be January.

I have cc'd our CFO, Gus, on this. He is more 'in the loop' on the building and will be your contact on anything regarding our lease going forward. Gus is out of the office this week, but hopefully will be able to provide you with more detail for your conversation with Arlene.

Gus, can you please give Lincoln a date based on what you know? He has an uphill battle trying to appease Arlene, so the more info the better!

Sheri Johnson



Johnson Thermal Systems Inc.  
 T 208-453-1000 | F 208-453-1001  
 1505 Industrial Way | Caldwell, Idaho 83605  
[www.JohnsonThermal.com](http://www.JohnsonThermal.com)

**From:** Lincoln Hagood [mailto:Lincoln.Hagood@colliers.com]  
**Sent:** Friday, August 15, 2014 4:42 PM  
**To:** Sheri Johnson  
**Subject:** Industrial Way and New Building

Sheri,

If you are any closer to knowing a date by which you might occupy your new facility and therefore vacate Arlene's building it would help me in my attempts with Arlene. I am going to try and sit down with her at her house next week to smooth everything over.

Thanks,

**Lincoln Hagood**  
 Brokerage Services | Nampa  
 Dir +1 208 472 1667 | Mobile +1 208 703 7916  
 Main +1 208 472 1660 | Fax +1 208 489 1520  
[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

Colliers International  
 5860 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)



● ●

# EXHIBIT "H"

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**From:** Lincoln Hagood  
**Sent:** Tuesday, December 23, 2014 4:40 PM  
**To:** George Iliff  
**Subject:** FW: City of Caldwell and New Building Timeframe

First indication that January might not work.

**Lincoln Hagood**

Brokerage Services | Nampa  
Dir +1 208 472 1667 | Mobile +1 208 703 7916  
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[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

**Colliers International**  
5660 Franklin, Suite 110 | Nampa, ID 83687 | USA  
[www.colliers.com](http://www.colliers.com)



---

**From:** Darrell "Gus" Gustaveson [mailto:gusg@johnsonthermal.com]  
**Sent:** Monday, December 08, 2014 2:26 PM  
**To:** Lincoln Hagood  
**Cc:** dave@ib-usa.com; Jeff Johnson  
**Subject:** Re: City of Caldwell and New Building Timeframe

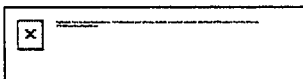
Thank you Lincoln for the assist with the City of Caldwell.

I did not find any correspondence with Arlene beyond the 3rd amendment. However, we did exercise our Tenant's six month extension option by continuing to pay the six month extension rate, and not paying the clearly different month by month rate. And we will defend that by seeking an injunction if need be.

In light of the bombshell you dropped on Friday, we have started to make contingency plans, but have not arrived at a firm move date that we can provide you. Give us a couple of days to work on that and we'll see what we can do. I did not offer a move out date in Friday's conversation.

Very generous of Peterbilt to take that stance after all the assistance we provided for their inspection.

Gus  
Darrell "Gus" Gustaveson  
CFO



Johnson Thermal Systems Inc.  
208-453-1000 ext 311 Office  
208-230-1675 cell

**From:** Lincoln Hagood <[Lincoln.Hagood@colliers.com](mailto:Lincoln.Hagood@colliers.com)>

**Sent:** Monday, December 8, 2014 2:09 PM

**To:** Darrell "Gus" Gustaveson

**Subject:** City of Caldwell and New Building Timeframe

Gus,

Per our conversation last week and my email to you about speaking with the City of Caldwell, I have just heard back from Steve Fultz that the City of Caldwell is more than willing to work with you on your temporary occupancy permit on your new building. They have stated that Rob McDonald, the city engineer, is the one handling your paperwork and the City of Caldwell has agreed to give you more than the 6 week time period from your initial occupancy of the space in order to allow you an adequate amount of time to get your areas paved. The wording that was relayed to me was they would be fine with allowing the extra time until the asphalt batch plants are opened. Rob with the city is available to discuss this and may be reached at 455-4682. Hopefully this will help you with some of your concerns.

If you were able to locate correspondence between you and the Gilberts in October extending your lease please provide such documentation as Arlene doesn't have any documentation other than the 3<sup>rd</sup> lease amendment that I provided. As you are aware the current buyer for your current building, Peterbilt Trucking, is wanting you to vacate the building immediately and they have been very persistent on this. I want to find a solution that will accommodate you. Per our previous correspondence and latest discussions on Friday you stated that you thought you could be out of 1505 Industrial by the end of January. If you would please provide a firm date in January that you can be off of the 1505 Industrial site as this would be very helpful.

Thanks,

**Lincoln Hagood**

Brokerage Services | Nampa

Dir +1 208 472 1667 | Mobile +1 208 703 7916

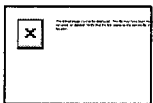
Main +1 208 472 1660 | Fax +1 208 489 1520

[lincoln.hagood@colliers.com](mailto:lincoln.hagood@colliers.com)

**Colliers International**

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!SIG:5486177f103635649619040!

# EXHIBIT "I"

VIA E-MAIL AND CERTIFIED MAIL

Johnson Thermal Systems, Inc.  
1505 Industrial Way  
Caldwell, ID 83605  
Attention: Darrell "Gus" Gustaveson  
gusg@johnsonthermal.com

Re: NOTICE OF TERMINATION  
1505 Industrial Way, Caldwell, ID

Dear Mr. Gustaveson:

This Notice of Termination is given by GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") to JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), with reference to that certain Commercial Lease Agreement, dated February 10, 2012, and the First, Second and Third Amendments thereto (collectively, the "Lease").

NOTICE IS HEREBY GIVEN that, pursuant to Idaho Code § 55-208, Lessor has the right to terminate the Lease upon written notice to Lessee to remove from the Premises within a period of not less than one (1) month. Accordingly, as of midnight on January 31, 2015, the Lease with Lessee shall TERMINATE and not be renewed or extended, and Lessee shall no longer be entitled to possession of the Premises. Accordingly, Lessee is hereby requested to vacate and surrender possession of the Premises to Lessor on or prior to January 31, 2015, which shall include the Lessee's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Premises in the same condition, reasonable wear and tear excepted, as the Premises were in at the beginning of the Lease.

Please note that pursuant to the Lease and despite Landlord's termination of the Lease, monthly rent will continue to be due and payable if Lessee continues in possession of the Premises. In the event that Lessee holds over and rent payment is not made, Landlord intends to pursue all remedies under the Lease despite Landlord's termination of the Lease as set forth herein. This includes, without limitation, rent pursuant to the Second Amendment, both unpaid and coming due and payable for any further period of possession by Lessee.

Please also note that in the event that Lessor is required to commence a lawsuit for possession of the Premises upon termination of the Lease or otherwise (including, but not limited, to non-payment of rent for all or any part of the Premises), that Lessor will pursue attorneys' fees and costs pursuant to the Lease and/or applicable Idaho Code, including, but not limited to, Idaho Code §§ 6-324, 12-120 and/or 12-121.

The Third Amendment to the Lease provides that Lessee had the option to extend the Lease for an additional period of either six (6) months or on a month to month basis. The Lease provides that any notice given under the terms of the Lease shall be deemed delivered when mailed by certified mail. The Lease further provides that any modification to the Lease must be in a writing by all parties. Lessee did not timely or properly exercise the option.

That the option to extend the Lease was not timely or properly exercised is evidenced by the following:

(i) Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Amendment. No notice of exercise, written or verbal, was ever provided. Rather, Lessee simply continued to hold over upon the Premises and pay monthly rent in the same amount as paid for the last month of the previous extended term.

(ii) Lessee did not obtain a writing signed by all parties that would modify the Lease in any way that would support the payment of rent after the conclusion of the Third Amendment's lease extension as being an effective exercise of the lease extension option.

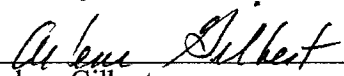
(iii) Time is of the essence of the Lease, as specifically set forth in the Lease.

(iv) Verbal communication from Lessee to Lessor or its agents after the conclusion of the lease extension under the Third Amendment (i.e. after October 15, 2014) indicated that Lessee intended to vacate the Premises as soon as Lessee completed the construction of a new building, thereby evidencing that Lessee did not intend a six month extension, but intended to hold over for a shorter duration.

Lessor reserves all its right and remedies, whether under the Lease or at law or in equity, whether or not mentioned herein, to terminate the Lease and cause Lessee to vacate the Premises.

Please be guided accordingly.

Sincerely,

  
\_\_\_\_\_  
Arlene Gilbert  
Gilbert Family Limited Partnership

12-11-14

MAR 28 2016

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN  
SUPPORT OF PLAINTIFF'S CROSS-  
MOTION**

Civil No.: CV15-587

Judge Nye

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In accordance with Idaho Rule of Civil Procedure 56, Plaintiff Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or "Plaintiff"), by and thorough counsel of record, Strong and Hanni law firm, submits this memorandum in opposition to the *Motion for Partial Summary Judgment* filed by Defendant Johnson Thermal Systems, Inc. ("Defendant") and in support of its cross-motion. For the reasons below, Caldwell



Land respectfully requests that Defendant's motion be denied and that summary judgment be granted to Caldwell Land for Defendant's failure to effectively extend the lease agreement for an additional six-month term beyond October 15, 2014.

### INTRODUCTION

Defendant's motion is premised on a flawed interpretation of a commercial lease agreement (the "Lease", defined *infra*). Defendant contends miraculously that it extended the Lease for a period of six-months beyond October 15, 2014, because it continued to make monthly payments after the lease expired. However, Defendant has offered, and cannot offer, any credible evidence to support that there was an agreement to extend the Lease. There are no emails, no communications, and most importantly no amendment, written or otherwise, that extended the Lease beyond October 15, 2014. Defendant simply continued has a hold-over tenant after the lease expiration date. Any payments on the Lease made by Defendant beyond October 15, 2014, were made as continued payments under the third amendment to the Lease on a month-to-month basis. Additionally, Defendant has offered conflicting testimony regarding its alleged intent to extend the Lease and its actions and communications demonstrate that it did not intend to extend the Lease a full six month period. Therefore, Defendant did not extend the Lease beyond October 15, 2014, and was operating as a holdover tenant after that date and its motion should be denied.

Furthermore, because Defendant cannot challenge Plaintiff's assertion that the Lease was not extended an additional six-month period, and the evidence and deposition testimony supports that there was no written or oral agreement extending the terms of the Lease beyond October 15,

2014, summary judgment should be granted in favor of Plaintiff. The course of dealing between the Defendant and Caldwell Land's predecessor-in-interest – the Gilbert Family Limited Partnership (“GFLP”) – demonstrates that had the parties agreed to extend the Lease there would have been a written contract memorializing the agreement as all previous amendments, additions, extensions, or changes to the Lease had been reduced to writing. Because Defendant's claimed exercise of the option was not reduced to writing and was not agreed to by GFLP, Defendant is in breach of the lease agreement and summary judgment should therefore be granted in favor of Plaintiff.

#### **STANDARD OF REVIEW**

Under Rule 56, I.R.C.P., summary judgment shall be granted if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P 56(c); *Heinz v. Heinz*, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court “liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor.” *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997).

Affidavits submitted in support of motions for summary judgment must be made on personal knowledge, set forth facts that would be admissible at trial on the issue addressed, and demonstrate that the affiant is competent to testify to the matters stated therein. I.R.C.P. Rule 56(e). When a motion for summary judgment is supported by affidavits or deposition testimony, the non-

moving party cannot rest on the allegations and/or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. *Arnold v. Diet Center, Inc.* 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987). If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 410, 987 P.2d 300, 313 (1999). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 966 P.2d 303, 306 (2000). "If the record contains conflicting inferences or reasonable minds might reach difference conclusions, summary judgment must be denied." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho, 830, 833 (1990).

#### **STATEMENT OF DISPUTED AND ADDITIONAL FACTS**

The following alleged facts asserted by Defendant are disputed and the additional facts support summary judgment in favor of Caldwell Land and, therefore, summary judgment in favor of Defendant is not appropriate.

1. Caldwell Land disputes Fact #5 of Defendant's statement of facts because Lincoln Hagood testified that he was instructed to put the first and third amendments in writing to ensure that the Gilberts were paid. *Affidavit of Ryan C. Bullock in Support of Opposition Memorandum*

and Cross-Motion for Partial Summary Judgment (“Bullock Aff.”) Ex. A (*Deposition of Lincoln Hagood* (“Hagood Depo.”) 35:13-20). Additionally, GFLP relied upon Mr. Hagood and Colliers to deal with issues concerning the Lease including selling the building and terminating the Lease with Defendants pursuant to the Notice of Termination. *Bullock Aff.* Ex. B (*Deposition of Arlene Gilbert* (“Gilbert Depo.”) 54:16-25, 55:1-11.)

2. Caldwell Land disputes Fact #12 of Defendant’s statement of facts because the reason Defendant was given options to extend the lease is because Defendants were constructing a new building and were uncertain whether or not the new building would be completed by October 15, 2014. *Bullock Aff.* Ex. A (*Hagood Depo.* 53:18-25, 54:1-4); *Bullock Aff.* Ex. C (*Deposition of Darrell “Gus” Gustaveson* (“Gustaveson Depo.”) 18:16-20).

3. Caldwell Land disputes Fact #14 of Defendant’s statement of facts because while GFLP may have accepted the first two months payment it was not based upon the understanding that Defendant had exercised an option to extend but rather as continued payments under the lease terms as a month-to-month tenant. Indeed, it was never communicated in writing or orally to GFLP that Defendants intended to exercise the option to extend beyond October 15, 2014. *Bullock Aff.* Ex C (*Gustaveson Depo.*, 20:20-24).

4. On or about February 10, 2012, Defendant and GFLP entered into a Commercial Lease Agreement (the “Lease”). (“Bullock Aff.”) Ex. D (CALD0040-0049).

5. The Lease expressly provides that “[it] may not be amended, modified, or changed except by a writing signed by all parties hereto.” *Bullock Aff. Ex D*, at 5.

6. In the months and years following the execution of the Lease, and pursuant to the above referenced provision, Defendant and GFLP entered into four separate written amendments to the Lease which were executed on or around the following dates: March 26, 2012, March 28, 2013, February 17, 2014, and April 18, 2014. *Bullock Aff.* Ex. E1-4 (CALD0037, JTS0126, CALD0038, CALD0039) (collectively the “Lease Amendments”)

7. The final lease amendment, which is referred to as the “Third Lease Amendment”, was executed on or about April 18, 2014, and provided for an extension of the Lease for an additional six (6) months until October 15, 2014. *Bullock Aff.* Ex. E4, at 1 (CALD0039).

8. Consequently, in the months leading up to the October 2014 lease expiration date, Defendant discussed extending the lease beyond October 15. For example, in an email dated 4/10/14 Defendant stated “that it would like to do a 6 month lease with the option to go month to month for an additional 3-6 months.” *Bullock Aff.* Ex. F (JTS0137-39).

9. Defendant also noted that it was “hoping on the December move in on the new building, but it could be January.” *Bullock Aff.* Ex. G (JTS0144)

10. Finally, in an email exchange between Hagood and Defendant on 12/8/2014, Hagood states “[i]f you were able to located correspondence between you and [GFLP] in October extending your lease please provide such documentation as [GLFP] doesn’t have any documentation other than the 3<sup>rd</sup> lease amendment that I provided . . . Per our previous and latest discussions on Friday [12/4/14] you stated that you thought you could be out of 1505 Industrial by the end of January,” and to which Defendant responds as follows “. . . I did not find any

correspondence with [GFLP] beyond the 3<sup>rd</sup> amendment . . .” *Bullock Aff.* Ex. H. (Email exchange between Darrell Gustaveson to Lincoln Hagood dated December 8, 2014).

11. Consistent with these communications Defendant and GFLP did not execute any additional written agreements extending the lease beyond the Third Lease Amendment. *Bullock Aff.* Ex B (*Gilbert Depo.* 33:13-19); Ex. C (*Gustaveson Depo.* 20:20-24).

12. The first time that there was any discussion or claim by Defendant that it had had exercised the option to extend was in December 2014. *Bullock Aff.* Ex A. (*Hagood Depo.* 37:20-25.)

13. Upon hearing Defendant’s claim that it had extended the Lease Agreement, Arlene Gilbert told Mr. Hagood that Defendant never told her they wanted to extend the lease and that “they are just making up stuff now.” *Bullock Aff.* Ex B (*Gilbert Deposition,* 48:16-20).

14. Prior to December 2014 Defendant never communicated to GFLP that it intended to exercise the option to extend the lease as provided in the Third Amended Lease. *Bullock, Aff.* Ex. C (*Gustaveson Depo.* 20:20-23; 35:10-16.)

15. In 2014 Defendant was in the process of constructing a new building and was not certain when it would be completed but believed it would be done by the fall of 2014. *Bullock Aff.* Ex. C (*Gustaveson Depo.* 18:16-20); *Bullock Aff.* Ex. A *Hagood Depo.* 53:18-25, 54:1-4).

16. Defendant stated, through its written representations to GFLP and its leasing agent at Caldwell that it would be moving in as early as December 2014 and then, as later indicated by Defendant in subsequent communications, in January. *Bullock Aff.* Ex G (JTS144); Ex. H.

17. Defendant communicated date ranges about when it expected to be out of the building but none of the dates included the full six month extension. *Bullock Aff. Ex. C (Gustaveson Depo. 26:1-10)*.

18. No oral or written agreement was formed as to any such six month extension of the Lease Expiration Date. *Bullock Aff. Ex. C (Gustaveson Depo at 20:20-24)*.

19. Rather, Defendant continued to make payments under the lease as a month to month tenant at the same rate - \$6,000 per month – that was required under the Third Lease Amendment. *Bullock Aff. Ex C (Gustaveson Depo. 35:4-9)*.

20. By virtue of Defendant’s continued possession of the building after the expiration, and without any express extension of the Lease, GFLP delivered to Defendant, on or around December 11, 2014, via certified mail and electronic transmission, a Notice of Termination (the “Notice of Termination”). *Bullock Aff. Ex I (CALD0117-118)*.

21. Notwithstanding its receipt of the Notice of Termination, Defendant remained in possession of the Building after January 31, 2015. *Bullock Aff. Ex C (“Gustaveson Depo. 42:20-25, 43:1-4)*.

22. On or around January 29, 2015, two days prior to the date on which Defendant was required to vacate the property, as identified in the Notice of Termination, Defendant, through counsel, represented to Caldwell Land that it would not comply with the Notice of Termination and would not vacate the Property by January 31, 2015, and, instead, would continue in possession of the Property until April 15, 2015. *Bullock Aff. Ex. C (Gustaveson Depo., Ex. 14)*.

23. Rather, Defendant did not vacate the property until February 12, 2015. *Bullock Aff. Ex C (Gustaveson Depo. 42:20-25; 43:1-4).*

### ARGUMENT

- A. The terms of the Lease are clear that it cannot be modified without a writing signed by all parties and there is no written amendment extending the lease beyond October 15, 2014.**

A provision in a contract that requires modifications to be in writing can only be avoided by the parties to the contract where their words, acts or conduct amount to waiver, modification, recession, or abandonment of that provision or where the owner by his acts or conduct is estopped to rely on it. *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass'n.*, 133 Idaho 669, 675 (Ct. App. 1999). Such waiver or modification of the agreement “may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.” *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 7171 (2014) quoting *Ore-Ida Potato Products Inc., v. Larsen*, 83 Idaho 290, 296 (1961). The question of whether such a modification has been proven is one for the trier of fact. *Pocatello Hosp., LLC*, 156 Idaho at 719. Questions of intent are factual questions which, when in dispute, cannot be resolved on summary judgment. *Porter v. Bassett*, 146 Idaho 399, 405 (2008).

Here, the Lease provides that it “may not be amended, modified, or changed except by a writing signed by all parties hereto.” *Bullock Aff. Ex D at 5 (CALD0044)*. Subsequent amendments to the Commercial Lease Agreement did not revise or amend this lease provision.



*See e.g. Bullock Aff. Ex E1-4.* (CALD0039 at ¶ 4; JTS0126 at ¶3; CALD0037 at ¶ 5). In the in the months leading up to the lease expiration date, Defendant and GFLP, through its leasing agent, engaged in various discussion regarding a possible six month extension beyond October 15, 2014. *See e.g., Bullock Aff. Ex. F* (JTS0137); *Bullock Aff. Ex. G* (JTS0144); *Bullock Aff. Ex. H.* Despite these numerous discussions concerning a *possible* extension to the term of the Lease Agreement, no agreement was reached and there is no written agreement providing an extension. *Bullock Aff. Ex C* (*Gustaveson Depo* at 20:20-24).

Importantly, the course of conduct between the Defendant and GFLP demonstrates that each time the Lease Agreement was revised, amended, or changed, the agreement to do so was reduced to a writing. For example, in the First Amended Lease, the parties reduced to writing the Defendant's desire to exercise its first one year lease renewal option. *Bullock Aff. Ex. E1* (JTS0126). This first amendment is consistent with the Lease term that requires all amendments, changes, and revisions to be in writing. Additionally, the Third Lease Amendment was reduced to writing consistent with the terms of the Lease and the parties' previous practices. *Bullock Aff. Ex. E4* (CALD0039). A second amendment to the Lease was also executed based upon Defendant's desire to rent a dirt lot adjacent to the building and GFLP's desire that Defendant maintain the lot free of any weeds during the lease period. Consistent with the parties' practice this agreement was reduced to writing. *Bullock Aff. Ex E3* (CALD0038).

Markedly different from this consistent course of dealing is the fact that there is no written or oral agreement as to a six-month extension beyond October 15, 2014. Indeed, while Defendant

and GFLP may have had discussions regarding the possibility of a six-month extension, it was admittedly never agreed to or reduced to writing. *Bullock Aff. Ex C. (Gustaveson Depo. 20:20-23)*. If Defendant and GFLP had actually intended and agreed to extend the Lease and additional six-month it would have been reduced to writing consistent with their previous practice. However, if was not and therefore it is clear that GLFP never intended to waive the written modification requirement and did not agree to an extension of the lease term beyond October 15, 2014.

**B. Defendant's actions and communications make clear that it did not intend to extend the Lease an additional six-month term.**

Not only it is clear that there was no extension of the Lease, but Defendant's own actions and statements make clear that they were operating, and intended to operate, as if they were on a month-to-month lease. Specifically, Defendant, in numerous written communications with GFLP, made clear that it had not extended the lease for an additional six months. For example, in an email from Defendant on April 10, 2014, Defendant requested an additional six month extension (until October 15, 2014) "with the option to go month to month for an additional 3-6 months." *Bullock Aff. Ex. F (JTS0137)*. Defendant also noted that it was hoping to vacate the property in December but "it could be January . . . and we are tentatively planning to move in January or February." Defendant also noted that it was "hoping on the December move in on the new building, but it could be January." *Bullock Aff. Ex. G (JTS0144)*. Additionally, Defendants were in the process of constructing a new building which they expected to be completed in late 2014 or early 2015 and would therefore not want to lock themselves into a lease agreement well beyond

those dates. *Bullock Aff. Ex. A, (Hagood Depo. 53:18-25, 54:1-4); Bullock Aff. Ex. C (Gustaveson Depo. 18:16-20).*

It is plainly clear from Defendant's own words and actions Defendant did not want or intend to lock itself into a six month extension beyond October 15, 2014. As noted above, there are numerous representations that it only planned to remain in the property a couple of months beyond the end of the lease term. Defendant is simply making arguments and taking positions that are convenient at the moment. This is apparent based on an email exchange between counsel for the parties dated January 29, 2015, two days prior to the date on which Defendant was required to vacate the property, as defined in the Notice of Termination, where in Defendant expressed its refusal to comply with the Notice of Termination and, instead, would continue in possession of the property until April 15, 2015. *Bullock Aff. Ex. C (Gustaveson Depo. Ex. 14).* Despite this representation, Defendant vacated the property less than two weeks later on February 12, 2015. *Bullock, Aff. Ex C (Gustaveson Depo. 42:20-25; 43:1-4).*

By saying that it would vacate the premises in December, then decide to stay, the completely change its position and argue that it exercised the option despite numerous communications that it did not intend to remain in the building beyond December Defendant clearly shows that it had no intention of entering into a six month extension. This is further demonstrated by the lack of any written agreement extending the lease beyond October 15, 2014. Thus, based on the undisputable evidence it is clear that Defendant did not exercise its option to extend the Lease and its motion should be denied.

**C. Defendant did not exercise the option to extend the Lease but rather continued making payments as a holdover tenant and therefore breached the Lease Agreement.**

When a lessee holds over after a tenancy for a fixed term expires, the lessor must elect to either treat the lessee as a trespasser or hold him to a new tenancy. *Lewiston Pre-Mix Concrete Inc. v. Rhode*, 110 Idaho 640, 644-645 (Ct. App. 1985). By treating the lessee as a trespasser, the lessor may bring an action for unlawful detainer. *Id.* at 645.


Because there was no extension of the Lease, Defendant's continued possession of the property necessarily dictates that Defendant is a tenant at will under Idaho law. Therefore, GFLP caused to be served a Notice of Termination on Defendant on December 11, 2014, informing Defendant that it had to vacate and surrender the Property by January 31, 2015. *Bullock Aff.* Ex I (CALD0117-118). Despite having not extended the Lease and having received the Notice of Termination, Defendant continued in possession of the Property after January 31, 2015. *Bullock Aff.* Ex C ("*Gustaveson Depo.* 42:20-25, 43:1-4). By virtue of this refusal to vacate the property after receipt of the Notice of Termination, Defendant is liable for unlawful detainer because it did not vacate or surrender the property by January 31, 2015. Therefore, summary judgment should be entered in favor of Caldwell Land.

**CONCLUSION**

For the foregoing reasons, Caldwell Land respectfully requests that Defendant's motion for partial summary judgment be denied and that summary judgment in favor of Plaintiff be granted.

DATED this 23<sup>rd</sup> day of March 2016.

STRONG & HANNI

  
\_\_\_\_\_  
Robert L. Janicki  
Graden P. Jackson  
Ryan C. Bullock  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**


I hereby certify that on the 23<sup>rd</sup> day of March, 2016, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock St., Ste. 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email

  
\_\_\_\_\_

F I L E D  
A.M. 2:47 P.M.

MAR 28 2016

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiffs*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**PLAINTIFF'S CROSS-MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Civil No.: CV15-587

Judge Nye


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Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or "Plaintiff"), by and thorough counsel of record, Strong and Hanni law firm, hereby files this Motion for Partial Summary Judgment (the "Motion"). By this Motion, Plaintiff requests that summary judgment be granted on its breach of contract cause of action for Defendant's failure to

surrender and vacate property after Defendants' failure to extend the lease agreement for an additional six-month term beyond October 15, 2015. Wherefore, Plaintiff requests that the Court enter summary judgment in its favor on these counts. This Motion is supported by Plaintiff's contemporaneously filed *Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment and In Support of Plaintiff's Cross-Motion*.

DATED this 23<sup>rd</sup> day of March, 2016.

STRONG & HANNI

  
Robert L. Janicki  
Graden P. Jackson  
Ryan C. Bullock  
*Attorneys for Plaintiff*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 23 day of March, 2016, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

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Bjorkman Dunn PLLC  
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Boise, ID 83702

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- Hand Delivered
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**FILED**  
A.M. P.M.

**APR 08 2016**

**CANYON COUNTY CLERK**  
**A GALLEGOS DEPUTY**

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*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE COMPANY,  
LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

**Case No. CV 15-587**  
**REPLY MEMORANDUM IN SUPPORT**  
**OF DEFENDANT'S MOTION FOR**  
**PARTIAL SUMMARY JUDGMENT AND**  
**IN OPPOSITION TO PLAINTIFF'S**  
**CROSS-MOTION FOR SUMMARY**  
**JUDGMENT**

COMES NOW defendant, Johnson Thermal Systems, Inc. ("Johnson Thermal"), by and through undersigned counsel of record, and hereby files its memorandum in opposition to

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION  
FOR SUMMARY JUDGMENT - 1**

Plaintiff Caldwell Land and Cattle, LLC's ("CLC") cross-motion for summary judgment and reply to Johnson Thermal's motion for summary judgment.

### INTRODUCTION

Johnson Thermal has brought a very narrow motion for summary judgment on a very discrete issue: whether or not the right to an extension contained in the Third Lease Agreement is clear and unambiguous. If it the Third Lease Agreement is unambiguous, then, as a matter of law, Johnson Thermal's payment of—and the Gilbert Family Limited Partnership's ("GFLP") acceptance of—\$6,000.00 base rent extended the lease term for an additional six months. If it is not clear and unambiguous, then the ambiguity gives rise to issues of fact that need to be resolved by the trier of fact.

In response to Johnson Thermal's motion for summary judgment on this narrow issue, CLC re-invigorated the same arguments that it raised last August on its own motion for summary judgment. Johnson Thermal hereby adopts and incorporates by reference all of the pleadings and evidence submitted in opposition to CLC's first motion for summary judgment, wherein the same or similar arguments were made. This Court rejected CLC's arguments last August and, for the same reasons such arguments were rejected last August, they should be rejected again today: if the document is ambiguous, there are simply too many genuine issues of material fact that preclude summary judgment.

The motion for summary judgment brought by Johnson Thermal is distinct from the issues addressed last August because, last August, Johnson Thermal had not conducted sufficient discovery to ensure that there was not some hidden fact, some course of dealing by and between the parties, that would be sufficient to interject an ambiguity into what seemed—even then—to be an unambiguous document: pay the stated rate of \$6,000 and extend the lease term for six-

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION  
FOR SUMMARY JUDGMENT - 2**

months. After having conducting thorough discovery, it is clear that the lease term means what it says. CLC has not advanced any argument or authority supporting its position that the Third Lease Agreement is ambiguous and, for the reasons that follow, summary judgment on this narrow issue should be granted in favor of Johnson Thermal.

### **RESPONSE TO DISPUTED FACTS**

1. CLC attempts to raise a dispute regarding Johnson Thermal's statement of fact No. 5. For Johnson Thermal's statement of fact No. 5, Johnson Thermal presented evidence tending to show that "it was Hagood's understanding that the most important reason to reduce any amendment to writing was to make sure that the amount of the lease payments were in writing." CLC disputes this fact, arguing instead that "Hagood testified that he was instructed to put the first and third amendments in writing to ensure that the Gilbert's were paid." Insofar as it speaks to the points raised on the present motion for summary judgment, the distinction between whether lease agreements were reduced to writing to (i) ensure that the amount of lease payments were in writing vs. (ii) ensure that the Gilbert's got paid is a distinction without meaning and, therefore, irrelevant.

2. CLC attempts to raise a dispute regarding Johnson Thermal's statement of fact No. 12. For Johnson Thermal's Statement of Fact No. 12, Johnson Thermal presented evidence regarding why the GFLP and Johnson Thermal agreed to the \$6,000 and \$6,250 lease rates that appeared in the Third Lease Amendment. In its attempt to dispute this fact, CLC presented evidence on the question of why the right to extend beyond October 15, 2014, existed in the Third Lease Amendment. Because CLC's evidence does not refute the point asserted by Johnson Thermal in Statement of Fact No. 12, such fact remains undisputed. Accordingly, the only evidence in the record regarding why the rates were set at \$6,000 (for six-month extension)

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 3**

and \$6,250 (for month-to-month) is that, at the time the parties entered into the third lease extension, it was important to Arlene Gilbert to have the additional security associated with having a tenant committed to remain in the building for an additional six months beyond October 12, 2014. Accordingly, the \$6,000.00, though it was a lower payment, represented a more secure position to the GFLP. It was, therefore, to her advantage to accept the \$6,000.00 payment as payment at that rate committed JTS into an additional six-month lease.

3. CLC attempts to raise a dispute regarding Johnson Thermal's statement of fact No. 14. For Johnson Thermal's statement of fact No. 14, Johnson Thermal presented evidence that Johnson Thermal paid \$6,000.00 for two months beyond the October 15, 2014, expiration date. Johnson Thermal then further observed that the Third Lease Agreement expressly stated that \$6,000.00 was the amount that would trigger the six-month extension. In opposition to this fact, CLC attempted to argue that GFLP accepted the \$6,000.00 payment because GFLP understood that it was continued payments as a month-to-month tenant. **Importantly, CLC does not provide any citation to the record to support this assertion.** Also important, CLC's proposed interpretation of GFLP's undisclosed subjective intent, for which it cited no record evidence, is that it is directly contrary to the express written terms of the Third Lease Agreement.

#### ARGUMENT

**A. Caldwell Land and Cattle makes no argument and presents no authority in opposition to Johnson Thermal's position that the third lease amendment is clear and unambiguous.**

In its moving papers, Johnson Thermal argued that the Third Lease Agreement is clear and unambiguous and that, according to its express terms, payment of \$6,000.00 is all that was required for Johnson Thermal to exercise its right to extend the lease for an additional six-month period. CLC failed to address this argument. Instead, CLC—repeating what it presented in its

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 4**

first motion for summary judgment, which was denied by this Court—argued that the terms of the Lease could not be modified without a writing signed by all of the parties.

The problem with CLC's reliance on this argument is that the portion of the lease provision that Johnson Thermal is asking this Court to interpret is not a modification of the lease; rather, it is the lease itself. Johnson Thermal is asking this Court to interpret and apply the lease according to its express terms. CLC's discussion about what is required to modify the lease is wholly irrelevant to the present analysis because—as Johnson Thermal makes clear—there is nothing to be modified in order for Johnson Thermal to extend the lease for six-months.

The Third Lease Agreement contemplates both a six-month extension and a month-to-month extension and it expressly states how Johnson Thermal is to elect between the two: pay \$6,000/month for a six-month extension; pay \$6,250/month for a month-to-month extension. There is no dispute that JTS paid the base rent of \$6,000.00. There is no dispute that the base rent was set at \$6,000.00 because Arlene Gilbert wanted the security associated with having a tenant locked into place for six-months, rather than on a month-to-month basis. Memorandum in Support of Motion for Partial Summary Judgment, SOF ¶ 12. The only question to be resolved by this Court on Johnson Thermal's motion for summary judgment is whether Johnson Thermal's payment of \$6,000.00 extended the lease for an additional six months as a matter of law.

CLC's reliance on the contractual requirement that modifications to the lease be put into writing is misplaced because the at-issue lease provisions do not involve modifications; rather, they involve enforcing the Third Lease Agreement in accordance with its express terms. Because CLC has not offered any argument or authority countering Johnson Thermal's position

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 5**

that the Third Lease Agreement was clear and unambiguous, this Court can and should grant Johnson Thermal's motion for summary judgment.

**B. CLC has failed to address Johnson Thermal's position that GFLP and Johnson Thermal waived the 60-day requirement for lease extensions.**

The only term of the lease that CLC could possibly have relied on to refute Johnson Thermal's position is the requirement that Johnson Thermal give the GFLP 60-days written notice of its intent to exercise a lease extension. On this point, Johnson Thermal argued that it and the GFLP had, through their course of dealing, waived that 60-days written notice requirement because it had not been used once during the history of the lease terms by and between these two parties. Johnson Thermal further argued that, as a stranger to the contract and the relationship and not having even entered into the picture until after Johnson Thermal had made two payments at the \$6,000 rate, CLC was not in a position to dispute whether Johnson Thermal and GFLP had waived that contractual position. Again, CLC did not refute any of Johnson Thermal's evidence or authority on these points.

To the extent that CLC's briefing can be construed to have addressed this argument at all, section B (pages 11-12) appear to be the closest attempt. However, in that section, rather than arguing that Johnson Thermal failed to give the required 60-day notice to extend the lease term, CLC argues instead that Johnson Thermal (i) manifested an intent to become a month-to-month tenant while (ii) paying \$6,000.00 (which is the lease rate for a six-month extension). That is to say, CLC argues that Johnson Thermal made payments in direct contravention and violation of the express terms of the lease—but that nobody ever raised an objection. Tellingly, despite CLC's attempts to argue that it was clear to both GFLP and Colliers that Johnson Thermal wanted to continue as a month-to-month tenant there is no evidence in the record that either the

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 6**

GFLP or its agent, Colliers, attempted to enforce the lease according to its terms: i.e., requiring Johnson Thermal to pay the amounts required by the express terms of the lease.

CLC's reliance on this evidence does little to nothing to help prove its points that the parties strictly adhered to the written terms of the lease: to the contrary, CLC's reliance on this evidence shows that the parties were—at best—very informal in adhering to those terms of the lease upon which CLC wishes to rely.

**C. In the event that this Court disagrees with Johnson Thermal's position that the Third Lease Agreement is unambiguous, there are genuine issues of material fact regarding whether Johnson Thermal was a hold-over tenant that otherwise preclude summary judgment in favor of CLC.**

As this Court previously determined in its Memorandum Decision and Order Denying Partial Summary Judgment, there are issues of fact precluding summary judgment on Plaintiffs' theory that Johnson Thermal Systems was a holdover tenant. *See* ROA, filed August 14, 2015, p. 5. Without presenting any new evidence on that point, Plaintiff again attempts to bring this issue before the Court. However, for the same reasons that summary judgment on these issues was not appropriate in August of last year, they remain inappropriate at this stage of the litigation.

### CONCLUSION

For the foregoing reasons, Johnson Thermal respectfully requests that this Court enter partial summary judgment on the issue of whether Johnson Thermal effectively exercised the six-month extension right provided in the Third Lease Agreement.

Dated this 7th day of April, 2016.

FISHER RAINEY HUDSON



Rebecca A. Rainey—of the firm  
Attorneys for Defendants

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 7**

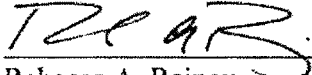


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7th day of April, 2016, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

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Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Email

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorneys for Defendant*

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT - 8**

**F I L E D**  
A.M. 4:50 P.M.

**APR 18 2016**

**CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY**

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*Attorneys for Plaintiffs*

---

**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**PLAINTIFF'S REPLY MEMORANDUM  
IN SUPPORT OF CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Civil No.: CV15-587

Judge Nye

---

Pursuant to Rule 56 of the Idaho Rules of Civil Procedure, Plaintiff, Caldwell Land & Cattle, LLC a/k/a Caldwell Land & Cattle Company, LLC (collectively, "Caldwell Land" or "Plaintiff"), by and through counsel of record, Strong and Hanni law firm, submits this Reply Memorandum filed in support of its previously filed Cross-Motion for Summary Judgment against Defendant Johnson Thermal Systems, Inc. ("Defendant").

## INTRODUCTION

While conceding that the terms of the Lease<sup>1</sup> require any amendments, modifications, or changes to be in writing, Defendant argues that it exercised an option to extend the Lease, despite lack of any written agreement extending the Lease, because it continued to make payments after the term of the Lease expired. The express terms of the Lease are clear that it “may not be amended, modified, or changed except by a writing signed by all parties hereto.” *Bullock Aff.* Ex. D, at 5. Thus, in order for Defendant to have exercised the option there must have been some writing extending the Lease. For there to be a written agreement, there necessarily must have been communications between GFLP and Defendant in which they agreed to all the terms of the extension and a document signed by each of them. Because each of these essential facts are clearly absent, there was no agreement to extend the Lease beyond October 15, 2014, and Defendant’s subsequent payments on the Lease were continued payments under the previous lease extension. Additionally, the parties’ course of dealing demonstrates that all previous amendments, additions, extensions, or changes to the Lease had always been communicated to GFLP before being subsequently reduced to a written agreement signed by each party. Because Defendant’s claimed exercise of the option to extend was not communicated to GFLP, was not reduced to writing, and because Defendant failed to timely vacate and surrender the property at the expiration of the notice of termination, Defendant is in breach of the lease agreement and liable for unlawful detainer pursuant to Idaho Code § 6-303. Accordingly, summary judgment should be entered in favor of Caldwell Land.

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<sup>1</sup> Unless otherwise noted, all capitalized terms shall have the same meaning as in Plaintiff’s Memorandum in Support.

## ARGUMENT

### **A. There was no agreement to extend the Lease beyond October 15, 2014.**

Formation of a valid contract requires a meeting of the minds as evidenced by a manifestation of mutual intent to contract. *Inland Title v. Comstock*, 116 Idaho 701, 701 (1989). This manifestation takes the form of an offer followed by acceptance. *Id.* An acceptance is not complete until it has been communicated to the offeror. *See* IDJI 6.05.2. Acceptance of an offer must be unequivocal. *Huyett v. Idaho State Univ.* 140 Idaho 904, 909, (2004).

In this case there was no valid agreement between Defendant and GFLP extending the Lease beyond October 15, 2014, because there was no communications from Defendant demonstrating its intent to exercise the option, no discussion of additional terms, no acceptance of the option to exercise by GFLP, and no written agreement which would have served extended the Lease. As it relates to the option, the Third Lease Amendment provides that Defendant had the “option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis . . .” at agreed upon rates. Thus, the language of the Lease is clear that Defendant only had the “option” to extend either by six months or on a month-to-month term. In order to exercise that option, Defendant must have communicated its intent to GFLP and subsequently reduced these communications to a written document signed by both parties because pursuant to express Lease terms there must be a written and signed agreement to extend the Lease. *Bullock Aff. Ex D (CALD00044)*; *Bullock Aff. Ex. E4 (CALD0039)*. Defendant admits it never communicated to GFLP regarding its intent or desire to extend the Lease beyond October 15, 2014,

and thus there are no terms by which the parties could come to a written agreement. *Bullock Aff. Ex. C (Gustaveson Depo. 20:16-23)*.

Defendants claim that it exercised the option rests only on the assertion that it continued to make monthly payments on the Lease after October 15, 2014. However, absent from the Lease is any language that continued payments under the Lease will act as an exercise of the option. Rather, the Third Lease Amendment simply provides the rates at which the parties would agree to extend the Lease. Because Defendant never communicated its intent to exercise the option and GFLP never communicated its assent regarding the extension no agreement was ever formed extending the Lease beyond October 15, 2014, and thus summary judgment should be granted in favor of Plaintiff.

**B. The course of dealing between GFLP and Defendant demonstrates that they always communicated regarding previous Lease extensions.**

Defendant argues that it and GFLP, through their course of dealing, waived the 60-day written notice requirement because it had not been used during the history of the Lease. While Defendant may not have provided written notice to exercise previous lease extensions, it always communicated in some way to GFLP regarding its intent to renew or extend the Lease. These communications were typically made between GFLP's lease agent, Lincoln Hagood at Colliers International, and Defendant. *Bullock Aff. Ex. B (Gilbert Depo. 57:2-5, 56:21-57:5)*. Markedly different from this previous course of conduct is the lack of any communication at all from Defendant to GFLP expressing its desire to exercise the option to extend the Lease beyond the Third Amendment. *Bullock Aff. Ex. C (Gustaveson Depo. 20:16-23)*. Indeed, Defendant admits to never having communicated in writing or orally to GFLP regarding its exercise of the option to

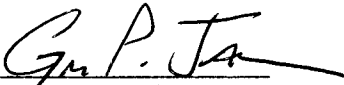
extend. *Id.* This is so because Defendant never intended to exercise this six-month extension which is apparent and evidenced by numerous emails wherein Defendant indicated to GFLP that it only intended to occupy the Property, at most, a few months after October 14, 2015. *See, Bullock Aff.* Exs. F, G, H. Thus, it is plainly clear from the parties' previous course of dealing that if Defendant wanted to extend the Lease it would have communicated this intent to GFLP and the parties would have executed a written agreement. But they did not. Defendant's own actions and words indicate that Defendant did not want or intend to lock itself into a six month lease extension. *Id.* Thus, the evidence before the Court demonstrates that Defendant did not exercise its option to extend the Lease, based on the lack of a written agreement to do so, and based upon Defendant's own statements and admissions that it only intended to stay in the Property at most a few months past October 15, 2014, and therefore summary judgment should be granted in favor of Plaintiff.

### CONCLUSION

For the foregoing reasons, and those stated in its initial and opposing memorandum, Plaintiff respectfully requests that Defendant's motion for summary judgment be denied and summary judgment entered in favor of Plaintiff.

DATED this 14<sup>th</sup> day of April, 2016.

STRONG & HANNI

  
Robert L. Janicki  
Graden P. Jackson  
Ryan C. Bullock  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of April, 2016, a true and correct copy of the foregoing

**REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** was served by the method indicated below, to the following:

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- Overnight Mail
- Facsimile
- CM/ECF Filing
- Email Transmission

*Rhonda Wecker*  
\_\_\_\_\_

**FILED**  
APR 23 2016 P.M.

**APR 23 2016**

**CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY**

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

**Case No. CV 15-587**

**ORDER GRANTING MOTION FOR  
LEAVE TO ADD THIRD PARTY AND  
DENYING DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND PLAINTIFF'S CROSS MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

THIS MATTER having come before the Court on Defendant Johnson Thermal System's Motion for Leave to Add Third Party, Defendant's Motion for Partial Summary Judgment, and Plaintiff's Cross Motion for Partial Summary Judgment, with all matters being heard on April 21, 2016, and good cause appearing therefore, it is hereby ORDERED that:

Defendant Johnson Thermal System's Motion for Leave to Add Third Party is GRANTED. All pleading hereinafter filed shall have the appropriate caption and Defendant has 10 days from the date of this order to file its Third Party Complaint.

Defendant Johnson Thermal System's Motion for Partial Summary Judgment is DENIED.

Plaintiff Caldwell Land & Cattle's Cross-Motion for Partial Summary Judgment is DENIED.

**ORDER GRANTING MOTION FOR LEAVE TO ADD THIRD PARTY AND DENYING  
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT - 1**



IT IS SO ORDERED.

DATED this 26<sup>th</sup> day of April, 2016.



Christopher Nye, District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26 day of April, 2016, I caused a true and correct copy of the foregoing **ORDER GRANTING MOTION FOR LEAVE TO ADD THIRD PARTY AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served upon the following individuals in the manner indicated below:

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- Email



Clerk of the Court

**ORDER GRANTING MOTION FOR LEAVE TO ADD THIRD PARTY AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT - 2**

**FILED**  
A.M. 5:50 P.M.

**APR 28 2016**

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*Attorneys for Defendant/Counterclaimant/Third Party Plaintiff*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant/Counterclaimant/Third  
Party Plaintiff,

v.

COLLIERS PARAGON LLC, an Idaho  
limited liability company.

Third Party Defendant.

**Case No. CV 15-587**

**THIRD PARTY COMPLAINT**

### **THIRD PARTY CLAIM**

Third Party Plaintiff, JOHNSON THERMAL SYSTEMS, INC. an Idaho corporation, by and through FISHER RAINEY HUDSON and BJORKMAN DUNN PLLC, its attorneys of record, complains and alleges as follows:

#### **PARTIES, JURISDICTION AND VENUE**

1. Johnson Thermal Systems, Inc. is an Idaho corporation (“Johnson Thermal”), with its principal place of business in Caldwell, Idaho.
2. Caldwell Land & Cattle, LLC, a/k/a Caldwell Land & Cattle Company, LLC is an Idaho limited liability company (collectively “Caldwell Land”) doing business in and around Canyon County, Idaho.
3. Caldwell Land owns the real property forming the basis for this action, which property is located at 1505 Industrial Way, Caldwell, Canyon County, Idaho (“Property”).
4. Colliers Paragon LLC (“Colliers”) is an Idaho limited liability company with its principal place of business in Ada County, Idaho.
5. Colliers facilitated the lease of the Property between the Gilbert Family Limited Partnership and Johnson Thermal. Colliers also facilitated the sale of the Property from Gilbert Family Limited Partnership to Caldwell Land on December 31, 2014.
6. Jurisdiction is proper before this District Court pursuant to Idaho Code § 5-514.
7. Venue is proper before this District Court pursuant to Idaho Code §§ 5-401 and 5-404.
8. The amount in controversy exceeds the jurisdictional amount of ten thousand dollars (\$10,000.00).

## BACKGROUND

9. Johnson Thermal leased the Property pursuant to a Commercial Lease Agreement entered into February 10, 2012, by and between Johnson Thermal as Lessee and Gilbert Family Limited Partnership as Lessor (“Commercial Lease”).

10. The Commercial Lease has been amended three times, to wit: that certain First Amendment signed in March 2012 (“First Amendment”), that certain First Amendment signed in March 2013 (“Second Amendment”), and that certain Third Lease Amendment dated April 15, 2014 (“Third Amendment”).

11. The Commercial Lease together with the First Amendment, the Second Amendment and the Third Amendment are collectively referred to as the “Lease.”

12. Among other things, the Third Amendment extends the term of the Lease until October 15, 2014, and grants the following option:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000.00/mo
- b. Month to Month Term: Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

13. The Third Amendment is silent regarding the mechanism for exercising such option to extend the term.

14. The Commercial Lease, First Amendment and Second Amendment do not contain any directive for exercising the option contained in the Third Amendment.

15. The Third Amendment to the Commercial Lease was prepared by Colliers agent, Lincoln Hagood, representing the Gilbert Family Limited Partnership.

16. The Gilbert Family Limited Partnership and Colliers were aware Johnson Thermal had outgrown the existing building and would eventually move from the Property to new space under construction in Caldwell, Idaho; however, there was no certainty concerning the date the new space would be ready for occupancy.

17. Following the expiration of the third lease agreement on October 15, 2014, Johnson Thermal continued to occupy the Property under the authority given by the parties' contract, and during such continued period of occupation, paid base rent of \$6,000, the rate specified to extend the lease for an additional six-month term.

18. The Gilbert Family Limited Partnership manifested its acceptance of the six-month extension by accepting base rent for November and December in the amount of \$6,000.00 each without any making any communication concerning the term of the Lease or demanding rent at the higher month-to-month rate.

19. Colliers was aware of Johnson Thermal's Lease because Colliers was the agent for the Gilbert Family Limited Partnership through the duration of the lease of the property from the Gilbert Family Limited Partnership to Johnson Thermal. With respect to the third lease amendment, Colliers' representation of Gilbert Family Limited Partnership included negotiating and drafting the lease that was signed by Gilbert Family Limited Partnership.

20. Sometime in late November, early December of 2014, Colliers—still representing the Gilbert Family Limited Partnership with respect to the Property—found a buyer for the Property: Caldwell Land.

21. After entering into contract on the Property, Caldwell Land claimed that it was unaware that the existing tenant, Johnson Thermal, would be unable to vacate the Property in

time to allow Caldwell Land to meet a December 31, 2014 closing date and take possession of the Property with no tenants in it.

22. In order to facilitate a December 31, 2014 closing under terms satisfactory to Caldwell Land, Colliers caused the Gilbert Family Limited Partnership to send a Notice of Termination to Johnson Thermal, requiring it to be out of the building not later than January 31, 2015.

23. Colliers' agent, Lincoln Hagood, testified that the Gilbert Family Limited Partnership sent the Notice of Termination because otherwise Caldwell Land would back out of the sale of the Property.

24. Upon information and belief, the Gilbert Family Limited Partnership sent the Notice of Termination to Johnson Thermal because Colliers directed it to do so.

25. Johnson Thermal countered the Notice of Termination on December 22, 2014, contending that the Lease expires in April 2015 hence any eviction would breach the Lease.

26. Prior to closing the sale of the Property between the Gilbert Family Limited Partnership and Caldwell Land, Colliers knew that Caldwell Land intended to break Johnson Thermal's lease of the Property.

27. In exchange for Colliers' reducing its commission by \$20,000, Caldwell Land agreed to move forward with the sale and released Colliers from liability for, among others, all claims arising from Johnson Thermal's occupancy of the Property.

28. The sale of the Property from the Gilbert Family Limited Partnership to Caldwell Land closed on December 31, 2014.

29. Upon information and belief, Caldwell Land made its purchase with full knowledge that Johnson Thermal occupied the Property and contended the term of the Lease did not expire until April 2015.

30. Following the purchase of the property, Caldwell Land brought an unlawful detainer against Johnson Thermal to vacate the property, thereby constructively evicting Johnson Thermal from the Property. Johnson Thermal has had to defend such lawsuit, resulting in costs and attorney's fees.

31. As a result of such constructive eviction, Johnson Thermal had to engage in an expedited move out of the Property, resulting in significant additional cost and expense to itself.

**COUNT ONE**  
**(Tortious Interference with Contract)**

32. Johnson Thermal re-alleges and incorporates paragraphs 1-31 as if fully set forth herein.

33. A contract for the lease of the Property existed between Johnson Thermal and the Gilbert Family Limited Partnership, i.e. the Third Amended lease provided that Johnson Thermal could exercise the option to extend the lease by six-months, which would expire on April 15, 2015, at a rate of \$6,000 per month.

34. Johnson Thermal exercised the option by paying the rate of \$6,000 per month in November and December of 2014.

35. Colliers had knowledge of the lease agreement between Johnson Thermal and the Gilbert Family Limited Partnership because Lincoln Hagood of Colliers represented the Gilbert Family Limited Partnership in all of its dealings with Johnson Thermal respecting the lease, including but not limited to negotiating and drafting the third lease extension.

36. Colliers intentionally interfered the lease between Johnson Thermal and the Gilbert Family Limited Partnership by (i) listing the Property for sale without making clear to prospective purchasers the nature of the existing tenant's right to occupy the Property; (ii) causing the Gilbert Family Limited Partnership to send to Johnson Thermal the December 11, 2014, Notice of Termination so as to facilitate the sale of the Property to Caldwell Land; (iii) reducing by \$20,000.00 its commission to be earned on the sale of the Property to facilitate the sale of the Property to Caldwell Land, despite knowing that Caldwell Land intended to aggressively pursue legal action against Johnson Thermal in breach of the agreements and course of dealing that Johnson Thermal had with the Gilbert Family Limited Partnership.

37. As a result of Colliers' intentional actions, Caldwell Land purchased the property and aggressively sought to remove Johnson Thermal from the Property, constructively evicting them from the premises.

38. Colliers' intentional interference with Johnson Thermal's lease agreement with the Gilbert Family Limited Partnership exposed Johnson Thermal to lawsuits from Caldwell Land asserting claims for, inter alia, wrongful detainer, breach of contract, and breach of the duty of good faith and fair dealing. To the extent that Johnson Thermal is found to be liable on such claims, such liability stems directly from Colliers' tortious interference with Johnson Thermal's contract with the Gilbert Family Limited Partnership and, accordingly, Colliers shall be liable for any judgment thereon.

39. Alternatively, if Johnson Thermal is not found liable under any of Caldwell Land's claims for relief, Colliers should be held liable, jointly and severally with Caldwell Land, for damages incurred by Johnson Thermal for having to vacate the property on an expedited



basis and defend itself in the present lawsuit as a result of Colliers' tortious interference with its contract with the Gilbert Family Limited Partnership.

**ATTORNEYS' FEES AND COSTS**

40. Johnson Thermal re-alleges and incorporates paragraphs 1-39 as if fully set forth herein.

41. Johnson Thermal has been required to employ the services of its attorneys to prosecute and defend this matter.

42. Johnson Thermal has incurred and will continue to incur attorneys' fees and costs in connection with this lawsuit.

43. Johnson Thermal is entitled to recover, and hereby makes a claim for recovery of all reasonable attorney fees, costs, and disbursements incurred herein, pursuant to Idaho Code §§ 12-120(1), 12-121, and Idaho Rule of Civil Procedure 54.

44. In the event Johnson Thermal is granted a default judgment, a reasonable award of attorneys' fees and costs is Ten Thousand Dollars (\$10,000.00).

**PRAYER FOR RELIEF**

WHEREFORE, Johnson Thermal prays for the following relief against Colliers:

1. Judgment in the amount of \$25,000.00 in favor of Johnson Thermal and against Colliers for any liability imposed against Johnson Thermal stemming from Colliers' tortious interference with Johnson Thermal's contract with Gilbert Family Limited Partnership;

2. Alternatively, judgment in the amount of \$25,000.00, in favor of Johnson Thermal and against Colliers for damages sustained by Johnson Thermal in having to facilitate vacating the Property on an expedited basis as a result of Caldwell Land's constructive eviction

of Johnson Thermal and for costs and attorney's fees incurred by Johnson Thermal in defending against the legal actions brought by Caldwell Land.

3. For reasonable attorney fees and costs incurred in connection with this lawsuit, which amount shall be Ten Thousand Dollars (\$10,000.00) if Johnson Thermal is granted a default judgment;

4. Such other relief as the Court deems appropriate.

DATED this 25<sup>th</sup> day of April, 2016.

FISHER RAINEY HUDSON


By: Rebecca A. Rainey  
Rebecca A. Rainey – of the firm  
*Attorneys for Defendant/Counter-  
Claimant/Third Party Plaintiff*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25<sup>th</sup> day of April, 2016, I caused a true and correct copy of the foregoing **THIRD PARTY COMPLAINT** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax:(801)596-1508

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

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorneys for Defendant/Counter-  
Claimant/Third Party Plaintiff*

FILED 003/008  
A.M. 4:14 P.M.  
JUN 07 2016

CANYON COUNTY CLERK  
M MARTINEZ, DEPUTY

Bruce R. McAllister, ISB No. 2531  
Leslie S. Brown, ISB No. 5665  
CAREY PERKINS LLP  
Capitol Park Plaza  
300 North 6<sup>th</sup> Street, Suite 200  
P. O. Box 519  
Boise, Idaho 83701  
Telephone: (208) 345-8600  
Facsimile: (208) 345-8660

Attorneys for Colliers Paragon LLC

IN THE DISTRICT COURT OF  
THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY,

Plaintiff/Counter-Defendant,

vs.

JOHNSON THERMAL SYSTEMS, INC.,  
an Idaho corporation,

Defendant/Counterclaimant/  
Third Party Plaintiff,

vs.

COLLIERS PARAGON LLC, an Idaho  
limited liability company,

Third Party Defendant.

Case No. CV 15-587

DEFENDANT COLLIERS PARAGON  
LLC'S ANSWER TO THIRD-PARTY  
COMPLAINT AND DEMAND FOR  
JURY TRIAL

DEFENDANT COLLIERS PARAGON LLC'S ANSWER TO THIRD-PARTY COMPLAINT  
AND DEMAND FOR JURY TRIAL - 1

COME NOW the Third-party Defendant, Colliers Paragon LLC, by and through its counsel of record, Carey Perkins LLP, and hereby answers the Third Party Complaint in the above-entitled matter as follows:

**FIRST DEFENSE**

The Third-Party Complaint fails to state facts sufficient to state a cause of action on which relief can be granted.

**SECOND DEFENSE**

1. Third-Party Defendant denies each and every allegation of the Third-Party Plaintiff's Complaint not herein expressly and specifically admitted.

2. Third-Party Defendant admits that Defendant Colliers Paragon, LLC ("Colliers") is a an Idaho Professional Limited Liability Company with its principal place of business in Boise, Ada County, Idaho.

3. Third-Party Defendant admits that subject matter jurisdiction is proper pursuant to Idaho Code § 5-514.

4. Third-Party Defendants admit venue is proper in Canyon County pursuant to Idaho Code § 5-401 and 5-404.

**THIRD DEFENSE**

Third-Party Defendant did not interfere with any alleged contract or lease agreements between Third-Party Plaintiff Johnson Thermal Systems and the Gilbert Family Limited Partnership and, therefore, did not cause a breach of such contract.

**FOURTH DEFENSE**

Third-Party Defendant Colliers was not a party to any contract or lease agreement between Third-Party Plaintiff and the Gilbert Family Limited Partnership.

DEFENDANT COLLIERS PARAGON LLC'S ANSWER TO THIRD-PARTY COMPLAINT  
AND DEMAND FOR JURY TRIAL - 2

**FIFTH DEFENSE**

Third-Party Plaintiff has failed to mitigate its damages.

**SIXTH DEFENSE**

Third-Party Plaintiff is not the real party in interest with respect to all or part of its claims, contrary to Rule 17 of the Idaho Rules of Civil Procedure.

**SEVENTH DEFENSE**

Third-Party Plaintiff was guilty of negligence, careless, reckless and/or intentional misconduct at the time of and in connection with the matter and damages alleged, which misconduct on its part proximately caused and contributed to said events and resultant damages, if any.

**EIGHTH DEFENSE**

The Third-Party Plaintiff's damages, if any, were proximately caused by the negligence, omissions, actions, or comparative fault of other third persons or entities, for which the Third-Party Defendant is not legally responsible, and the responsibility should be compared by Idaho law.

**NINTH DEFENSE**

The Third-Party Plaintiff's claims may be barred by the equitable doctrines of laches and/or unclean hands.

**TENTH DEFENSE**

Third-Party Plaintiff may have waived or by its conduct may be estopped from asserting the matters alleged in its Third-Party Complaint.

**ELEVENTH DEFENSE**

Third-Party Plaintiff may lack the capacity or right to sue or be sued.

**DEFENDANT COLLIERS PARAGON LLC'S ANSWER TO THIRD-PARTY COMPLAINT  
AND DEMAND FOR JURY TRIAL - 3**

**TWELFTH DEFENSE**

Third-Party Defendant had just cause for its actions.

**THIRTEENTH DEFENSE**

Third-Party Defendant's communications and actions were privileged.

**FOURTEENTH DEFENSE**

Third-Party Defendant's communications were true at the time fo the alleged intentional conduct. The third Lease Agreement had expired on October 15, 2014. Accordingly, there was not a valid economic expectancy for such contract to continue longer than a month to month term.

**FIFTEENTH DEFENSE**

If any contract, oral or otherwise, existed pursuant to the subject lease terms between Third-Party Plaintiff and The Gilbert Family Limited Partnership, Third-Party Plaintiff's own actions interfered with the relationship, if any. Third-Party Defendant did not intend to interfere with any such relationship.

**SIXTEENTH DEFENSE**

The Third-Party Plaintiff's claims may be barred by ratification.

**PRAYER FOR RELIEF**

WHEREFORE, Third-Party Defendant prays for relief as follows:

1. That the Third-Party Plaintiff take nothing by way of the Third-Party Complaint and that the claim against Third-Party Defendant be dismissed with prejudice.
2. That Third-Party Defendant be awarded its attorney fees and costs pursuant to all applicable law, including, but not limited to, Idaho Code § § 12-120, 12-121 and I.R.C.P. 54.

DEFENDANT COLLIERS PARAGON LLC'S ANSWER TO THIRD-PARTY COMPLAINT  
AND DEMAND FOR JURY TRIAL - 4

4. That this Court award Third-Party Defendant such other and further relief as the Court deems just and equitable in the premises.

**JURY DEMAND**

Third-Party Defendant demands a trial by jury of 12 as to all issues.

DATED this 7<sup>th</sup> day of June, 2016.

CAREY PERKINS LLP

By 

Bruce R. McAllister, Of the Firm  
Leslie S. Brown, Of the Firm  
Attorneys for Colliers Paragon LLC



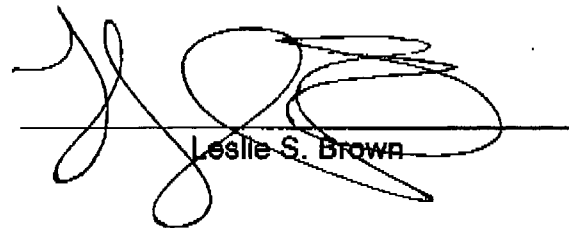
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of June, 2016, I served a true and correct copy of the foregoing DEFENDANT COLLIERS PARAGON LLC'S ANSWER TO THIRD-PARTY COMPLAINT AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Graden Jackson	<input type="checkbox"/>	U.S. Mail, postage prepaid
STRONG & HANNI	<input type="checkbox"/>	Hand-Delivered
9350 South 150 East, Suite 820	<input type="checkbox"/>	Overnight Mail
Sandy, Utah 84070	<input checked="" type="checkbox"/>	Facsimile: (801) 596-1508
Telephone: (208) 532-7080		
Attorneys for Plaintiff/Counter-Defendant		

Rebecca Rainey	<input type="checkbox"/>	U.S. Mail, postage prepaid
FISHER RAINEY HUDSON	<input type="checkbox"/>	Hand-Delivered
950 W. Bannock, Suite 630	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83702	<input checked="" type="checkbox"/>	Facsimile: (208) 514-1900
Telephone: (208) 345-7000		
Attorneys for Defendant/Counterclaimant/Third Party Plaintiff		

Kristin Bjorkman Dunn	<input type="checkbox"/>	U.S. Mail, postage prepaid
BJORKMAN DUNN PLLC	<input type="checkbox"/>	Hand-Delivered
121 N. 9 <sup>th</sup> Street, Suite 300	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83702	<input checked="" type="checkbox"/>	Facsimile: (208) 330-3700
Telephone: (208) 639-1458		
Attorneys for Defendant/Counterclaimant/Third Party Plaintiff		



Leslie S. Brown



**CERTIFICATE OF SERVICE**

STATE OF IDAHO,            )  
  ) ss  
COUNTY OF CANYON        )

I HEREBY CERTIFY that a true and correct copy of the foregoing FINAL JUDGMENT was forwarded to the following:

Graden P. Jackson  
Ryan C. Bullock  
STRONG & HANNI  
9350 South 150 East, Ste. 820  
Sandy, UT 84070

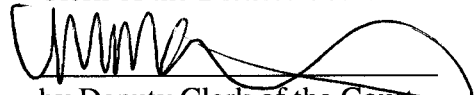
Rebecca A. Rainey  
Allison Blackman  
FISHER RAINEY HUDSON  
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Boise, ID 83702

Kristin Bjorkman Dunn  
BJORKMAN DUNN, PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

Bruce R. McAllister  
Leslie S. Brown  
CAREY PERKINS, LLP  
P.O. Box 519  
Boise, ID 83701

Either by depositing the same in the U.S. mail, first class postage prepaid, or by personal service.

DATED this   11   day of April, 2016.

Chris Yamamoto  
Clerk of the District Court  
  
by Deputy Clerk of the Court

**F I L E D**  
A.M. *3:01* P.M.

**JUN 15 2017**

**CANYON COUNTY CLERK  
J COTTLE, DEPUTY CLERK**

Kristin Bjorkman Dunn, ISB No 4613  
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Angie Perkins, ISB No. 10113  
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*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant/Counterclaimant/Third  
Party Plaintiff,

v.

COLLIERS PARAGON LLC, an Idaho  
limited liability company.

Third Party Defendant

**Case No. CV 15-587**

**PRETRIAL BRIEF**

**DEFENDANT'S PRETRIAL BRIEF - 1**

COMES NOW Plaintiff, Johnson Thermal Systems, Inc. by and through its counsel of record, FISHER RAINEY HUDSON, and hereby submits this Pretrial Brief, pursuant to this Court's Third Amended Order Setting Pretrial Conference and Jury Trial (filed Nov. 16, 2016).

### **INTRODUCTION**

This case is a dispute between the tenant of a building Johnson Thermal Systems ("JTS") and a successor landlord ("Peterbilt"), who came into the rights of the prior landlord through the purchase of the building. The crux of the dispute is whether JTS effectively exercised its right to extend its lease term for six months, giving it until April 15, 2015 to vacate the building. JTS maintains it did properly exercise the lease extension; Peterbilt claims that JTS did not. Peterbilt claims that, at the time it purchased the property, JTS was a month-to-month tenant and was required to vacate the property not later than January 31, 2015.

### **Defenses to Plaintiff's Claims**

#### **I. Unlawful Detainer and Damages**

Peterbilt's claim for unlawful detainer rests entirely on whether JTS effectively extended the lease for an additional six months. If the trier of fact finds that JTS did not effectively extend the lease, then Johnson Thermal was required to vacate the property on or before January 31, 2015, and is liable to Peterbilt for damages stemming from its holding over on the property.

If the trier of fact finds that JTS effectively extended the lease, Peterbilt's claim for unlawful detainer fails entirely and Peterbilt is liable to JTS for damages stemming from Peterbilt's early termination of the lease and wrongful eviction of JTS from the premises.

**II. Breach of Contract**

Peterbilt's claim for breach of contract rests upon the same set of operative facts governing the wrongful detainer: if the contract was extended for six months, Peterbilt's breach of contract claim fails. If not, Peterbilt's breach of contract claim survives.

**III. Breach of Implied Covenant of Good Faith & Fair Dealing**

Theory upon which Peterbilt asserts its claim for breach of the implied covenant of good faith and fair dealing is unclear to JTS. The theory appears to derive from a perceived conflict between JTS's counsel's representation that JTS had until April 15, 2015 to vacate the property and JTS, after being served with a lawsuit for eviction, vacated the property on February 11, 2015.

JTS disputes that this conduct constitutes a breach of the covenant of good faith and fair dealing.

**IV. Intentional and Malicious Injury to Property and Punitive Damages**

The claim for intentional and malicious injury to property appears to derive from a perception that JTS maliciously had Idaho Power remove a temporary power transformer from the property when JTS vacated the building, and that JTS "zip-tied" heating apparatuses to make them blow up. Regarding the Idaho Power transformer, JTS is prepared to show that it was installed as a temporary transformer, and that there was nothing untoward about its removal. Regarding the "zip-tied" heating apparatuses, JTS simply has no idea what Peterbilt is talking about and, to date, has seen no evidence supporting the allegation.

**Defendant's Counterclaims**

**I. Breach of Contract—Constructive Eviction; Refund of Security Deposit; Refund of Prorated Share of February 2015 Rent**

JTS's counterclaims for breach of contract and constructive eviction are the mirror image of Peterbilt's claims. Again, the issue comes down to whether JTS effectively extended the lease for six months, or whether JTS was on a month-to-month lease at the time Peterbilt purchased the property. If JTS effectively exercised its six-month extension, then Peterbilt breached the contract and constructively evicted JTS when it filed a lawsuit to evict them and, thereafter, changed the locks after JTS moved out its equipment, thereby preventing JTS from making necessary repairs to the property. If JTS was a month-to-month tenant at the time Peterbilt purchased the property, then JTS's claims for breach of contract fail.

**Affirmative Defenses**

**I. Peterbilt failed to mitigate damages.**

In response to Peterbilt filing a lawsuit for eviction, JTS vacated the property on February 11, 2015—only 11 days after the January 31, 2015 deadline Peterbilt wished to apply. Peterbilt changed the locks the following day.

Despite the undisputed 11-day delay, Peterbilt claims damages for a period extending for over three months, including lost profits resulting from not being able to move into the building more quickly.

JTS is prepared to demonstrate that Peterbilt failed to effectively mitigate its damages.

**II. Peterbilt has unclean hands.**

Peterbilt purchased the property with full knowledge that its purchase of the property triggered a dispute regarding whether JTS had properly extended the lease term. Peterbilt first blamed the landlord for this problem and then shifted the blame to the seller's agent, Colliers. To facilitate the sale of the property, Colliers agreed to reduce its commission by \$20,000.00.

Immediately after closing on the property, Peterbilt demanded nearly \$20,000.00 from JTS in conjunction with negotiating a move-out date other than the disputed January 31, 2015 move-out date. It is JTS's position that Peterbilt created and/or knowingly entered into a dispute regarding the termination date of JTS's lease, then attempted to leverage that dispute into extraordinary fees from JTS that were not rationally related to any injury Peterbilt might suffer as the result of the dispute into which Peterbilt knowingly and voluntarily entered. JTS's position is that Peterbilt should not profit from a dispute it created and knowingly accepted the risk of; its actions in resolving the fabricated dispute constitute unclean hands.

**Defendant's Facts, Witnesses, and Exhibits**

**A. Stipulated Facts & Exhibits**

Discovery is still ongoing and the parties have agreed that it is premature to stipulate to facts and exhibits. The parties will continue to work together to reach an agreement regarding stipulated facts and exhibits at a date that is acceptable to the Court.



**B. Witnesses**

Defendant JTS intends to call the following witnesses at trial:

Dave Ehrelbach	Sheri Johnson	Jeff Johnson
Graden Jackson	Blake Jackson	Brian Bixler
Kristin Bjorkmann Dunn	Lincoln Hagood	Bruce Adams


JTS anticipates presenting the testimony of Arlene Gilbert by deposition. JTS reserves the right to supplement this list as discovery is ongoing.

**Mediation Efforts**

The parties participated in mediation on March 22, 2017, and continued informal settlement discussions thereafter. Those discussions did not resolve the case.

**DATED** this 5<sup>th</sup> day of June 2017.

FISHER RAINEY HUDSON

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorney for Defendant*  
Johnson Thermal Systems

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> day of June 2017, I caused a true and correct copy of the foregoing **DEFENDANT'S PRETRIAL BRIEF** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorney for Defendant*

**F I L E D**  
1115 (A.M.) P.M.

**JUN 16 2017**

**CANYON COUNTY CLERK  
Z VETOS, DEPUTY CLERK**

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;"><b>PLAINTIFF'S PRETRIAL BRIEF</b></p> <p style="text-align: center;">Case No: CV15-587</p> <p style="text-align: center;">Judge Nye</p>
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In accordance with Idaho Rule of Civil Procedure 16 and the *Third Amended Order Setting Pretrial Conference*, Plaintiff Caldwell Land & Cattle, LLC, a/k/a Caldwell Land & Cattle Company, LLC ("Caldwell Land" or "Plaintiff") by and through its undersigned counsel Strong & Hanni law firm, submits the following Pretrial Brief

**I. WRITTEN STATEMENT OF THEORY OF RECOVERY**

In its Verified Amended Complaint, Plaintiff asserted four claims for relief: unlawful detainer, breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional and malicious injury to property against Defendant Johnson Thermal Systems, Inc.

("JTS" or "Defendant").

**A. Unlawful Detainer**

A tenant is guilty of unlawful detainer where it continues in possession of the premises after termination of the lease term, or where he fails to pay rent. I.C. § 6-303. Further, a tenant who holds over after expiration of a lease is not a tenant at will, but is guilty of unlawful detainer. *Johnston v. Schmidt*, 285 P.2d 476, 477-78 (Idaho 1955). Finally, I.C. § 6-316 allows a landlord in an unlawful detainer action to recover, in addition to his possession of his property, damages, and rent found due.

On or about February 10, 2012 Defendant, and Plaintiff's predecessor in interest<sup>1</sup>, Gilbert Family Limited Partnership ("GFLP") entered into a commercial lease agreement (the "Lease Agreement") where by GFLP leased real property located at 1505 Industrial Way in Caldwell, Idaho to Defendant for a 13-month term. The Lease Agreement had a renewal option that required Defendant to give written notice of its intent to renew as least sixty (60) days prior to the lease expiration date. It also required that all amendments, modifications, or changes to the Lease Agreement be made in writing.

In the months and years following the execution of the Lease Agreement, Defendant and GFLP entered into three separate written amendments to the Lease Agreement. As a consequence of third amendment, the Lease Agreement expired on October 15, 2014 (the "Lease Expiration Date"). Defendant and GFLP did not enter into any written or oral agreements beyond the Lease Expiration Date. Consequently, on December 11<sup>th</sup> GFLP sent written notice of termination to

---

<sup>1</sup> Plaintiff purchased the property from GFLP on December 31, 2014.

Defendant, terminating the Lease Agreement and requesting that Defendant vacate and surrender possession of the property by January 31, 2015. On January 29, 2015, Defendant's counsel informed Plaintiff that it would not vacate the property until April 15<sup>th</sup>, despite receipt of the notice of termination. Defendant claims to have vacated the property on February 12, 2015. Because Defendant did not vacate or surrender the property by January 31, 2015, Defendant is liable for unlawful detainer.

### **B. Breach of Contract**

In a suit regarding contract, "the burden of proving the existence of a contract and the fact of its breach is upon the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (Idaho 2000). Breach of contract has been defined as:

[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance by part to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

*Hughes v. Idaho State University*, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting BLACK'S LAW DICTIONARY 188 (6<sup>th</sup> ed. 1990)).

The Lease Agreement is a written contract between the parties. Defendant has breached the Lease Agreement in at least three ways: (1) failing to vacate or surrender the property by January 31, 2015; (2) failing to maintain the property in good condition and repair and leaving the property in the same condition it was at the beginning of the Lease Agreement; and (3) modifying and changing the property without the consent of GFLP.

While GFLP and Defendant engaged in varied discussions regarding and extension of the Lease Agreement after the Lease Expiration Date, no agreement was reached as there is no agreement providing an extension. The Lease Agreement expressly provides that “[it] may not be amended, modified or changed except by a writing signed by all parties hereto.” Without any express written extension of the Lease Agreement, Defendant was in possession of the property as a tenant at will and was required to vacate or surrender the property by January 31, 2015. Defendant claims to have vacated the property on February 12, 2015. Furthermore, Defendant did not maintain the property in good condition or repair. Upon vacating the property, Defendant caused an electrical transformer to be removed from the building and in doing so caused significant damage to the property including damaged to siding, duct work, concrete, and asphalt. Additionally, the work performed by Defendant to remodel, change or reconstruct the property was not approved by GFLP and is thus a further breach of the Lease Agreement.

**C. Breach of Implied Covenant of Good Faith and Fair Dealing.**

Under Idaho law, a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract. *First Security Bank of Idaho v. Gage*, 115 Idaho 172, 176, 765 P.2d 683,687 (1998); *see also Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 52 P.3d 848, 855-56 (2002) (The implied covenant of good faith and fair dealing is a covenant implied by law in a party’s contract . . . The covenant requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.”) (emphasis added) (citation omitted).

Defendant’s breach of the Lease Agreement deprived Plaintiff of the benefits it contracted

for when it purchased the property, namely possession. Additionally, Defendants left the property in a condition not in conformity with the terms of the Lease Agreement and removed an electrical transformer conveying power to the property, which prohibited Plaintiff from fully operating its business. Thus, Defendant has breached the implied covenant of good faith and fair dealing.

#### **D. Damages and Malicious Injury to Property**

Caldwell seeks general and special damages for Defendant's unlawful detainer, breach of contract, and breach of the implied covenant, including, among other things, damages incurred for extending the terms of a lease and other business costs caused by Defendant's refusal to vacate. Alternatively, if Defendant prevails in its claim that the Lease Agreement was extended for 6 months beyond the Lease Expiration Date, then Defendant is liable for unpaid rent for the remainder of that alleged term.

Caldwell also seeks damages for Defendant's damage to the building that were beyond normal wear and tear and Defendant's malicious injury. A defendant is liable for malicious injury to property when the defendant's injurious conduct is accompanied by an intent to injure the property of another. *State v. John Doe*, 333 P.3d 858 (Idaho Ct. App. 2014). "Maliciously," as used in the statute setting forth the offense of malicious injury to property, means an intent to damage the property at issue without a lawful excuse for doing so. *State v. Skunkcap*, 335 P.3d 561 (Idaho 2014). Upon vacating the building JTS left zip ties on several furnaces, which upon their use by Plaintiff, caused a fire in the building. Additionally, Defendant caused a power transformer to be removed from the building which left Plaintiff unable to fully operate out of the building.

Finally, Caldwell seeks recovery of contractual and statutory attorney fees.

### **E. Defendant's Counterclaims**

Defendant has asserted claims for breach of contract (constructive eviction), refund of security deposit, and refund of pro-rated share of February 2015 Rent. Caldwell contends that Defendant was a holdover tenant at the time it purchased the property because there was no extension of the Lease Agreement beyond October 15, 2014, and because Defendant was properly served with a Notice of Termination by GFLP, which required Defendant to vacate the property by January 31, 2015. Defendant failed to vacate the property by said date. Because Defendant was a holdover tenant and failed to vacate the property as required it cannot prevail on its breach of contract claims. Additionally, if Defendant prevails in its claim that the Lease Agreement was extended for 6 months beyond the Lease Expiration Date, then Defendant was not constructively evicted by Caldwell's written demands (which Defendant ignored), but voluntarily vacated the building.

## **II. LIST OF FACTS, WITNESSES AND EXHIBITS**

### **A. Stipulated Facts & Exhibits**

Discovery is still ongoing and the parties have agreed that it is premature to stipulate to facts and exhibits. The parties will continue to work together to reach an agreement regarding stipulated facts and exhibits at a date that is acceptable to the Court.

### **B. Witnesses**

Blake Jackson

Bruce Adams

Gary Summercorn

Bryan Coats

Mike Greiner



Arlene Gilbert

Darryl "Gus" Gustaveson

Sheri Johnson

Lincoln Hagood

George Illiff

**III. STATEMENT REGARDING SETTLEMENT**

Plaintiff and Defendant participated in mediation on March 22, 2017 with B. Newal Squyres. Plaintiff left mediation believing that the parties had agreed in principal to settle the case with a few points, such as payment terms, to be worked out. However, on March 27, Defendant informed Plaintiff that it would rather move forward with litigation.

DATED this 15<sup>th</sup> day of June, 2017.

**STRONG & HANNI**

*/s/ Ryan Bullock*

Robert L. Janicki  
Graden P. Jackson  
Ryan C. Bullock  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of June, 2017, a true and correct copy of the foregoing **PLAINTIFF'S PRETRIAL BRIEF** was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702  
kbd@bjorkmandunn.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile (208) 330-3700
- CM/ECF Filing

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
rar@frhtrial lawyers.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile (208) 514-1900
- CM/ECF Filing

Rhonda Waeker

Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702  
Email: [kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

**FILED**  
A.M. 4:05 P.M.  
JUL 18 2017  
CANYON COUNTY CLERK  
WB DEPUTY

Rebecca A. Rainey, ISB No. 7525  
Allison Blackman, ISB No. 8686  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, ID 83702  
Email: [rar@frhtriallyawyers.com](mailto:rar@frhtriallyawyers.com)  
Email: [allison@frhtriallyawyers.com](mailto:allison@frhtriallyawyers.com)  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

**Case No. CV 15-587**

**AFFIDAVIT OF REBECCA A. RAINEY**

STATE OF IDAHO            )  
  ) ss.  
County of Ada             )

Rebecca A. Rainey, being first duly sworn, deposes and states as follows:

**ORIGINAL**

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for the Defendant and I have personal knowledge of the matters contained herein.

3. Attached hereto as **Exhibit 1** is a true and correct copy of corporate filings for Boise Peterbilt Inc., Caldwell Peterbilt, Caldwell Peterbilt Inc. and Caldwell Land & Cattle LLC.

4. Attached hereto as **Exhibit 2** is a true and correct copy of a Cover Letter Explaining Damages dated July 11, 2017.

5. Attached hereto as **Exhibit 3** is a true and correct copy of the Lease between Caldwell Land & Cattle Company LLC and Caldwell Peterbilt LLC.

6. Attached hereto as **Exhibit 4** is a true and correct copy of relevant portions of the deposition of Blake Jackson taken on July 6, 2017, and documents bates numbered CALD 0220 and 0218.

7. Attached hereto as **Exhibit 5** is a true and correct copy of documents produced as bates numbers CALD 0145-0150.

8. Attached hereto as **Exhibit 6** is a true and correct copy of the Certificate of Occupancy issued May 19, 2015.

9. Attached hereto as **Exhibit 7** is a true and correct copy of relevant portions of the deposition of Bruce Adams taken on July 6, 2017, PLATINUM REMODEL 099 and CALD 0226.

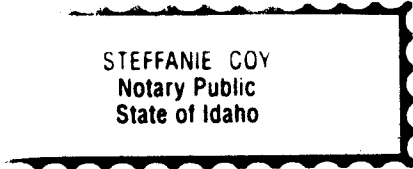
10. Attached hereto as **Exhibit 8** is a true and correct copy of relevant portions of the deposition of Blake Jackson taken on July 6, 2017 and CALD 0242-0243.

11. Attached hereto as **Exhibit 9** is a true and correct copy of document produced as bates number CALD 0276.

DATED this 18<sup>th</sup> day of July, 2017.

Rebecca A. Rainey  
Rebecca A. Rainey

SUBSCRIBED AND SWORN BEFORE ME this 18<sup>th</sup> day of July, 2017.



Steffanie Coy  
Notary Public for the State of Idaho  
Residing at: Boise  
Commission Expires: March 28, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18th day of July, 2017, I caused a true and correct copy of the foregoing **AFFIDAVIT OF REBECCA A. RAINEY** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax:(801)596-1508

- ( ) Via U.S. Mail
- (X) Via Facsimile
- ( ) Via Overnight Mail
- ( ) Email

Rebecca A. Rainey  
Rebecca A. Rainey  
*Attorneys for Defendant*



# **Exhibit 1**



# ARTICLES OF INCORPORATION (General Business)

The undersigned, in order to form a Corporation under the provisions of Title 30, Chapter 1, Idaho Code, submits the following articles of incorporation to the Secretary of State.

FILED EFFECTIVE  
2003 MAY 21 PM 1:10  
SECRETARY OF STATE  
STATE OF IDAHO

**Article 1: The name of the corporation shall be:**

Boise Peterbilt, Inc.

**Article 2: The number of shares the corporation is authorized to issue:**

Ten Thousand, (10,000)

**Article 3: The street address of the registered office is**

2677 East 17<sup>th</sup> Street, Suite 400, Idaho Falls, Idaho 83406

**The registered agent at the above address is:**

Gregory J. Ehardt

**Article 4: The name and address of the incorporator is:**

Blake A. Jackson, 3870 Stonebrook Lane, Idaho Falls, Idaho 83404

**Article 5: The mailing address of the corporation shall be:**

3870 Stonebrook Lane, Idaho Falls, Idaho 83404

**Article 6: The corporation shall be effective as of:**

The 1st day of May, 2003.

**Article 7: If upon completion of filing of the above Articles of Incorporation, the Division elects to send a copy of the said Articles of Incorporation to the Corporation by mail, the address to which the copy should be mailed is:**

Gregory J. Ehardt, 2677 East 17<sup>th</sup> Street, Suite 400, Idaho Falls, Idaho 83406

Secretary of State use only

Signature of at least one incorporator:

Typed Name: Blake A. Jackson

Typed Name:

IDAHO SECRETARY OF STATE  
05/21/2003 05:00  
CK: 1239 CT: 167838 BH: 681875  
1 @ 100.00 = 100.00 CORP # 2  
1 @ 20.00 = 20.00 EXPEDITE C # 3

C/49291



# CERTIFICATE OF ASSUMED BUSINESS NAME

Pursuant to Section 53-504, Idaho Code, the undersigned submits for filing a certificate of Assumed Business Name:

SEP 13 AM 8:19

Please type or print legibly.

NOTE: See instructions on reverse before filing.

SECRETARY OF STATE  
STATE OF IDAHO

1. The assumed business name which the undersigned use(s) in the transaction of business is:

Caldwell Peterbilt

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name:

Name

Complete Address

Boise Peterbilt Inc.

6633 Federal Way, Boise ID 83716

C149291

3. The general type of business transacted under the assumed business name is:

- Retail Trade
- Wholesale Trade
- Services
- Manufacturing
- Finance, Insurance, and Real Estate
- Transportation and Public Utilities
- Construction
- Agriculture
- Mining

Submit Certificate of Assumed Business Name and \$25.00 fee to:

Secretary of State  
700 West Jefferson  
Basement West  
PO Box 83720  
Boise ID 83720-0080  
208 334-2301

4. The name and address to which future correspondence should be addressed:

Caldwell Peterbilt

6633 Federal Way

Boise ID 83716

Phone number (optional):

208-344-8515

5. Name and address for this acknowledgment copy is (if other than # 4 above):

Secretary of State use only

Signature:

*Blake A Jackson*

(signature required)

Printed Name:

Blake A Jackson

Capacity/Title:

President

(see instruction # 8 on back of form)

9/13/05 10:51 AM  
Revised 04/2004

091583

IDAHO SECRETARY OF STATE  
09/13/2005 05:00  
CK: 9798 CT: 192227 BH: 911308  
1 @ 25.00 = 25.00 ASSUM NAME # 2





# CERTIFICATE OF ASSUMED BUSINESS NAME

Pursuant to Section 53-504, Idaho Code, the undersigned submits for filing a certificate of Assumed Business Name.

FILED EFFECTIVE

2006 APR -7 AM 9:29

SECRETARY OF STATE  
STATE OF IDAHO

**Please type or print legibly.**  
**NOTE: See instructions on reverse before filing.**

1. The assumed business name which the undersigned use(s) in the transaction of business is:

Caldwell Peterbilt

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name:

Name	Complete Address
Boise Peterbilt Inc.	6633 Federal Way, Boise, Idaho 83716
(C 149291)	

3. The general type of business transacted under the assumed business name is:

- Retail Trade
- Wholesale Trade
- Services
- Manufacturing
- Finance, Insurance, and Real Estate
- Transportation and Public Utilities
- Construction
- Agriculture
- Mining

Submit Certificate of Assumed Business Name and \$25.00 fee to:

Secretary of State  
700 West Jefferson  
Basement West  
PO Box 83720  
Boise ID 83720-0080  
208 334-2301

4. The name and address to which future correspondence should be addressed:

Caldwell Peterbilt  
6633 Federal Way  
Boise, Idaho 83716

Phone number (optional):

208-344-8515

5. Name and address for this acknowledgment copy is (if other than # 4 above):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature: Blake Jackson  
(signature required)

Printed Name: Blake A Jackson

Capacity/Title: President

(see instruction # B on back of form)

Secretary of State use only

g:\compforms\sb\form\slact\p85 Revised 04/2003

298478

IDAHO SECRETARY OF STATE  
04/07/2006 05:00  
CK: 18774 CT: 192227 BH: 948181  
1 @ 25.00 = 25.00 ASSUM NAME # 3

FILED EFFECTIVE

228



# CANCELLATION OR AMENDMENT OF CERTIFICATE OF ASSUMED BUSINESS NAME

2014 OCT -6 PM 4: 29

SECRETARY OF STATE  
STATE OF IDAHO

(Please type or print legibly. Instructions are included on the back of the application.)

1. The assumed business name is: Caldwell Peterbilt
2. The assumed business name was filed with the Secretary of State's Office on 9/13/2008 as file number D91583
3.  Cancellation. The persons who filed the certificate no longer claim an interest in the above assumed business name and cancel the certificate in its entirety.
4.  The assumed business name is amended to: \_\_\_\_\_
5.  The true names and business addresses of the entity or individuals doing business under the assumed business name are amended as follow:

Add:	Delete:	Name:	Address:
<input type="checkbox"/>	<input type="checkbox"/>	_____	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____	_____

6.  The type of business is amended to read:
 

<input type="checkbox"/> Retail Trade	<input type="checkbox"/> Manufacturing	<input type="checkbox"/> Transportation and Public Utilities
<input type="checkbox"/> Wholesale Trade	<input type="checkbox"/> Agriculture	<input type="checkbox"/> Mining
<input type="checkbox"/> Services	<input type="checkbox"/> Construction	<input type="checkbox"/> Finance, Insurance, and Real Estate
7.  The name and address to which future correspondence should be addressed is changed to read: \_\_\_\_\_

8. Name and address for this acknowledgment copy is:

Blake A. Jackson  
1910 S 5500 W  
Salt Lake City, UT 84104

Signature: *Blake A. Jackson*

Printed Name: Blake A. Jackson

Capacity: President

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

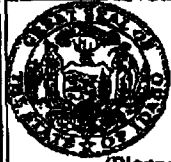
Capacity: \_\_\_\_\_

Secretary of State use only

D 91583

FILED EFFECTIVE

228



CANCELLATION OR AMENDMENT OF CERTIFICATE OF ASSUMED BUSINESS NAME

2014 OCT -6 PM 4: 29

SECRETARY OF STATE STATE OF IDAHO

(Please type or print legibly. Instructions are included on the back of the application.)

- 1. The assumed business name is: Caldwell Peterbilt
2. The assumed business name was filed with the Secretary of State's Office on 04/07/2006 as file number D98478
3. [X] Cancellation. The persons who filed the certificate no longer claim an interest in the above assumed business name and cancel the certificate in its entirety.
4. [ ] The assumed business name is amended to:
5. [ ] The true names and business addresses of the entity or individuals doing business under the assumed business name are amended as follow:

Table with 4 columns: Add, Delete, Name, Address. Contains three rows of empty checkboxes and lines for data entry.

- 6. [ ] The type of business is amended to read:
[ ] Retail Trade [ ] Manufacturing [ ] Transportation and Public Utilities
[ ] Wholesale Trade [ ] Agriculture [ ] Mining
[ ] Services [ ] Construction [ ] Finance, Insurance, and Real Estate

- 7. [ ] The name and address to which future correspondence should be addressed is changed to read:

8. Name and address for this acknowledgment copy is:
Blake A. Jackson
1910 S 5500 W
Salt Lake City, UT 84104

Signature: [Handwritten Signature]
Printed Name: Blake A. Jackson
Capacity: President
Signature:
Printed Name:
Capacity:

Secretary of State use only
D98478

**FILED EFFECTIVE**

200



**ARTICLES OF INCORPORATION**

(General Business)

(Instructions on back of application)

2014 OCT -6 PM 4: 29

SECRETARY OF STATE  
STATE OF IDAHO

The undersigned, in order to form a Corporation under the provisions of Title 30, Chapter 1, Idaho Code, submits the following articles of incorporation to the Secretary of State.

Article 1: The name of the corporation shall be:

Caldwell Peterbilt, Inc.

Article 2: The number of shares the corporation is authorized to issue: 10,000 - See Exhibit 1

Article 3: The street address of the registered office is: 812 W Laurel Street, Caldwell, ID 83605

and the name of the registered agent at such address is: Blair Jackson

Article 4: The name of the incorporator is: Blake Jackson

and address of the incorporator is: 1910 South 5500 West, Salt Lake City Utah 84104

Article 5: The mailing address of the corporation shall be:

812 W Laurel Street, Caldwell, ID 83605

Optional Articles:

EXHIBIT 1 - LIST OF ISSUED STOCK

SHAREHOLDER	NUMBER OF SHARES
Jackson Group Peterbilt, Inc., a Utah Corporation	10,000

Customer Acct #:

(if using pre-paid account)

Secretary of State use only

Signature of at least one incorporator:

Typed Name: Blake A. Jackson

Typed Name: \_\_\_\_\_

0:\p\office\forms\issincorp\id.pdf  
2014100208  
Web Form

IDAHO SECRETARY OF STATE

10/07/2014 05:00

CK:2273336 CT:172099 BH:1444233

1@ 100.00 = 100.00 CORP #5

C203681

**FILED EFFECTIVE**

251



# CERTIFICATE OF ORGANIZATION LIMITED LIABILITY COMPANY

(Instructions on back of application)

2014 NOV 17 PM 3:45

SECRETARY OF STATE  
STATE OF IDAHO

1. The name of the limited liability company is:

Caldwell Land & Cattle, LLC

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

6633 Federal Way Boise, ID 83716

(Street Address)

(Mailing Address, if different than street address)

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

Blake Jackson

6633 Federal Way Boise, ID 83716

(Name)

(Street Address)

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

Name	Address
<u>Jackson Group Land and Cattle, LLC</u>	<u>1910 S. 5500 W. Salt Lake City, UT 84104</u>
<u>Blake A. Jackson</u>	<u>1910 S. 5500 W. Salt Lake City, UT 84104</u>

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

1910 S, 5500 W. Salt Lake City, UT 84104

6. Future effective date of filing (optional): \_\_\_\_\_

Signature of a manager, member or authorized person.

Signature *Blake A. Jackson*  
Typed Name: Blake A. Jackson

Signature \_\_\_\_\_  
Typed Name: \_\_\_\_\_

Secretary of State use only

IDAHO SECRETARY OF STATE  
11/18/2014 05:00  
CK:2366028 CT:172099 BH:1449724  
1@ 100.00 = 100.00 ORGAN LLC #2  
1@ 20.00 = 20.00 EXPEDITE C #3

W144416

# **Exhibit 2**



**STRONG & HANNI  
LAW FIRM**

A PREMIER BUSINESS & LITIGATION LAW FIRM

**SALT LAKE CITY OFFICE  
102 SOUTH 200 EAST, SUITE 800  
SALT LAKE CITY, UT 84111**

T : (801) 532-7080  
F : (801) 596-1508

WWW.STRONGANDHANNI.COM

HENRY E. HEATH  
PHILIP R. FISHLER  
ROGER H. BULLOCK  
PAUL M. BELNAP  
STUART H. SCHULTZ  
BRIAN C. JOHNSON<sup>2</sup>  
STEPHEN J. TRAYNER  
STANFORD P. FITTS<sup>12</sup>  
BRADLEY W. BOWEN  
PETER H. CHRISTENSEN<sup>6, 12</sup>  
ROBERT L. JANICKI<sup>5</sup>  
H. BURT RINGWOOD  
ZACHARY T. SHIELDS  
CATHERINE M. LARSON  
KRISTIN A. VANORMAN<sup>8</sup>  
KENT M. BROWN<sup>5</sup>  
PETER H. BARLOW<sup>5</sup>  
MICHAEL L. FORD<sup>4, 5, 12</sup>  
GRADEN P. JACKSON<sup>3</sup>  
H. SCOTT JACOBSON

MICHAEL J. MILLER<sup>11</sup>  
ANDREW D. WRIGHT  
BYRON G. MARTIN<sup>11</sup>  
BENJAMIN P. THOMAS  
LANCE H. LOCKE  
MICHAEL D. STANGER<sup>6</sup>  
A. JOSEPH SANO  
JACOB S. REDD  
JAMES C. THOMPSON  
KARMEN C. SCHMID  
LORI A. JACKSON  
WILLIAM B. INGRAM  
RYAN P. ATKINSON<sup>12</sup>  
JENNIFER R. CARRIZAL  
JOHN M. ZIDOW  
ANDREW B. McDANIEL  
SADÉ A. TURNER<sup>5</sup>  
CASEY W. JONES  
RYAN C. BULLOCK  
MICHAEL A. STAHLER<sup>7, 10</sup>

KATHLEEN J. ABKE  
MARSHALL J. HENDRICKSON  
CHET W. NEILSON<sup>2</sup>  
S. SPENCER BROWN  
KATHRYN T. SMITH<sup>12</sup>  
RON W. HAYCOCK, JR.  
JOSEPH SHAPIRO<sup>2</sup>  
ANDREW D. DAY  
NICHOLAS E. DUDOICH  
ALAN R. HOUSTON  
ALLISON S. MILES  
JASON L. DEFOREST  
JESSICA J. JOHNSTON  
FREDRICK J. PENA  
AXEL TRUMBO  
ASHLEY F. LEONARD<sup>11</sup>  
JOHN C. SARAGER<sup>1</sup>  
SCARLET R. SMITH  
KYLE J. HOYT  
JACK DAVID SMART

<sup>1</sup> ALSO MEMBER ARIZONA BAR  
<sup>2</sup> ALSO MEMBER CALIFORNIA BAR  
<sup>3</sup> ALSO MEMBER COLORADO BAR  
<sup>4</sup> ALSO MEMBER DISTRICT OF COLUMBIA BAR  
<sup>5</sup> ALSO MEMBER IDAHO BAR  
<sup>6</sup> ALSO MEMBER NEVADA BAR  
<sup>7</sup> ALSO MEMBER NEW YORK BAR  
<sup>8</sup> ALSO MEMBER OREGON BAR  
<sup>9</sup> ALSO MEMBER VIRGINIA BAR  
<sup>10</sup> ALSO MEMBER VERMONT BAR  
<sup>11</sup> ALSO MEMBER WASHINGTON BAR  
<sup>12</sup> ALSO MEMBER WYOMING BAR

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July 11, 2017

**SENT VIA U.S. MAIL AND EMAIL**

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Re: *Caldwell Land & Cattle, LLC v. Johnson Thermal Sys., Inc.*  
Case No. CV15-587

Dear Counsel:

Further to your recent deposition of the 30(b)(6) corporate representative of Caldwell Land & Cattle, LLC and Caldwell Peterbilt, Inc., Blake Jackson, enclosed, please find the lease agreement between these two entities for the lease of the 1505 Industrial Way property. You will note there is a typo on the "Commencement Date" (p. 3), which should read February 1, 2015, not 2008. This lease agreement constitutes the basis for Caldwell Land & Cattle's liability to Caldwell Peterbilt for the property not being available to occupy. (The notice to quit sent by Caldwell Land & Cattle's predecessor required Johnson Thermal to vacate the property by January 31, 2015.) As discussed in the deposition of Mr. Jackson, this liability is the responsibility of Johnson Thermal.

Additionally, supplemental discovery responses that were discussed in Mr. Jackson's deposition are also enclosed.

Please let us know if you have any questions or concerns.



SALT LAKE OFFICE — 102 SOUTH 200 EAST, SUITE 800, SALT LAKE CITY, UTAH 84111  
SANDY OFFICE — 9350 SOUTH 150 EAST, SUITE 820, SANDY, UTAH 84070

July 11, 2017  
Page 2

Sincerely yours,

A handwritten signature in black ink, appearing to read "Ryan C. Bullock". The signature is written in a cursive style with a large initial "R".

Graden P. Jackson  
Ryan C. Bullock

Enclosures

cc: William B. Ingram



# **Exhibit 3**

LEASE

CALDWELL LAND & CATTLE COMPANY, LLC

(Lessor)

CALDWELL PETERBILT, INC.

(Tenant)

---

1905 Industrial Way  
Caldwell, ID 83605

(Location)

LEASE

**CALD0404**

**ARTICLE I.  
BASIC LEASE PROVISIONS**

THIS LEASE is entered into as of June 1, 2015 between Caldwell Land & Cattle Company, LLC, a Utah limited liability company ("Lessor"), and CALDWELL PETERBILT, INC., an Idaho corporation ("Tenant").

1.1 Basic Lease Provisions.

Property Location:

1905 Industrial Way  
Caldwell, ID 83605

Address of Lessor: Caldwell Land & Cattle Company, LLC  
1910 S. 5500 W.  
Salt Lake City, Utah 84104  
Phone No.: (801) 486-8781  
Fax No.: (801) 486-5907

Address of Tenant: Caldwell Peterbilt, Inc.  
1910 S. 5500 W.  
Salt Lake City, UT  
Phone No.: (801) 486-8781  
Fax No.: (801) 486-5907

Premises: The real property located at 1905 Industrial Way, Caldwell, ID together with all buildings and improvements now or hereafter situated on the real property.

Term: Ten (10) years commencing on the Commencement Date

Annual Net Rent: \$96,000.00

**ARTICLE II.  
DEFINITIONS**

2.1 Definitions. In this Lease:

(a) "Actual Operating Costs" means the Operating Costs actually incurred for a calendar year.

(b) "Annual Net Rent" means the amount of \$96,000.00, Or \$8,000.00 a month.

(c) "Article" means an article of this Lease.

- (d) "Basic Lease Provisions" means those essential lease provisions defined in Section 1.1.
- (e) "Casualty" means a fire, explosion, tornado or other cause of damage to or destruction of the Premises.
- (f) "City" means the city where the Premises is located or other governmental authority having jurisdiction over the matter in question.
- (g) "Commencement Date" means February 1, 2008.
- (h) "Contamination" is defined in Section 6.4.
- (i) "Environmental Damages" is defined in Section 6.4.
- (j) "Environmental Regulations" is defined in Section 6.4.
- (k) An Extension Option is not referenced in this lease. Any such Extension or continuation of the agreement will be defined in a new document.
- (l) Extension Terms, if applicable, will be defined in a new lease agreement.
- (m) "Excusable Delays" means a delay occasioned by a strike, lockout, riot, act of God, or any other cause or causes, whether similar or dissimilar to those enumerated, beyond Lessor's reasonable control. When this Lease extends a deadline by reason of an Excusable Delay, the deadline will be extended by a period of time equal to the duration of the Excusable Delay, unless specified otherwise.
- (n) "Hazardous Substance" is defined in Section 6.4.
- (o) "Initial Term" means the Term without taking into account the exercise of any Extension Option for any Extension Term.
- (p) "Interest Rate" means the per annum reference rate, as publicly announced from time to time by Citibank, N.A., plus two percent (2%).
- (q) "Laws" is defined in Section 6.1.
- (r) "Monthly Net Rent" means the Annual Net Rent divided by twelve.
- (s) "Operating Costs" means all costs in connection with the operation, maintenance and repair of the Premises, except those costs specifically made the responsibility of Lessor pursuant to the terms of this Lease.
- (t) "Section" means a section of this Lease.
- (u) "Taking" means acquisition by a public authority having the power of eminent domain of all or part of the Premises by condemnation or conveyance in lieu of condemnation.

(v) "Tax Costs" means all real estate taxes, levies, charges, and installments of assessments (including interest on deferred assessments) assessed, levied or imposed on the Premises, excluding (i) taxes on rents or other income, (ii) special assessments levied, pending or a lien as of the date of execution of this Lease, or (iii) sewer, water or other utility hook-up or access charges or assessments.

(w) "Term" means the period beginning on the Commencement Date and ending five (5) years from that date.

### ARTICLE III. TERM

3.1 Initial Term. Lessor leases the Premises to Tenant, and Tenant leases the Premises from Lessor, for the Initial Term, under the terms and conditions of this Lease.

### ARTICLE IV. MONETARY OBLIGATIONS

4.1 Monthly Net Rent. Tenant will pay the Monthly Net Rent to Lessor at the Address of Lessor, or such other place as Lessor may designate, in advance on the fifth day of each calendar month during the Term, commencing on the Commencement Date, without demand, deduction or setoff, except as provided otherwise in this Lease. If the Commencement Date is a day other than the first day of a month, the Monthly Net Rent for the first partial month will be prorated on a per diem basis and paid on the Commencement Date and the next payment of Monthly Net Rent shall be due on the first day of the following calendar month, and each calendar month thereafter. Should the final day of the Term of this Lease fall on any day other than the final day of a calendar month, Monthly Net Rent for that month will be prorated accordingly and paid on the fifth day of that calendar month. All amounts to be paid by Tenant to Lessor under this Lease will be deemed to be rent for purposes of payment and collection.

4.2 Rent Adjustment. The Annual Net Rent shall be subject to an adjustment effective following fifty five (55) months from the Commencement Date. On that date (January 1, 2020), the Annual Net Rent shall be adjusted to equal \$120,000.00, or \$10,000.00 a month.

4.3 Right to Renew Lease. Tenant will have the right to renew the lease after 120 months for a period of 60 months.

4.4 Operating Costs. Tenant agrees to pay all Operating Costs attributable to the Term.

4.5 Tax Costs. Tenant agrees to pay all Tax Costs assessed during the Term directly to the taxing authority on or before the date the Premises would be subject to penalty for failure to timely pay the Tax Costs. Any partial periods at the beginning or end of the Term will be prorated between Lessor and Tenant on a per diem basis. Tenant will not be obligated to pay any special assessments related to the initial development of the Premises. The payment of any special assessments will be spread over the longest period possible. Tenant will be entitled to a prompt refund of any tax refund attributable to the Term, even after the expiration or termination of this Lease. Tenant will have the right to contest the Tax Costs with the appropriate governmental authority. Lessor warrants that the tax parcel covering the Premises contains no excess land being

held for future development.

## **ARTICLE V. USE; QUIET ENJOYMENT**

5.1 Use. Tenant may use and occupy the Premises for a truck sales, service, lease, storage and repair shop for trucks, parts and vehicles. Tenant will not use or occupy nor permit the Premises or any part of the Premises to be used or occupied for any unlawful business, use or purpose. Lessor further warrants and represents that both with and without regard to Tenant's contemplated uses of the Premises as described in the first sentence of this Section 5.1, the Premises will comply with all applicable laws, statutes, rules, regulations and ordinances, and that the Premises will be properly zoned and permitted for use of the Premises as intended by Tenant, as described in the first sentence of this Section 5.1. Tenant will have no obligation of continuous operation.

5.2 Title. On or before the date thirty (30) days after the date hereof, Lessor agrees to provide Tenant, at Tenant's sole expense (provided Tenant is informed of the cost before the commitment is ordered and Tenant has the right to decline coverage), with a commitment for an ALTA leasehold owner's policy of title insurance committing to insure Tenant's interest in this Lease, subject only to real estate taxes, the mortgage of the mortgagee from whom Tenant has received a nondisturbance agreement and easements which do not interfere with Tenant's intended use of the Premises. Lessor disclaims any lien (statutory or otherwise) on any of Tenant's inventory or personal property or on any trade fixtures paid for by Tenant.

5.3 Quiet Enjoyment. If Tenant pays the Monthly Net Rent and other charges and performs all of Tenant's obligations under this Lease, Lessor promises that Tenant may peaceably and quietly possess and enjoy the Premises under this Lease.

## **ARTICLE VI. OPERATIONAL MATTERS**

6.1 Maintenance by Lessor. Lessor, at its sole expense, will maintain in good condition and repair (including replacement, if necessary) all structural components of the Premises. Lessor, at its sole expense, also will make all repairs or replacements to the Premises, where such repairs or replacements are necessary due to design, construction or latent defects, or are subject to construction or material warranties.

6.2 Maintenance of the Premises by Tenant. Except as provided in Section 6.1, Tenant, at its sole expense, will keep the Premises, including the fixtures and equipment, the heating, ventilating and air conditioning system, the roof, paving and asphalt in as good condition and repair as they were in at the time possession of the Premises is tendered to Tenant, as later improved pursuant to the terms hereof, except for ordinary wear and tear, damage from Casualty or incidental damage caused by Tenant's removal of its trade fixtures or other property. If Tenant fails to do so, Lessor may, after ten (10) days notice (or a shorter time in the case of an emergency) enter the Premises to perform the maintenance and repairs and charge the costs to Tenant, which amount will be payable upon demand, together with interest at the Interest Rate.

6.3 Compliance with Laws. Subject to Lessor's obligations under Section 6.1, Tenant

will, at its expense, promptly comply with all laws, ordinances, rules, orders, regulations and other requirements of governmental authorities now or subsequently pertaining to Tenant's particular use (as opposed to mere occupancy) of the Premises.

6.4 Environmental. Lessor represents that Lessor has not received notice of any past or present events, conditions, circumstances, activities, practices, incidents or actions at or affecting the Premises that have not been remedied and which may result in non-compliance with Environmental Regulations or which may give rise to any common law or legal liability, or otherwise form the basis for any claim, action, suit, proceeding or investigation based on the use, treatment, release or threatened release into the environment on or adjacent to the Premises of any Hazardous Substances or the actual or alleged violation of any Environmental Regulation relating to the Premises ("Environmental Claims"). Lessor releases any direct or indirect claim or cause of action it may have against Tenant arising out of or relating to Environmental Claims, and agrees to indemnify, defend and hold Tenant harmless against, any and all Environmental Damages incurred or to be incurred as a result of the breach, by Lessor, of its representations or with respect to Environmental Claims, Existing Contamination or the failure of the Premises to comply with any Environmental Regulations, including reasonable attorneys' fees. Tenant agrees to indemnify and defend and hold Lessor harmless against, any and all Environmental Damages with respect to Contamination that is shown to be a result of Tenant's use of or activities on the Premises. "Existing Contamination" means contamination, if any, which exists on, in, below, or is migrating on, under or in the direction of the Premises, whether known or unknown, on the date Tenant takes possession of the Premises, including without limitation the environmental conditions and contamination disclosed in the Environmental Report. "Contamination" means the uncontained or uncontrolled presence of or release of Hazardous Substances into any environmental media from, upon, within, below, into or on the Premises. "Hazardous Substances" means any toxic or hazardous chemicals, wastes, materials or substances, including, without limitation, lead, radon, asbestos, asbestos containing materials, polychlorinated biphenyls, dioxin, urea-formaldehyde, nuclear fuel or waste, radioactive materials, explosives, carcinogens, petroleum products, or any pollutants or contaminants, as those terms are defined in any applicable federal, state, local or other governmental law, statute, ordinance, code, rule or regulation. "Environmental Regulations" means all laws, statutes, ordinances, codes, rules and regulations relating to Hazardous Substances or the protection of the environment. "Environmental Damages" means all claims, judgments, losses, penalties, fines, liabilities, encumbrances, liens, costs and reasonable expenses of investigation, defense or good faith settlement resulting from violations of Environmental Regulations, and including, without limitation: (i) damages for personal injury and injury to property or natural resources; (ii) reasonable fees and disbursement of attorneys, consultants, contractors, experts and laboratories; (iii) costs of any cleanup, remediation, removal, response, abatement, containment, closure, restoration or monitoring work required by any Environmental Regulation and other costs reasonably necessary to restore full economic use of the Premises; and (iv) third party claims relating to the immediately preceding subsections (i) - (iii). Lessor will perform any remediation required by any governmental authority in such a manner as to have as little impact on Tenant's business being conducted at the Premises as reasonably possible. If Existing Contamination actually prevents Tenant, or its employees or customers, from occupying any material part of the Premises in a manner that materially adversely affects Tenant's business being conducted at the Premises for any period of 60 or more continuous calendar days, Tenant will have the right to terminate the Lease by giving written notice to Lessor. Lessor's obligations and liabilities under this Section 6.4 will survive the expiration or termination of this Lease.

6.5 Alterations. It is understood that Tenant will be making alterations, additions and

improvements in or to the Premises, and that the Tenant will pay for all labor, services, materials, supplies or equipment furnished by Tenant in or about the Premises, and Tenant will pay and discharge any mechanic's, materialmen's or other lien against the Premises resulting from Tenant's failure to make such payment, or will contest the lien and deposit with Lessor, or an escrow agent or title insurance company, cash equal to 125% of the amount of the lien, or otherwise post security sufficient to release the Premises from such lien.. If the lien is reduced to final judgment and all appeals are exhausted or waived, Tenant will discharge the judgment and may use any cash deposited with Lessor for such purpose, and Lessor will return all remaining cash deposited by Tenant. Lessor may post notices of nonresponsibility on the Premises as provided by law.

6.6 Utilities. Tenant agrees to pay for all public utilities rendered or furnished to the Premises during the Term, including, but not limited to, water, sewer, gas and electricity. Lessor agrees and represents that, during the Term, the Premises will at all times be connected to water, sewer, gas and electric lines.

6.7 Entry by Lessor. Lessor and its agents and contractors will have the right to enter the Premises at reasonable times for inspecting or repairing the Premises, upon not less than 24 hours' prior written notice to Tenant (except in an emergency) and, at Tenant's election, if accompanied by an escort provided by Tenant (except in an emergency), but Lessor will have no obligation to make repairs, alterations or improvements except as expressly provided in this Lease. During the last one hundred eighty (180) days of the Term, Lessor will have the right to enter the Premises at reasonable times, subject to the same prior notice requirements set forth in the preceding sentence, for the purpose of exhibiting the Premises for leasing, provided such entry does not unreasonably interfere with Tenant's use of the Premises.

6.8 Interruption of Business. Notwithstanding any Excusable Delay, if an interruption or impairment of utilities or services provided to the Premises materially impairs Tenant's ability to conduct its business and Tenant closes its business in the Premises by reason thereof and such impairment and closure continues for three (3) consecutive days, beginning after the end of such 3-day period, all rent will abate until such utilities or services are reasonably restored to an extent to render the Premises tenantable. Lessor will use reasonable efforts to cause such utilities or services to be restored as soon as possible. If such impairment and closure continues for thirty (30) consecutive days, Tenant may, in addition to all other remedies now or hereafter afforded or provided by law or this Lease, terminate this Lease.

## **ARTICLE VII. TRANSACTIONS**

7.1 Assignment and Subletting. With Lessor's prior written consent, which consent shall not be unreasonably withheld or delayed, Tenant may assign or sublet all or any part of the Premises for any permitted use at any time during the Term. If Lessor withholds its consent for any reason other than the lack of financial ability of the proposed assignee or subtenant to meet the obligations of the Lease, the parties hereby agree that such withholding of consent is unreasonable. Tenant will be relieved of any liability under this Lease accruing after its assignment.

7.2 Subordination and Nondisturbance. At the request of any mortgagee or ground lessor, this Lease will be subject and subordinate to any mortgage or ground lease which may now or in the future encumber the Premises, and Tenant will execute, acknowledge and deliver to Lessor any document requested by Lessor to evidence the subordination. Any such future



subordination by Tenant will be subject to Tenant receiving a nondisturbance agreement from the party to whom it is subordinating, which nondisturbance agreement will recognize the rights of Tenant under this Lease so long as Tenant is not in default. Tenant's obligations under this Lease are contingent upon Lessor obtaining a nondisturbance agreement in Tenant's favor, reasonably acceptable to Tenant, from Lessor's current mortgagees or ground lessor.

7.3 Estoppel Certificates. Within twenty (20) days after written request from either party, the other party will execute, acknowledge and deliver a document furnished by the requesting party, which statement may be relied upon by the requesting party and third parties, stating (a) that this Lease is unmodified and in full force and effect (or if modified, that this Lease is in full force and effect as modified and stating the modifications), (b) the dates to which rent and other charges have been paid, (c) the current Monthly Net Rent, (d) the dates on which the Term begins and ends, (e) the existence of any unexpired Extension Options, (f) that Tenant has accepted the Premises and is in possession, (g) that neither Lessor nor Tenant is in default under this Lease, or specifying any such default, and (h) such other and further information as may be reasonably requested.

## **ARTICLE VIII. RISK SHIFTING**

8.1 Indemnification. Tenant agrees to indemnify, defend, and hold harmless Lessor and its officers, directors, shareholders; partners, employees and agents from and against all third party claims of whatever nature to the extent arising from the negligent acts or willful misconduct of Tenant, or Tenant's contractors, licensees, officers, partners, agents or employees, including reasonable attorneys' fees. Lessor agrees to indemnify, defend, and hold harmless Tenant and its officers, directors, shareholders, partners, employees and agents from and against all third party claims of whatever nature to the extent arising from the negligent acts or willful misconduct of Lessor or Lessor's contractors, licensees, officers, partners, agents or employees, including reasonable attorneys' fees.

8.2 Liability Insurance. Tenant agrees during the Term to maintain adequate liability and other insurance with duly qualified, reputable insurers authorized to do business in the state in which the Premises are located and, upon request, to furnish Lessor with certificates of insurance properly executed by Tenant's insurance companies evidencing the insurance policies in effect, which certificates will agree to provide thirty (30) days' notice to Lessor in the event of cancellation of such coverage. The minimum insurance coverage to be maintained by Tenant will be commercial general liability insurance, naming Lessor as an additional insured, including coverage against claims for bodily injury, death and property damage or personal injury occurring in or about the Premises, affording minimum limits of One Million Dollars (\$1,000,000.00) with respect to bodily injury, personal injury, death or property damage occurring or resulting from one occurrence and aggregate limits of not less than Two Million Dollars (\$2,000,000).

8.3 Lessor's Property Insurance. Lessor agrees that it will keep the Premises insured against loss or damage by those perils covered by "all risks" coverage, including, malicious mischief and vandalism, and boiler and machinery coverage, in an amount sufficient to prevent Tenant from being a co-insurer under the terms of the applicable policies, but in any event, in an amount not less than one-hundred percent (100%) of the full replacement value of the Premises, as

determined from time to time. Such insurance will be issued by financially responsible insurers duly authorized to do business in the state where the Premises are located. Lessor agrees to competitively bid all its insurance policies at least every other year. The insurance company will be required to give Lessor not less than thirty (30) days' notice in the event of cancellation, non-renewal or material alteration of such coverage. Tenant will be deemed to be a self-insurer as to the deductible or any co-insurance applicable to such insurance coverage and will pay any deductible or co-insurance amount applicable in the event of loss or damage. Tenant agrees to reimburse Lessor for the premiums paid by Lessor for the insurance referred to in this Section 8.3, within ten (10) business days after receipt of a copy of the invoice for such insurance. At Tenant's option, Tenant may elect to insure the Premises in the manner required above, at Tenant's sole expense, in which event Tenant will notify Lessor thereof, Tenant will no longer be required to reimburse Lessor for any such insurance and Lessor will cancel its property insurance on the Premises. If Tenant elects to carry its own insurance on the Premises, Tenant will cause its insurer to provide Lessor with a certificate of insurance evidencing such coverage. If Tenant elects to carry its own insurance on the Premises, Tenant will cause Lessor to be named as the loss payee on the insurance policy.

8.4 Tenant's Property Insurance. Tenant agrees to maintain, at its own expense, insurance against loss or damage by those perils covered by "all risks" coverage, including malicious mischief and vandalism, on Tenant's personal property located at the Premises. Nothing contained in this Section 8.4 will be construed as creating any liability or responsibility on the part of Lessor for the adequacy of insurance coverage on Tenant's personal property. Tenant will be deemed to be a self-insurer as to the deductible or any co-insurance applicable to such insurance coverage and will pay any deductible or co-insurance amount applicable in the event of loss or damage.

8.5 Waiver of Insurable Claims. Notwithstanding anything contained in this Lease to the contrary, Lessor and Tenant release each other and the other's agents and employees from any liability for loss or damage by fire or other casualty coverable by a standard form of "all risks" insurance policy, whether or not the loss or damage resulted from the negligence of the other, its agents or employees. Each party will use reasonable efforts to obtain policies of insurance that provide that this release will not adversely affect the rights of the insureds under the policies. The releases in this Section 8.5 will be effective whether or not the loss was actually covered by insurance.

## **ARTICLE IX. CASUALTY**

If the Premises are damaged by Casualty, the damage (excluding damage to Tenant's personal property) will be repaired by Lessor at its expense to a condition as near as reasonably possible to the condition prior to the Casualty, Lessor will begin repairs within thirty (30) days after the Casualty and complete the repairs within one hundred twenty (120) days after the Casualty, subject Excusable Delays. If Lessor fails to begin or complete the repairs as required, Tenant may give Lessor notice to do so. If Lessor has not begun the repairs or completed the repairs, as applicable, within thirty (30) days after Tenant's notice, Tenant may terminate this Lease by written notice to Lessor given within thirty (30) days after expiration of the 30-day period. If this Lease is terminated because of the Casualty, rents and other payments will be prorated as of the later of the date of such Casualty or the date when Tenant ceased doing business in the Premises

and will be proportionately refunded to Tenant or paid to Lessor, as the case may be. During any period in which the Premises or any portion of the Premises are made untenable as a result of the Casualty (whether or not the Premises themselves were damaged by the Casualty), all rent will be abated for the period of time untenable, plus thirty (30) days for Tenant to reopen all of the Premises after the completion of Lessor's repairs, in proportion to the square foot area made untenable as a result of the Casualty. In addition, if the Casualty occurs less than one (1) year prior to the end of the Term, as the same may have been extended, Tenant may terminate this Lease as of the date of the Casualty if the Premises may not reasonably be made tenantable within thirty (30) days after the Casualty.

## **ARTICLE X. EMINENT DOMAIN**

If there is a Taking that materially affects Tenant's use of the building or the Premises, either party may terminate this Lease as of the date the public authority takes possession, by written notice to the other party within thirty (30) days after the Taking. If this Lease is so terminated, any rents and other payments will be prorated as of the termination and will be proportionately refunded to Tenant, or paid to Lessor, as the case may be. All damages, awards and payments for the Taking will belong to Lessor regardless of the basis upon which they were made or awarded, except that Tenant will be entitled to any amounts specifically awarded by the condemning authority to Tenant for relocation, damage to Tenant's property or business loss. If this Lease is not terminated as a result of the Taking, Lessor will restore the remainder of the Premises to a condition as near as reasonably possible to the condition prior to the Taking (excluding Tenant's personal property) and all rent will be abated for the period of time the space is untenable in proportion to the square foot area untenable.

## **ARTICLE XI. DEFAULTS**

11.1 Tenant Defaults. If (a) Tenant defaults in the payment of rent or other amounts under this Lease and the default continues for ten (10) business days after written notice by Lessor to Tenant, (b) Tenant defaults in any other obligation under this Lease and the default continues for thirty (30) days after written notice by Lessor to Tenant (unless such default is of a nature that cannot be cured within such 30 day period, in which case Tenant will have such time to cure the default as is reasonably necessary, provided Tenant commences to cure such default within the original 30 day period and continues to diligently and continuously pursue the cure thereof to completion), (c) any proceeding is begun by or against Tenant to subject the assets of Tenant to any bankruptcy or insolvency law or for an appointment of a receiver of Tenant or for any of Tenant's assets and with respect to proceeding against Tenant is not discharged within sixty (60) days, or (d) Tenant makes a general assignment of Tenant's assets for the benefit of creditors, then Lessor may, with or without terminating this Lease, cure the default and charge Tenant all costs and expenses of doing so, and Lessor also may, by process of law, re-enter the Premises, remove all persons and property, and regain possession of the Premises.

11.2 Lessor Defaults. If Lessor fails or neglects to keep and perform any of the covenants or agreements in this Lease on the part of Lessor to be kept and performed, Tenant may notify Lessor thereof and if Lessor does not cure such default within thirty (30) days (or such shorter period as may be reasonable under the circumstances, in the event of an emergency) after the date of receiving such notice (or if the default is of such a character as to require more than thirty (30) days to cure, Lessor does not commence to cure such default within thirty (30) days and proceed with the cure with reasonable diligence), Tenant may, in addition to all other remedies now or hereafter afforded or provided by law, perform such covenant or agreement for or on behalf of Lessor or make good any such default, and any amount or amounts which Tenant advances on Lessor's behalf will be repaid by Lessor to Tenant on demand, together with interest thereon at the Interest Rate from the date of such advance to the repayment thereof in full, and if Lessor does not repay any such amount or amounts upon demand, Tenant may, without forfeiture of its rights under this Lease, deduct the same, together with interest thereon as provided above, from the next installment or installments of rent to accrue under this Lease.

11.3 Remedies. In the event of material breach or default under the terms of this Lease, either party shall have all rights and remedies available to them under law or equity in Utah.

## **ARTICLE XII. BOILERPLATE**

12.1 Waiver of Lease Provisions. No waiver of any provision of this Lease will be deemed a waiver of any other provision or a waiver of that same provision on a subsequent

occasion. The receipt of rent by Lessor with knowledge of a default under this Lease by Tenant will not be deemed a waiver of the default. Neither party will be deemed to have waived any provision of this Lease unless it is done by express written agreement. Any payment by Tenant and acceptance by Lessor of a lesser amount than the full amount of all rent then due will be applied to the earliest rent due. No endorsement or statement on any check or letter for payment of rent or other amount will be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to its right to recover the balance of any rent or other payment or to pursue any other remedy provided in this Lease.

12.2 Surrender. On expiration of the Term or sooner termination of this Lease, Tenant will return possession of the Premises to Lessor, without notice from Lessor, in good order and condition, except for ordinary wear and damage. Casualty or conditions Tenant is not required to remedy under this Lease. If Tenant does not so return possession of the Premises to Lessor, Tenant will pay Lessor all resulting damages Lessor may suffer and will indemnify Lessor against all claims made by any new tenant of all or any part of the Premises. Any property left in the Premises after expiration or termination of this Lease will be deemed abandoned by Tenant and will be the property of Lessor to dispose of as Lessor chooses.

12.3 Holding Over. If Tenant remains in possession of the Premises after expiration of the Term without a new lease, it may do so only with the consent of Lessor, and, any such holding over will be from month-to-month, subject to all the same provisions of this Lease, except that the rental rate will be 125% of the then Monthly Net Rent. The month-to-month occupancy may be terminated by Lessor or Tenant on the last day of any month by at least thirty (30) days prior written notice to the other.

12.4 Notices. Any notice under this Lease will be in writing, and will be sent by prepaid certified mail or reputable overnight courier or by facsimile confirmed by certified mail or reputable overnight courier, addressed to Tenant at the Address of Tenant, with a copy Lessor at the Address of Lessor, with a copy to Blair Jackson, Esq., 360 South Technology Court, Suite 200, Lindon UT 84042 or to such other address as is designated in a notice given under this Section 12.4, which change of address will be effective ten (10) days after the giving of notice of such change. A notice will be deemed given on the date of first attempted delivery (if sent by certified mail or overnight courier) or upon completed facsimile transmission to the proper fax number. Routine mailings by either party may be sent by regular mail.

12.5 Governing Law. This Lease will be construed under and governed by the laws of the state of Utah. If any provision of this Lease is illegal or unenforceable, it will be severable and all other provisions will remain in force as though the severable provision had never been included.

12.6 Entire Agreement. This Lease contains the entire agreement between Lessor and Tenant regarding the Premises. This Lease may be modified only by an agreement in writing signed by Lessor and Tenant. This Lease was thoroughly negotiated by Lessor and Tenant and no inference will be drawn based on which party drafted the original version of this Lease.

12.7 Successors and Assigns. All provisions of this Lease will be binding on and for the benefit of the successors and assigns of Lessor and Tenant, except that no person or entity holding under or through Tenant in violation of any provision of this Lease will have any right or interest in this Lease or the Premises.

12.8 Brokers. Each party represents to the other that it has not dealt with any brokers in connection with the negotiation or execution of this Lease.

12.9 Consent Not Unreasonably Withheld. Lessor and Tenant agree that whenever under this Lease provision is made for securing the consent or approval of the other, such consent or approval will not be unreasonably withheld or delayed. If either party believes the other has unreasonably withheld or delayed its consent or approval, an action for declaratory judgment or specific performance will be the sole right and remedy in any dispute as to whether the other has breached such obligation.

12.10 Short Form Lease. Upon the request of either Lessor or Tenant, Lessor and Tenant will enter into a Short Form Lease, in recordable form, which will set forth the parties to this Lease, the Premises, the Initial Term and the Extension Options, but will incorporate the balance of this Lease only by reference. Either party, at its cost, may record such a Short Form Lease.


12.11 Attorneys' Fees. In any dispute between Lessor and Tenant, the reasonable attorneys' fees of the prevailing party will be paid by the non-prevailing party.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Lessor and Tenant have executed this Lease to be effective as of the date stated in the first paragraph of this Lease.


**LESSOR:**

**CALDWELL LAND & CATTLE COMPANY,  
LLC**

  
By: Blake Jackson  
Title: Manager

**TENANT:**

**CALDWELL PETERBILT, INC.**

  
By: Blake Jackson  
Title: President/CEO

# **Exhibit 4**



1 on this building and this other building. I had to pay  
2 rent on both buildings.

3 **Q. You have both of these listed?**

4 A. Correct.

5 **Q. Right.**

6 A. So those rents were subtracted out. That gave  
7 me a total here; right?

8 **Q. One of the rents was subtracted out for each**  
9 **month.**

10 A. Correct.

11 **Q. Correct.**

12 A. So that gave me a net profit number; right?

13 **Q. Right.**

14 A. I guess, how is it double-dipping? I am  
15 getting to the net number. I guess -- I don't know. I  
16 have to think about that for a minute. I know what  
17 you're asking.

18 **Q. You don't need to determine whether or not it**  
19 **is double-dipping. I just wanted to make sure --**

20 A. I get what you're saying. I guess I would have  
21 to really think about that. I'm sorry. Can I just  
22 check this real quick?

23 What we are seeing here is we are seeing that  
24 we netted out a profit that would have been more had we  
25 been in the other building.

1 **going to charge what I am going to call your affiliate**  
2 **entities?**

3 A. It's based upon how much the property is  
4 appraised for and financed for, generally speaking.

5 **Q. Is it fair market value, or is it under fair**  
6 **market value?**

7 A. We were approached about two years ago.  
8 Someone wanted to buy us. They determined, when they  
9 looked through our rents, that we were either at or  
10 below fair market value on all of our rents, cumulative.

11 **Q. At or below?**

12 A. Correct.

13 **Q. That is, the amounts that what I am going to**  
14 **call the real estate holding companies were charging the**  
15 **operations companies --**

16 A. Correct.

17 **Q. -- were at or below?**

18 A. Correct.

19 **Q. "At" makes sense to me. When you say "below,"**  
20 **I need to quantify. Five percent below? Fifty percent**  
21 **below?**

22 A. As I recall, it was around two to three  
23 percent.

24 **Q. Is it your intent that the rents between the**  
25 **real estate companies and the operations companies be**

1 **Q. Right.**

2 A. I don't know. I will have to think about that.  
3 I can't answer that definitively. I understand what  
4 your question is.

5 **Q. I think we have the record with respect to what**  
6 **the numbers mean, which is fine.**

7 A. Okay.

8 **Q. We don't need to jump to any legal conclusions**  
9 **right now.**

10 A. Okay. I apologize. I just need to think  
11 through what you're asking me.

12 **Q. I want to make sure my numbers mean what I**  
13 **think they mean.**

14 A. I get what you're saying. Yes.

15 **Q. Let's move next to how Caldwell Land & Cattle**  
16 **works with, I guess, the operations groups that you own**  
17 **to rent space. Is that how it is set up? Does Caldwell**  
18 **Land & Cattle lease the space to Caldwell Peterbilt?**

19 A. Correct.

20 **Q. Do you have a lease agreement for that?**

21 A. We do.

22 **Q. Have you provided it to your counsel?**

23 A. I don't know if we have, but we can.

24 **Q. How do you determine the amount of the lease**  
25 **that you are -- the amount of monthly rent that you are**

1 **somewhere in that range of at or close to there?**

2 A. My pay, my income, is derived from the  
3 Peterbilt entities, not from the land companies.

4 **Q. You are not trying to give a sweetheart deal to**  
5 **related entities?**

6 A. Yes.

7 **Q. It is more of a market value analysis?**

8 A. And it's a legal protection.

9 **Q. A legal protection? Why?**

10 A. You have your assets in different baskets.

11 **Q. So you are making sure that things are**  
12 **protected if something goes wrong; right?**

13 A. That's what you guys get paid to do, as  
14 attorneys; right?

15 **Q. Right.**

16 A. You help us protect assets.

17 **Q. I want to look at the rents that you did charge**  
18 **to Caldwell Peterbilt when it had moved into the**  
19 **facility. I think where we go there is Exhibit 32, the**  
20 **June --**

21 A. Yes.

22 **Q. -- statement which is called '0218. That is**  
23 **the first one where I see rents moving from, basically,**  
24 **just shy of \$4,000 a month to right around \$8,000 a**  
25 **month; correct?**

Page 74

1 A. Yes.

2 **Q. You would agree with me that that is relatively**

3 **the fair market value for that property?**

4 A. I would agree that that's the appraised value.

5 **Q. Within that realm of -- you are not giving your**

6 **related entity a sweetheart deal?**

7 A. I am just charging them the cost to service

8 that debt.

9 **Q. What you testified earlier is that has been**

10 **consistently -- or it is your intent that that be right**

11 **around the fair rental value at or slightly below fair**

12 **rental value?**

13 A. I don't go out and conduct a survey. I am just

14 telling you that a third party came in. Their analysis

15 was that I was at fair market value or slightly below.

16 I don't go out and calculate that.

17 **Q. Okay. Can --**

18 A. When I --

19 **Q. Keep going.**

20 A. When I calculate rents, it's based upon debt

21 service. That's how I calculate the rent. Generally

22 speaking, at least according to that third party, we

23 have been at fair market value or below.

24 **Q. I think that gets me to how I can appreciate**

25 **the numbers that you are coming up with here on this**

Page 75

1 **June income and expense.**

2 **Does money actually change hands between your**

3 **operating companies and your real estate holding**

4 **companies?**

5 A. Absolutely.

6 **Q. Were you involved in calculating the lost**

7 **profits caused by the delay that we see on Exhibit 20?**

8 A. Yes.

9 **MS. RAINEY:** I feel like I understand how you

10 are going about the process, but I want to talk through

11 it with you a little bit. We are going to mark Exhibit

12 34 and Exhibit 35.

13 (Exhibit 34 and Exhibit 35 were marked.)

14 **Q. BY MS. RAINEY: All right. You have just been**

15 **handed Exhibit 34 and Exhibit 35. These are two**

16 **different calculations based on the same numbers.**

17 **Exhibit 35 is CALD 0224. Does that match up with what**

18 **you have got?**

19 A. Yes.

20 **Q. Exhibit 34 is CALD '0359. Does that match up**

21 **with what you have got?**

22 A. Yes.

23 **Q. Have you seen Exhibit 34 and Exhibit 35**

24 **before?**

25 A. Yes.

Page 76

1 **Q. Were you, in fact, involved in creating Exhibit**

2 **34 and Exhibit 35?**

3 A. More Exhibit 34 than Exhibit 35.

4 **Q. Let's start with Exhibit 35. No, no. Let's**

5 **start with Exhibit 34. When you look at Exhibit 34 --**

6 **why do you say that you were more involved with creating**

7 **Exhibit 34 than Exhibit 35?**

8 A. I didn't like how Bryan, my CFO, calculated the

9 numbers on Exhibit 35.

10 **Q. What didn't you like about it?**

11 A. He didn't include June, and he spread the

12 period of time past what I believe to be our damages.

13 **Q. So you said Exhibit 35 --**

14 A. Correct, Exhibit 35.

15 **Q. On Exhibit 35, you said he did not include**

16 **June. How is June not included?**

17 A. Well, he took the average of July, August, and

18 September; and that came to \$25,567.

19 **Q. Hang on just one second. When you say --**

20 A. Right there.

21 **Q. When you say he did not include June --**

22 A. Correct.

23 **Q. It is in the calculation for --**

24 A. It's not in the calculation for the average.

25 **Q. For the average of months seven through nine?**

Page 77

1 A. Yes.

2 **Q. It is in the calculation of the average of one**

3 **through six?**

4 A. It is. Correct.

5 **Q. You thought June should be in the seven through**

6 **nine average?**

7 A. Correct. As Bruce said, we just want exactly

8 what we think we were damaged.

9 **Q. Right.**

10 A. Bryan, when he calculated it, said, well, we

11 were not fully at max strength with technicians; and we

12 were in July. That was his thought process.

13 **Q. Okay.**

14 A. In my mind, what we are really talking about is

15 the first part of the year versus when we took

16 possession.

17 **Q. So you think the inclusion of just July,**

18 **August, and September, when you had full technicians,**

19 **fully operational, pushed the damages a little too high**

20 **because you were totally up and running by then?**

21 A. You could make the argument for what Bryan was

22 trying to do.

23 **Q. Right.**

24 A. I was just trying to be fair. That is why you

25 get the revision on Exhibit 34.

DEPARTMENTAL INCOME AND EXPENSE								PAGE 4		
LINE NO.	NAME OF ACCOUNT	ACCT. NO.	C - PARTS DEPARTMENT		D - SERVICE DEPARTMENT		E - BODY SHOP DEPARTMENT		LINE NO.	
			MONTH	YEAR-TO-DATE	MONTH	YEAR-TO-DATE	MONTH	YEAR-TO-DATE		
1	NET SALES		114966	595452	17534	98999			1	
2	GROSS PROFIT		24333	126848	6472	43293			2	
3	Finance Income	003							3	
4	Insurance Income	004							4	
5	Maintenance Cont. - Comm. Earned	005							5	
6	Fin & Ins. - Charge Backs	006							6	
7	TOTAL F & I	(LINE 3-6)							7	
8	TOTAL OPERATING INCOME	(LINE 7-7)	24333	126848	6472	43293			8	
9	Sales Mgrs	COMM. & INCENT							9	
10	Salespeople	COMM. & INCENT	4801	20927	542	2900			10	
11	Sales Salaries	012							11	
12	Delivery Expense	013							12	
13	Policy Expense Trucks	015							13	
14	Used Truck Expense	016							14	
15	Floor Plan Interest	017							15	
16	TOTAL SELLING EXPENSE	(LINE 9-15)	4801	20927	542	2900			16	
17	Salaries - Administration	020							17	
18	Salaries - Supervisors	021							18	
19	Salaries & Wages - Clerical	022							19	
20	Other Salaries & Wages	023	5204	20798		466			20	
21	Absentee Wages - Productive	024	120	600	430	2150			21	
22	Payroll Taxes	025	811	3391	940	4844			22	
23	Lost & Idle Time	026							23	
24	Employee Benefits	027	936	4475	846	3822			24	
25	Pension Fund	029							25	
26	TOTAL PERSONNEL EXPENSE	(LINE 17-25)	7071	29264	2216	11282			26	
27	Company Vehicle Expense	051	1932	5281	615	993			27	
28	Office Supplies	060	334	367	15	207			28	
29	Other Supplies & Tools	061	93	182	- 551	- 548			29	
30	Laundry & Uniforms	062		112	1353	3951			30	
31	Freight	063	597	1077					31	
32	Advertising	065	608	1404	42	441			32	
33	Contributions	066							33	
34	Policy Expense - Parts & Svc.	067				535			34	
35	Outside Services	068	194	1275	11	782			35	
36	Computer Expenses	069	2178	10570	2178	10620			36	
37	Travel & Entertainment	070	732	884	633	930			37	
38	Memberships, Dues & Pblns	071		80	117	823			38	
39	Legal & Auditing	072							39	
40	Telephone	074	857	2846	598	2701			40	
41	Training	075			576	1576			41	
42	Equipment Repairs	076		41	39	1071			42	
43	Miscellaneous	077	694	2326	514	2152			43	
44	TOTAL SEMI-FIXED EXPENSE	(LINE 27-43)	8219	26445	6140	26034			44	
45	Rent	080	1990	9951	1990	9951			45	
46	Mortgage Interest	081							46	
47	Repairs & Maint. - Real Estate	082	464	819	464	824			47	
48	Depreciation - Bldgs. & Imps.	083							48	
49	Taxes - Real Estate	084							49	
50	Insurance - Bldgs. & Imps.	085							50	
51	Amortization Leasholds	086							51	
52	Utilities	087	421	2158	421	2158			52	
53	Insurance - Other	088	96	747	96	747			53	
54	Taxes - Other	089							54	
55	Depreciation - Other	091	315	1731	949	4902			55	
56	Equipment Rental	092			158	464			56	
57	Management Fees	093							57	
58	TOTAL FIXED EXPENSE	(LINE 45-57)	3288	15406	4078	19046			58	
59	TOTAL OVERHEAD	(LINE 27-58)	18576	71115	12434	56362			59	
60	TOTAL EXPENSES	(LINE 16-59)	23377	92042	12976	59262			60	
61	OPERATING PROFIT (LOSS)	(LINE 8-60)	956	34806	- 6504	- 15969			61	
62	ALLOCATION OF "Z" EXPENSES								62	
63	DEPT OPERATING PROFIT AFTER "Z" ALLOCATION		956	34806	- 6504	- 15969			63	
64	PERSONNEL SUMMARY								64	
65	NO. OF EMPLOYEES								65	
66	CLASSIFICATION	F & I	NEW TRUCK	USED TRUCK	PARTS	SVC	BODY SHOP	G & A	LEASE	TOTAL
67	ADMINISTRATION									
68	DEPARTMENT MANAGERS									
69	SALESPEOPLE				1					1
70	TECHNICIANS					2				2
71	CLERICAL				1					1
72	OTHER									
73	TOTAL					2	2			4
74	HIRED Y-T-D									
75	TERMINATED Y-T-D									

DEPARTMENTAL INCOME AND EXPENSE								PAGE 4		
LINE NO	NAME OF ACCOUNT	ACCT. NO	C - PARTS DEPARTMENT		D - SERVICE DEPARTMENT		E - BODY SHOP DEPARTMENT		LINE NO	
			MONTH	YEAR-TO-DATE	MONTH	YEAR-TO-DATE	MONTH	YEAR-TO-DATE		
1	NET SALES		154962	750413	44020	143019			1	
2	GROSS PROFIT		34911	161749	23606	66899			2	
3	Finance Income	003							3	
4	Insurance Income	004							4	
5	Maintenance Cont. - Comm. Earned	005							5	
6	Fin & Ins - Charge Backs	006							6	
7	TOTAL F & I	(LINES 3-6)							7	
8	TOTAL OPERATING INCOME	(LINES 1-7)	34911	161749	23606	66899			8	
9	Sales Mgrs	COMM. & INCENT							9	
10	Salespeople	COMM. & INCENT	4248	25175	642	3542			10	
11	Sales Salaries								11	
12	Delivery Expense								12	
13	Policy Expense Trucks								13	
14	Used Truck Expense								14	
15	Floor Plan Interest								15	
16	TOTAL SELLING EXPENSE	(LINES 9-15)	4248	25175	642	3542			16	
17	Salaries - Administration	020							17	
18	Salaries - Supervisors	021							18	
19	Salaries & Wages - Clerical	022							19	
20	Other Salaries & Wages	023	5542	26340		466			20	
21	Absentee Wages - Productive	024	120	720	430	2580			21	
22	Payroll Taxes	025	801	4193	2770	7614			22	
23	Lost & Idle Time	026							23	
24	Employee Benefits	027	885	5360	1547	5368			24	
25	Pension Fund	029							25	
26	TOTAL PERSONNEL EXPENSE	(LINES 17-25)	7348	36613	4747	16028			26	
27	Company Vehicle Expense	051	3303	8584	326	1319			27	
28	Office Supplies	080	823	1190	580	787			28	
29	Other Supplies & Tools	061	838	1020	- 89	- 637			29	
30	Laundry & Uniforms	062		112	663	4615			30	
31	Freight	063	504	1582					31	
32	Advertising	065	2084	3488	138	579			32	
33	Contributions	066							33	
34	Policy Expense Parts & Svc	067			936	1471			34	
35	Outside Services	068	292	1567	292	1075			35	
36	Computer Expenses	069	2884	13454	2884	13504			36	
37	Travel & Entertainment	070	75	959	29	959			37	
38	Memberships, Dues & Pblcs	071	15	95	131	755			38	
39	Legal & Auditing	072							39	
40	Telephone	074	825	3671	687	3388			40	
41	Training	075			540	2116			41	
42	Equipment Repairs	076		41	65	1136			42	
43	Miscellaneous	077	1010	3335	823	2975			43	
44	TOTAL SEMI-FIXED EXPENSE	(LINES 27-43)	12653	39098	8005	34042			44	
45	Rent	080	4000	13951	4000	13951			45	
46	Mortgage Interest	081							46	
47	Repairs & Maint. - Real Estate	082		819	385	1209			47	
48	Depreciation - Bldgs & Imps	083							48	
49	Taxes - Real Estate	084							49	
50	Insurance - Bldgs & Imps	085							50	
51	Amortization - Leaseholds	086							51	
52	Utilities	087	507	2665	507	2665			52	
53	Insurance - Other	088	96	842	96	842			53	
54	Taxes - Other	089							54	
56	Depreciation - Other	091	315	2046	949	5851			56	
58	Equipment Rental	092	375	375	375	839			58	
57	Management Fees	093							57	
58	TOTAL FIXED EXPENSE	(LINES 44-57)	5293	20698	6312	25357			58	
59	TOTAL OVERHEAD	(LINES 44-58)	25294	96409	19064	75427			59	
60	TOTAL EXPENSES	(LINES 16-59)	29542	121584	19706	78969			60	
61	OPERATING PROFIT (LOSS)	(LINE 8)	5369	40165	3900	- 12070			61	
62	ALLOCATION OF "Z" EXPENSES	(LINE 9)							62	
63	DEPT. OPERATING PROFIT AFTER "Z" ALLOCATION		5369	40165	3900	- 12070			63	
64	PERSONNEL SUMMARY								64	
65	CLASSIFICATION				NO. OF EMPLOYEES				65	
66		F & I	NEW TRUCK	USED TRUCK	PARTS	SVC	BODY SHOP	O & A	LEASE	TOTAL
67	ADMINISTRATION									
68	DEPARTMENT MANAGERS									
69	SALESPEOPLE				1					1
70	TECHNICIANS					2				2
71	CLERICAL				1					1
72	OTHER									
73	TOTAL					2	2			4
74	HIRED Y-T-D									
75	TERMINATED Y-T-D									

# **Exhibit 5**

**From:** [Blake Jackson](#)  
**To:** [Mike Pena](#)  
**Cc:** [Graden Jackson](#); [Bryan Coats](#)  
**Subject:** Re: 1505 Industrial Lease Agreement  
**Date:** Friday, December 05, 2014 5:27:42 PM  
**Attachments:** [CABDFC8E-4817-4E09-9205-D8153C3CD403\[2\].png](#)

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Mike -

I just sent this to you – but looks like our emails passed between each other – so here it is again.

I think my email addresses all of your questions listed below.

As a double check I did check in with our legal team. The contract at the time of signing, would have required a material disclosure and an acceptance on our part for a tenant to remain in the property after closing. Obviously neither one of those provisions were met. Since they were not disclosed and agreed to, any attempt to renegotiate terms by the seller or her agent during the Due Diligence period is inappropriate and unfounded. As you know, the Due Diligence period is for my protection as the purchaser – and not for the seller.

Further as we discussed and you disclosed today, the Landlord doesn't even have a contract with the tenant at this current time that I as the purchaser could even have accepted when we originally signed the contract. And up until today – we have always been told the tenant would vacate the property by years end.

Baring an unforeseen notices from the Phase I, we have every intention of closing on December 31, 2014. We expect the property to be vacated from the prior tenants, with no material destruction/ damage to the building, and the yard devoid of all materials and rubbish.

In short, we expect everyone to honor the agreements that we have signed and live up to their commitments.

**CALD 0145**

As I stated earlier, if the seller wishes to push back closing to January 10th-15th time frame, so that she can accommodate her tenants, I am agreeable to helping her with this. But as I have stated clearly, we have never, nor would ever agree to close on a building and become landlords for someone else's tenants. Additionally, since I would be accommodating the seller in this request, it would be uncalled for her to request any more earnest money from me or any draconian contractual language changes to the agreement as we have every intention of closing per our original agreement.

I appreciate you working for us. We hope that the seller and her agent can figure out how to remedy their situation and close at the end of the year or on the 15th of January, 2015 - and we all can move along with our other priorities. Issues such as weather, permits and moving on the part of the tenant should have been considered by the seller and her agent - in factoring an appropriate closing date.

Thx-



**BLAKE A JACKSON | PRESIDENT / CEO**

**O: 801.464.8208 | C: 801.828.8990 | F: 801.990.7708 | [blakeajackson@jgpete.com](mailto:blakeajackson@jgpete.com)**

---

**From:** Mike Pena <[Mike.Pena@colliers.com](mailto:Mike.Pena@colliers.com)>  
**Date:** Friday, December 5, 2014 at 5:08 PM  
**To:** Blake Jackson <[blakeajackson@jgpete.com](mailto:blakeajackson@jgpete.com)>  
**Subject:** Re: 1505 Industrial Lease Agreement

Blake,

**CALD 0146**

Per our phone conversation I am confirming that I understand that you wish to have the Tenant out by closing. As discussed, I believe I did verbally tell you the current tenant in the property was building another location and the information I had at the time was that they would be leaving towards the end of the year. The property flyer that was emailed and hand delivered also discloses that there is a tenant in the building. When we toured the property we also had to schedule with the current Tenant. The exhibit B states that that owner has to disclose any leases and I have sent you the lease information as soon as I received it..

As you know construction dates ebb and flow based on many factors including weather, contractors, and material availability. Since we spoke earlier to today the selling agent contacted the Tenants CFO and the City of Caldwell regarding some possible paving permit waivers. The Tenant wishes to be in their new building (they will own the building) as soon as possible and we are in process of trying to get a firm date.

I understand that you are my Customer and I am working hard to find a resolution that will meet your needs. We are on the same team and I am conveying your concerns to the proper parties. Your Due Diligence is over 10DEC14. I hope to have enough information prior to that timeframe for you to make the decision on how you want to proceed.

Thank you,

**Mike Peña**

Brokerage Services

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[mike.pena@colliers.com](mailto:mike.pena@colliers.com)

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**CALD 0147**



On Dec 5, 2014, at 12:12 PM, Blake Jackson <[blakeajackson@jgpete.com](mailto:blakeajackson@jgpete.com)> wrote:

Mike –

I don't want to be unkind – but we don't care about their agreement. When we close on Dec 31 – we are taking possession of the building. This entire matter was not discussed or disclosed by you, the other realtor or by the owner. When we close – we own the building and therefore we expect the tenant to be out.

If you want to push the closing back to January 10<sup>th</sup> - 15<sup>th</sup> - so you can get the tenant out, I will accept this change – but we are not closing and then dealing with your tenant.

Please confirm you understand.

Thx

<image001.gif>

---

**From:** Mike Pena [<mailto:Mike.Pena@colliers.com>]  
**Sent:** Friday, December 05, 2014 12:05 PM  
**To:** Blake Jackson  
**Subject:** Fwd: 1505 Industrial Lease Agreement

Blake,

Please find the attached lease documents. The last addendum extension (3rd) expired in Oct 2014 and I was told they now are on a month to month without any formal agreement. The owner is still looking for the 2nd addendum and we hope to have it soon.

The Tenant CFO had told Lincoln they were planning on leaving late this year and then more recently it might go out to mid to late January 2015. Listing agent said the owner would give the tenant 30 days notice with the removal of all contingencies and earnest money increasing to \$100K non refundable. They do not want to kick the tenant unless they are 100% sure the deal will close (therefor wanting high earnest money amount).

Thank you,

**Mike Peña**

**CALD 0148**

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Begin forwarded message:

**From:** Lincoln Hagood <[Lincoln.Hagood@colliers.com](mailto:Lincoln.Hagood@colliers.com)>  
**Subject:** 1505 Industrial Lease Agreement  
**Date:** December 5, 2014 at 11:28:19 AM MST  
**To:** Mike Pena <[Mike.Pena@colliers.com](mailto:Mike.Pena@colliers.com)>

Mike,

Here is the lease agreement with amendments. I am tracking down the 2<sup>nd</sup> amendment, but from what I know all it addressed was a lease price increase and the addition of the excess 2.35ac to the lease on a month to month basis.

Thanks,

**Lincoln Hagood**

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**CALD 0149**

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# Exhibit 6



# City of Caldwell

DEPARTMENT OF BUILDING SAFETY

621 Cleveland Blvd.  
Caldwell, ID 83605

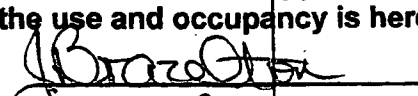
## CERTIFICATE OF OCCUPANCY

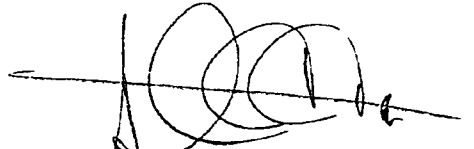
**This Certificate issued pursuant to the requirements of the International Code certifying that at the time of issuance this structure was in compliance with the various ordinances of the city regulating building construction or use. For the following:**

ISSUED:	05/19/2015	JURISDICTION:	City of Caldwell
PERMIT TYPE:	Commercial Alteration	TYPE OF CONST:	
PERMIT NUMBER:	BC15-00023		
NAME OF PROJECT:	PETERBILT- Commercial/Alteration/Peterbilt/Interior alterations		
PROJECT INFORMATION:	PETERBILT- Commercial/Alteration/Peterbilt/Interior alterations 1505 INDUSTRIAL WAY CALDWELL, ID		
OWNER:	JACKSON GROUP (Management Co.) 6633 S FEDERAL WAY BOISE ID 83716		
TYPE OF WORK:	Commercial/Alteration/Peterbilt/front office remodel/adding garage doors to shop & adding (2) offices to rear rooms		
USE ZONE:	M-1 Light Industrial		
OCCUPANCY GROUP:			

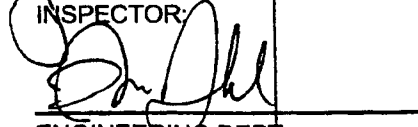
The above has been inspected and has met the applicable requirements of the Caldwell City Code and the use and occupancy is hereby authorized.

  
BUILDING OFFICIAL:

  
INSPECTOR:

  
FIRE DEPT:

  
PLANNING & ZONING DEPT:

  
ENGINEERING DEPT:

This certificate is a legal document and shall be posted in a conspicuous place at or close to the main entrance of the building or structure and permanently maintained.

# **Exhibit 7**

1 noticed that that asphalt patch was in disrepair, what  
2 caused you to connect the dots of, "Oh, this is where  
3 the transformer was"?

4 A. We knew that's where the transformer was.

5 Q. Oh, okay.

6 A. We thought somebody had gone in and removed the  
7 concrete that was there also.

8 Q. That is what you thought originally. Did you  
9 learn something different subsequent to that?

10 A. Yes. We learned it had come out with the  
11 transformer.

12 Q. The concrete slab had come out with --

13 A. With the transformer.

14 Q. And how did you learn that?

15 A. I can't say exactly. It was just from looking  
16 at other transformers and conversations as we tried to  
17 reason out what was going on.

18 Q. You just pieced it together?

19 A. We pieced it together, yes.

20 (Exhibit 16 was marked.)

21 Q. BY MS. RAINEY: Exhibit 16, which I have just  
22 handed you, is two pages with Bates Nos. PLATINUM  
23 REMODEL 106 and '107. Is that what you have been  
24 handed?

25 A. Yes.

1 additional doors, overhead doors.

2 Q. Garage doors?

3 A. Garage doors.

4 Q. All right.

5 A. We painted. We put in air lines and oil  
6 delivery lines. We put in equipment. Mr. Sommercorn  
7 talked about that earlier.

8 Q. Did you do that, or did Platinum Remodel do  
9 that?

10 A. As far as equipment that was put in?

11 Q. Yes.

12 A. They did not put in the equipment. I can't  
13 remember if we used our electrician or not. We had the  
14 equipment come in after and did that ourselves.

15 Q. The air lines? Is that something you did  
16 yourselves?

17 A. We contracted that ourselves.

18 Q. As far as work done by Platinum Remodel, was  
19 that just generally putting in the new overhead doors?

20 A. And some painting of the walls.

21 Q. And some painting?

22 A. Yes.

23 Q. Did Platinum Remodel, in fact, do that list of  
24 things that is listed there on page '99 of Exhibit 15?

25 A. Everything except for the slab, the very bottom

1 Q. Do you recognize the document that has been  
2 marked as Exhibit 16?

3 A. Yes.

4 Q. What do you recognize it to be?

5 A. This looks more in line with what our final  
6 plan was on the building.

7 Q. When we were looking at Exhibit 15, you said,  
8 "That's what the plan was before I got out there." Is  
9 this closer to what the plan was after you and Bryan sat  
10 down together to hash it out a little bit further?

11 A. Yes.

12 Q. I am noticing on this that, again, this looks  
13 to me to be kind of that front office retail space; is  
14 that correct?

15 A. That's correct.

16 Q. What was the extent of the work done to either  
17 the warehouse area or the bay area?

18 A. Overall?

19 Q. Yes.

20 A. You would have to go back to --

21 Q. Exhibit 15?

22 A. -- Exhibit 15.

23 Q. Okay.

24 A. I don't know if there is a -- I can tell you,  
25 in general, that the bay area -- we put in some

1 item.

2 Q. My first question is: How do you know that  
3 they did everything except the slab that shows up there  
4 on the bottom item?

5 A. Because they repaired them. We paid them to  
6 repair them.

7 Q. Did you see them repair them?

8 A. No.

9 Q. Who wrote the checks for paying them? Is that  
10 your job?

11 A. I don't know if I actually signed them, but I  
12 approved the invoices.

13 Q. Were you invoiced for these separately, or was  
14 it part of the overall remodel?

15 A. We received a separate bid for these items, but  
16 I can't tell you if they were separated out on the  
17 payment or not.

18 Q. What causes you to recall that they did not do  
19 the asphalt repair on the southeast corner of the  
20 building?

21 A. That goes back to our previous discussion. As  
22 we looked at it, we found out that that concrete pad  
23 would come back with the transformer.

24 Q. So when that concrete pad came back, that is  
25 something that -- Idaho Power put that concrete pad back

Page 60

1 cold, that they opened them up and both heaters were in  
2 disrepair.

3 **Q. Okay.**

4 A. In particular, one looked like it had been kind  
5 of jerry-rigged or someone had done something to help, I  
6 guess, make it work; but it was not done properly.

7 **Q. That was a conversation that you had with Mr.  
8 Jackson about the heaters?**

9 A. And the conversation we had with Mr. Brennan  
10 because he was reporting what the technicians were  
11 saying as they were actually doing the work.

12 **Q. So I kind of want to separate out the different  
13 conversations you had with each individual.**

14 A. They were had together.

15 **Q. Oh, okay. Fair enough.**

16 A. Yes.

17 **Q. If I understand correctly, it is your  
18 recollection that heater repair personnel were called  
19 out to fix the heaters because they were cold? They  
20 were not running right?**

21 A. That's correct.

22 **Q. In the course of fixing those heaters that were  
23 not running right, the technicians reported -- and you  
24 heard this from the people that they reported it to --  
25 that they were in disrepair and they had been**

Page 62

1 A. The weather was getting cold, and so they  
2 needed the heaters on.

3 **Q. Well, it was coming into spring, was it not?**

4 A. Yes. We weren't in the shop until the March --  
5 February range. It was still cold out. They needed  
6 heaters as they were in the building and looking at  
7 things.

8 **Q. When you attempted to the turn heaters on, they  
9 didn't turn on at all?**

10 A. I'm not sure about that. I just know that they  
11 weren't working properly, and so they called the repair  
12 people out.

13 **Q. You don't know if they were not working  
14 properly because they were running cold or if they were  
15 not working properly because they were not turning on at  
16 all?**

17 A. I don't.

18 **Q. You just know that the heater repair people  
19 were called out to come --**

20 A. Because they needed heaters, because the  
21 weather was cold outside.

22 **Q. How many heaters do you recall having been  
23 repaired, if you know?**

24 A. I can't be exact here, but I believe there was  
25 two.

Page 61

1 **jerry-rigged or something?**

2 A. Yes. There were wire ties used inside to hold  
3 things together. Wire ties should not be used on a  
4 heating application.

5 **Q. When you say "wire ties," what are you  
6 referring to?**

7 A. They are plastic -- a piece of plastic that  
8 goes through a loop and pulls tight on each other.

9 **Q. A zip tie?**

10 A. Yeah, kind of a zip tie to hold wires in  
11 place.

12 **Q. Do you recall anything else about those  
13 conversations that you had regarding what the service  
14 men were reporting about what they found inside of the  
15 broken heaters?**

16 A. No. The other thing that was discussed is it  
17 was lucky we caught it so there wasn't an accident that  
18 had happened from turning those heaters on in that type  
19 of a situation.

20 **Q. Had the heaters been turned on?**

21 A. No.

22 **Q. You said that they were running cold. How did  
23 you know that they were running cold?**

24 A. They weren't running.

25 **Q. Oh. They weren't running at all?**

Page 63

1 **Q. It could have been more? It could have been  
2 less?**

3 A. I'm pretty sure it's two. I couldn't --

4 **Q. The next category that is listed here is "Lost  
5 Profits Caused by Delay." What can you tell me about  
6 efforts undertaken by Jackson Group Peterbilt to reduce  
7 the lost profits caused by the delay?**

8 A. I wasn't involved in those calculations and  
9 discussions.

10 **Q. So that is something that I need to cover with  
11 Mr. Jackson; correct?**

12 A. Yes.

13 **Q. Going back on this broken heater, since most of  
14 the information that you received regarding the broken  
15 heaters came from Mr. Jackson and the other gentleman  
16 that you mentioned, Mr. Jackson is a better person to  
17 talk to about that broken heater situation than  
18 yourself; is that correct?**

19 A. Yes.

20 **Q. Moving back to the Platinum Remodel & Repair  
21 discussion, you said that it was your role to approve  
22 the invoices for payment; correct?**

23 A. Yes.

24 **Q. How often during the course of the build-out  
25 were you invoiced by Platinum Remodel?**



1 A. I couldn't tell you definitely, but I believe  
2 there was an interim payment of \$40,000. There may have  
3 been a second interim payment, and I believe there was a  
4 final payment.

5 **Q. What did those invoices look like? Were they  
6 detailed invoices or just lump sum payments?**

7 A. The interim payments? They were just lump sum  
8 payments. We had approved the overall amount. Because  
9 of the size of his company and the need to purchase  
10 materials, he needed interim payments.

11 **Q. At some point, did you get a full, itemized  
12 listing of what had been done?**

13 A. You know, after our final payment, I believe it  
14 was close to what we had talked about. At that time, I  
15 don't believe we had an itemized list from him. Later  
16 on, I did request an itemized list for income tax  
17 purposes.

18 **Q. Later on, after you made full payment --**

19 A. After we made full payment.

20 **Q. -- you requested the itemized list?**

21 A. Yes.

22 **Q. Did you receive one?**

23 A. I believe we did. I would have passed it on to  
24 our CFO to use for tax purposes.

25 **Q. Did you review the itemized list to make sure**

1 A. I had a working relationship, yes.

2 **MS. RAINEY:** I am going to take a little bit of  
3 a break to make sure I haven't missed anything before I  
4 let you go. I think I am just about done.

5 (Break taken.)

6 **MS. RAINEY:** Upon further review, I don't have  
7 anything further.

8 (The foregoing deposition concluded at 11:30 a.m.)

9 (Signature requested.)

10 \* \* \*

1 that everything that was listed on that itemized list  
2 had actually been done by Platinum?

3 A. I can't say that I did, no.

4 **Q. You cannot say that you did?**

5 A. No.

6 **Q. You just received it and passed it on?**

7 A. Yes.

8 **Q. By that time, the bill had already been paid;  
9 correct?**

10 A. Yes. During the process, as we changed things  
11 and needed additional things done, I knew the additional  
12 costs that were associated with that.

13 **Q. Basically, there was no reason to review that  
14 full, itemized list?**

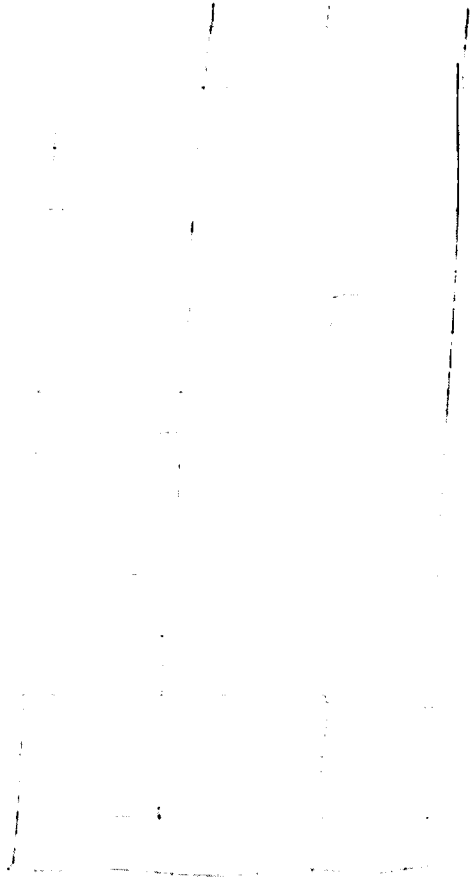
15 A. No.

16 **Q. If I am understanding your testimony correctly,  
17 those interim payments that were made were just lump sum  
18 payments to be applied toward the entirety? It was not  
19 a payment that reflected certain particular items that  
20 had been done; is that correct?**

21 A. That's correct. We looked at -- I made several  
22 trips up here during the process that was going on. I  
23 knew that construction was at a certain level, and I  
24 felt comfortable paying that portion of it.

25 **Q. And you had a working relationship with them?**

- Repair metal siding on NE corner 500<sup>00</sup>
- Remove conduit on E. side of building 500<sup>00</sup>
- Patch concrete hole in NW corner of shop 575<sup>00</sup> Markup
- Repair asphalt in slab on SE corner of building 575<sup>00</sup> Markup



*[Handwritten signature]*

Platinum Remodel & Repair LLC.  
 288 N. Maple Grove Rd.  
 Boise, ID 83704 US  
 (208)375-7881

ADDRESS  
 Boise Peterbilt Inc.  
 6633 Federal Way  
 Boise, ID 83716

SHIP TO  
 Caldwell Peterbilt  
 1505 Industrial Way  
 Caldwell, ID

**1072**

DATE 03 05 2015

EXPIRATION DATE 03 20 2015

ACTIVITY	QTY	RATE	AMOUNT
<b>02 Site Work</b> Metal Siding repairs on Northeast corner of building where duct work was removed	1	750.00	750.00
<b>02 Site Work</b> Removal of all unused existing conduit on east side of building	1	500.00	500.00
<b>02 Site Work</b> Fill trench in concrete in Northwest corner of shop	1	250.00	250.00
<b>02 Site Work</b> Repair asphalt patch in Southeast corner of lot where transformer was removed.	1	625.00	625.00

**TOTAL** \$2,125.00

Accepted By

Accepted Date

**CALD 0226**

# **Exhibit 8**

1 **run-of-the-mill service call?**  
 2 A. No. He was continuing to fix things. Found  
 3 indoor blower not working, found bad 15 med. blower  
 4 capacitor, replaced blower capacitor, checked A/C  
 5 operations and refrigerant level, compressor is starting  
 6 to drain. So he was just bringing them up to capacity  
 7 or usefulness or however you want to term it.  
 8 **Q. After the first service, did you expect that**  
 9 **they were coming out again later in the month; or did**  
 10 **you think that the first service had fixed it?**  
 11 A. I don't know. It appears to me that these are  
 12 two different types of repairs. The second one appears  
 13 to be more A/C-related, which means they are probably  
 14 fixing different items, if that makes sense.  
 15 **Q. On Exhibit 20, you are claiming damages for**  
 16 **both of these repair bills; correct?**  
 17 A. Correct.  
 18 **Q. Why do you believe that Johnson Thermal is**  
 19 **responsible for the repair and maintenance of the**  
 20 **heating and air conditioning?**  
 21 A. Because the contract that JTS signed with  
 22 Mrs. Gilbert specifically states, "You will maintain  
 23 that HVAC system."  
 24 **Q. And you have read that contract?**  
 25 A. Yes.

1 **Q. Did you read it before you purchased the**  
 2 **property or after?**  
 3 A. Both.  
 4 **Q. Was it the Caldwell Peterbilt operations entity**  
 5 **or Caldwell Land & Cattle that actually paid these**  
 6 **service bills?**  
 7 A. Caldwell Peterbilt.  
 8 **Q. Regarding attorney's fees, Bruce said he had no**  
 9 **information other than what your attorneys have billed**  
 10 **and provided. Do you have any information other than**  
 11 **what your attorneys have provided to you in billings**  
 12 **with respect to the attorney's fees that you are**  
 13 **claiming as damages?**  
 14 A. That \$35,000 represents all the way up through  
 15 mediation which, as you know, failed.  
 16 **Q. I am aware of that.**  
 17 A. So that amount has continued to grow. What  
 18 point are we at now? I do not know.  
 19 **Q. The way you are coming up with that number is**  
 20 **just based exclusively on what --**  
 21 A. What I am being billed by Graden.  
 22 **Q. Who pays the bills for the attorney's fees? Is**  
 23 **that paid for out Caldwell Land & Cattle's account or**  
 24 **Caldwell Peterbilt's account?**  
 25 A. Caldwell Peterbilt's.

1 **Q. In Exhibit 14, Topic 5 refers to information**  
 2 **regarding damages to or modifications observed by**  
 3 **Caldwell Land & Cattle to any, quote, "Apparatuses at**  
 4 **1505 Industrial Way, as alleged in the Complaint."**  
 5 A. Did you have a question?  
 6 **Q. Yes. I just thought you were trying to find**  
 7 **that one.**  
 8 A. No. Sorry.  
 9 **Q. The apparatuses referred to -- I just need to**  
 10 **know if, by that, you are referring to anything other**  
 11 **than the heaters.**  
 12 A. Just the heaters.  
 13 **Q. You have talked previously about a conversation**  
 14 **that I think you said Jeff Brennan had with Gus about**  
 15 **the power supply to the building.**  
 16 A. I did not say that.  
 17 **Q. Who had the conversation with Gus about the**  
 18 **power supply?**  
 19 A. I never said that. I said Jeff Brennan had a  
 20 discussion with someone at JTS.  
 21 **Q. I thought you said it was Gus.**  
 22 A. No.  
 23 **Q. So you don't even know who at JTS he had a**  
 24 **discussion with?**  
 25 A. That's what I've said twice.

1 **Q. Other than that conversation that Jeff had with**  
 2 **somebody -- we don't know who -- at JTS --**  
 3 A. Correct.  
 4 **Q. -- did Caldwell Land & Cattle do anything else**  
 5 **to confirm what it was getting with respect to power to**  
 6 **the building?**  
 7 A. I think I said this, but I will answer it  
 8 again. Jeff called to verify.  
 9 **Q. Called who?**  
 10 A. Again, I just answered that. I don't know who  
 11 he talked to at JTS.  
 12 **Q. So he had a conversation, and then he had**  
 13 **another phone call with someone?**  
 14 A. No. I said that he talked with or --  
 15 **Q. I want to know about other than that.**  
 16 A. I don't -- I think -- let me back up so we are  
 17 very clear. I think we are getting some word exchanges  
 18 here.  
 19 **Q. I think so.**  
 20 A. He spoke with someone at JTS. I do not know  
 21 who.  
 22 **Q. Okay.**  
 23 A. I do not know if that was phone or visit. I  
 24 assume it's visit because he went by there to check the  
 25 facility out. We also inspected it when we went up. I

**SERVICE INVOICE**



**Heating & Air Conditioning**

*Be Warm. Be Cool. Be Comfy.*  
 327 N. Linder Rd. • Meridian, Idaho 83642  
 (208) 343-4445 • Fax (208) 345-6728

Bill To: Contractors License #RCE873  
 Boise Peterbilt  
 6633 Federal Way  
 3070501/3070705/3080107  
 Boise, ID 83716

INVOICE NO. 403492	REFERENCE NO.
PHONE 344-8515	DATE OF ORDER 3/3/2015
ORDER TAKEN BY Jen	MISCELLANEOUS

Page 1 of 1

JOB LOCATION Caldwell Peterbilt 1505 Industrial Way Caldwell, ID 83605	JOB PHONE 941-0234 Jeff	START DATE 3/3/2015
---	----------------------------	------------------------

OPEN ACCOUNT	PAID CHECK#	CASH	CREDIT CARD	TECH NAME#
G-FURN			A/C	
E-FURN	O-FURN		HP	
MODEL#	MBA 120 MHSR	AGE:	MODEL#	
SERIAL#	980505004	EFFICIENCY:	SERIAL#	
OTHER EQUIP:			FILTERS:	

**REASON FOR CALL:**

<input type="checkbox"/> CHECK GAS PRESSURE	<input type="checkbox"/> CHECK VENT & COMBUSTION MOTORS	<input type="checkbox"/> CHECK CONDENSATE PUMPS
<input type="checkbox"/> INSPECT FAN BELTS / SIZE	<input type="checkbox"/> CHECK INDUCER MOTOR / AMPS	<input type="checkbox"/> CHECK HUMIDIFIER / OPERATION
<input type="checkbox"/> CHECK CABINET INTERIOR FOR LEAKS / DAMAGE	<input type="checkbox"/> MONITOR FLUE DRAFT	<input type="checkbox"/> REPLACE / CLEAN ALL FILTERS ON ALL UNITS
<input type="checkbox"/> CHECK PILOT & BURNER OPERATION	<input type="checkbox"/> MEASURE FURNACE AMPS	<input type="checkbox"/> RETURN AIR TEMP
<input type="checkbox"/> CHECK BLOWER COMPONENTS / AMPS	<input type="checkbox"/> MEASURE FURNACE VOLTS	<input type="checkbox"/> SUPPLY AIR TEMP
<input type="checkbox"/> CHECK PRESSURE PORTS	<input type="checkbox"/> SUPERHEAT	<input type="checkbox"/> WIPE UNIT DOWN
<input type="checkbox"/> MONITOR FOR CORRECT AIR FLOW	<input type="checkbox"/> SUBCOOL	<input type="checkbox"/> CHECK VIBRATION OR NOISE
<input type="checkbox"/> CHECK HEAT EXCHANGER	<input type="checkbox"/> WASH CONDENSOR COIL (NEED HOSE BIB)	<input type="checkbox"/> CHECK SAFETY CONTROLS
<input type="checkbox"/> CHECK CARBON MONOXIDE	<input type="checkbox"/> CHECK CONDENSOR FAN MOTOR / AMPS	<input type="checkbox"/> TIGHTEN ALL ELECTRICAL CONNECTIONS
<input type="checkbox"/> CHECK FLUE PIPES	<input type="checkbox"/> CHECK COMPRESSOR AMPS	<input type="checkbox"/> MEASURE TEMPERATURE DIFFERENTIALS
<input type="checkbox"/> CHECK THERMOCOUPLE	<input type="checkbox"/> CHECK DEFROST CONTROLS	
<input type="checkbox"/> CHECK IGNITOR	<input type="checkbox"/> WASH EVAP COIL	<input type="checkbox"/> TEST STARTING CAPABILITIES
<input type="checkbox"/> CLEAN IGNITION ASSEMBLY	<input type="checkbox"/> CHECK CAPACITOR / SIZE	<input type="checkbox"/> CHECK THERMOSTAT / VERIFY SETTINGS
<input type="checkbox"/> CLEAN FLAME SENSOR	<input type="checkbox"/> CHECK PRESSURES	<input type="checkbox"/> CHECK FOR POTENTIAL FIRE HAZARDS
<input type="checkbox"/> CLEAN BURNER ASSEMBLY	<input type="checkbox"/> FLUSH CONDENSATE DRAINS (IF ACCESSIBLE)	

DESCRIPTION OF WORK PERFORMED	PRICE	WARRANTY	PRIC
Found Ball gas Valve			
Fired 2 unit heaters			
4 unit heaters 2 split bypassing			
Replaced gas Smart Valve	850.00		850.00
Credit & correct ok			

DATE	TIME	INITIALS	I hereby authorize the above work & materials used. A Finance Charge of 1 1/2% per month (18% per annum) will be assessed on any account that is 30 days past due. CUSTOMER SIGNATURE <i>[Signature]</i> 3/3/15 TERMS: Due and payable upon receipt. Please pay from this invoice.	TOTAL CHARGED \$ 850.00
	AM	AM		
	PM	PM		
	AM	AM		
	PM	PM		

**CALD 0242**



# Heating & Air Conditioning

*Be Warm. Be Cool. Be Comfy.*  
 327 N. Linder Rd. • Meridian, Idaho 83642  
 (208) 343-4445 • Fax (208) 345-6728  
 Contractors License #RCE873

Boese Peter Bussert  
 6633 FEDERAL WAY  
 BOOSE, ID 83716

632004

INVOICE NO. 411953	REF. NO.
PHONE 304-3515	DATE OF ORDER
ORDER TAKEN BY	MISCELLANEOUS
JOB LOCATION CALDWELL PETER BUSSERT 1505 INDUSTRIAL WAY CALDWELL, ID 83605	
JOB PHONE	START DATE 8/26/15

PO # → CP41561824

OPEN ACCOUNT <input checked="" type="checkbox"/>	PAID CHECK <input type="checkbox"/>	CASH <input type="checkbox"/>	CREDIT CARD <input type="checkbox"/>	TECH NAME <u>JOHNSON #68</u>
G-FURN		A/C		
E-FURN O-FURN <del>GOODMAN</del> CONSOLIDATED		HIP GOODMAN		
MODEL# <u>MRA 120 NH5R</u>	AGE:	MODEL# <u>CK60-1C</u>	AGE:	
SERIAL# <u>980505010</u>	EFFICIENCY:	SERIAL# <u>9904420793</u>	EFFICIENCY:	
OTHER EQUIP:		FILTERS:		
REASON FOR CALL: <u>A/C FROM U/D</u>				
<input type="checkbox"/> CHECK GAS PRESSURE	<input type="checkbox"/> CHECK VEN™ & COMBUSTION MOTORS	<input type="checkbox"/> CHECK CONDENSATE PUMPS		
<input type="checkbox"/> INSPECT FAN BELTS / SIZE:	<input type="checkbox"/> CHECK INDUCER MOTOR / AMPS	<input type="checkbox"/> CHECK HUMIDIFIER / OPERATION		
<input type="checkbox"/> CHECK CABINET INTERIOR FOR LEAKS / DAMAGE	<input type="checkbox"/> MONITOR FLUE DRAFT	<input type="checkbox"/> REPLACE / CLEAN ALL FILTERS ON ALL UNITS		
<input type="checkbox"/> CHECK PILOT & BURNER OPERATION	<input type="checkbox"/> MEASURE FURNACE AMPS	<input checked="" type="checkbox"/> RETURN AIR TEMP <u>74°</u>		
<input checked="" type="checkbox"/> CHECK BLOWER COMPONENTS / AMPS <u>4.5</u>	<input type="checkbox"/> MEASURE FURNACE VOLTS	<input checked="" type="checkbox"/> SUPPLY AIR TEMP <u>52°</u>		
<input type="checkbox"/> CHECK PRESSURE PORTS	<input type="checkbox"/> SUPERHEAT <u>5°</u>	<input type="checkbox"/> WIPE UNIT DOWN		
<input type="checkbox"/> MONITOR FOR CORRECT AIR FLOW	<input type="checkbox"/> SUBCOOL	<input type="checkbox"/> CHECK VIBRATION OR NOISE		
<input type="checkbox"/> CHECK HEAT EXCHANGER	<input type="checkbox"/> WASH CONDENSOR COIL (NEED HOSE BIB)	<input type="checkbox"/> CHECK SAFETY CONTROLS		
<input type="checkbox"/> CHECK CARBON MONOXIDE	<input checked="" type="checkbox"/> CHECK CONDENSOR FAN MOTOR / AMPS <u>1.3</u>	<input type="checkbox"/> TIGHTEN ALL ELECTRICAL CONNECTIONS		
<input type="checkbox"/> CHECK FLUE PIPES	<input checked="" type="checkbox"/> CHECK COMPRESSOR AMPS <u>24.3</u>	<input type="checkbox"/> MEASURE TEMPERATURE DIFFERENTIALS		
<input type="checkbox"/> CHECK THERMOCOUPLE	<input type="checkbox"/> CHECK DEFROST CONTROLS <u>25 MAX</u>	<input type="checkbox"/>		
<input type="checkbox"/> CHECK IGNITOR	<input type="checkbox"/> WASH EVAP COIL	<input type="checkbox"/> TEST STARTING CAPABILITIES		
<input type="checkbox"/> CLEAN IGNITION ASSEMBLY	<input type="checkbox"/> CHECK CAPACITOR / SIZE	<input type="checkbox"/> CHECK THERMOSTAT / VERIFY SETTINGS		
<input type="checkbox"/> CLEAN FLAME SENSOR	<input checked="" type="checkbox"/> CHECK PRESSURES <u>64/235</u>	<input type="checkbox"/> CHECK FOR POTENTIAL FIRE HAZARDS		
<input type="checkbox"/> CLEAN BURNER ASSEMBLY	<input type="checkbox"/> F-USH CONDENSATE DRAINS (IF ACCESSIBLE)	<input type="checkbox"/>		
DESCRIPTION OF WORK PERFORMED		UP FRONT PRICING	ANY SAVINGS	PRICE
TRIP + DIAGNOSTIC				\$119.00
# 016845 CAPACITOR				\$131.00
- FOUND INDOOR BLOWER NOT WORKING				
- FOUND BAD 15 MFD BLOWER CAPACITOR				
- REPLACED BLOWER CAPACITOR				
- CHECKED A/C OPERATIONS + REFRIGERANT				
LEVEL - COMPRESSOR IS STARTING TO DRAW				
NEAR ITS MAX & A/C IS WORKING				
OK @ THIS TIME				
DATE	FROM	TO	HOURS	
	AM	AM		
	PM	PM		
	AM	AM		
	PM	PM		
	AM	AM		
	PM	PM		
I hereby authorize the above work & materials used. A Finance Charge of 1 1/2% per month (18% per annum) will be assessed on any account that is 30 days past due.			TOTAL CHARGED \$ <u>250.00</u>	
CUSTOMER SIGNATURE <u>QSB</u>			TERMS: Due and payable upon receipt. Please pay from this invoice.	

CALD 0243

# **Exhibit 9**



CHECK CONTROL NO. 368

ISSUED BY: Diane\_Lindberg

CALDWELL PETERBILT  
Caldwell, Idaho 83605

PAGE 1C

INVOICE STOCK NO.	INVOICE DATE	PURCHASE ORDER NO.	COMMENT/V.I.N.	AMOUNT	DISCOUNT/ACCOUNT NO.	NET AMOUNT
	031215		INSTALLATION OF 480 POWER TO NEW CALDWELL BLDG			7,929.00
					368107*103000	-7,929.00
				NEWCPBLDG	107*240000	7,929.00
				TOTAL	103000	7,929.00

DETACH AT PERFORATION BEFORE DEPOSITING CHECK

REMITTANCE ADVICE



812 W. Laurel St., Caldwell, Idaho 83605  
Phone (208) 453-7020  
Fax (208) 459-3026



368

97-154  
1240

DATE
12MAR15

PAY THIS AMOUNT			
*****7,929	DOLLARS	00	CENTS

AMOUNT OF CHECK
*****7,929.00

TO THE ORDER OF

IDAHO POWER  
PO BOX 34966  
SEATTLE WA 98124-1666

CAL41350

CALDWELL PETERBILT  
NOT VALID AFTER 90 DAYS

BY \_\_\_\_\_  
\*\*\* NOT NEGOTIABLE \*\*\*  
BY \_\_\_\_\_  
AUTHORIZED SIGNATURE

FILE COPY

CALD 0276

Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702  
kbd@bjorkmandunn.com  
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Rebecca A. Rainey, ISB No. 7525  
Angie Perkins, ISB No. 10113  
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rar@frhtriallawyers.com  
angie@frhtriallawyers.com  
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*Attorneys for Defendant*

**FILED**  
A.M. *10:07* P.M.  
JUL 18 2017  
CANYON COUNTY CLERK  
*MB* DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant/Counterclaimant

Case No. CV 15-587

**DEFENDANT JOHNSON  
THERMAL SYSTEMS'  
MEMORANDUM IN SUPPORT OF  
MOTION IN LIMINE  
REGARDING EVIDENCE OF  
DAMAGES ALLEGED BY  
ENTITIES OTHER THAN  
PLAINTIFF**

COMES NOW Defendant, Johnson Thermal Systems, Inc. ("JTS"), by and through its counsel of record, FISHER RAINEY HUDSON, hereby submits this Memorandum in Support of its Motion in Limine, and asks this Court to exclude from trial any evidence offered by Plaintiff regarding alleged damages incurred by entities other than Plaintiff,

Caldwell Land & Cattle, LLC, or Caldwell Land & Cattle Company, LLC (“CLC”).

## I. INTRODUCTION

During the 30(b)(6) deposition of Plaintiff CLC, defendant JTS learned that—contrary to the representations made in Plaintiff’s Verified Complaint—most of the damages alleged in this action were not incurred by Plaintiff CLC but, instead, incurred by a non-party to this lawsuit: Caldwell Peterbilt, Inc., Plaintiff’s sister company.<sup>1</sup> See Motion in Limine, Appendix A, filed concurrently with this Memorandum.

Following CLC’s 30(b)(6) deposition, Plaintiff produced the lease agreement by and between itself and sister company, Caldwell Peterbilt, Inc., for the property at 1505 Industrial Way (the “Property”). The cover letter from Plaintiff’s attorney, which accompanied the lease, explained the unpled theory: “This lease agreement constitutes the basis for Caldwell Land & Cattle’s liability to Caldwell Peterbilt for the property not being available to occupy.” Rainey Aff., Ex. 2. The cover letter also explained that the February 1, 2008 commencement date in the lease was a typographical error that should have read “February 1, 2015.” Rainey Aff., Ex. 2. However, the lease agreement also lists June 1, 2015, as the commencement date (Rainey Aff., Ex. 3, p. 2), which is, notably, the first month Caldwell Peterbilt paid rent on the Property. Rainey Aff., Ex. 4 at 73:17-74:1, CALD 0218, and CALD 0220. Accordingly, June 1, 2015 appears to be the true, contractual commencement date.

Because the lease directly contradicts CLC’s position that the lease began on February 1, 2015—showing, instead, a commencement date of June 1, 2015 (Rainey Aff.,

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<sup>1</sup> The Idaho Secretary of State website shows that Caldwell Peterbilt, Inc., was at one time an assumed business name for Boise Peterbilt, Inc.—then Caldwell Peterbilt incorporated as a separate entity in October 2014. Affidavit of Rebecca A. Rainey, “Rainey Aff.” Ex. 1 (Corporate Filings).

Ex. 3 at p. 2)—Plaintiff's claims for damages allegedly incurred by sister company Caldwell Peterbilt as early as February 1, 2015 are simply unsupported.

Moreover, if it were true that CLC executed a lease promising to deliver the property to Caldwell Peterbilt on or before February 1, 2015, it did so in the face of a known dispute with JTS regarding JTS's vacate date. Accordingly, rather than mitigating its damages, CLC walked right into those damages and cannot recover them.

Finally, because the evidence shows that Plaintiffs' tenant (sister company Caldwell Peterbilt) voluntarily made repairs to the Property that it was not legally required to make, Caldwell Peterbilt is not entitled to recover from its landlord for payments voluntarily made. Similarly, Plaintiff CLC cannot turn around and attempt to recover those voluntary payments from Defendant JTS.

For the reasons that follow, JTS seeks an order in limine excluding any evidence offered by CLC that relates to damages that were incurred by Caldwell Peterbilt (an entity separate and distinct from Plaintiff CLC, and not a party to this lawsuit), and arising from a legal theory that was not pled in the First Amended Verified Complaint.

## II. STANDARD OF REVIEW

Trial courts have broad discretion to determine the admissibility of evidence and ruling on motions in limine. *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000) (overruled on other grounds). A trial court's motion in limine ruling is reviewed under an abuse of discretion standard. *Leavitt v. Swain*, 133 Idaho 624, 631, 991 P.2d 349, 356 (1999). This standard requires a three-pronged inquiry to determine whether the district court (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the

specific choices before it; and (3) reached its decision by an exercise of reason. *Id.* at 631, 991 P.2d at 356; *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). Absent a clear showing of abuse, a district court's exercise of discretion will not be overturned. *Appel*, 135 Idaho at 135, 15 P.3d at 1143.

### III. ARGUMENT

**A. There is no evidence to support CLC's unpled claim that it is obligated to Caldwell Peterbilt for lost profits and other damages incurred for failing to deliver the property to Caldwell Peterbilt on or before February 1, 2015.**

At the time CLC purchased the Property at 1505 Industrial Way, it knew there was a dispute regarding JTS's lease and whether JTS was even capable of vacating the building on or before February 1, 2015. Rainey Aff., Ex. 5. Despite having that knowledge, CLC claims to have entered into a lease agreement with Caldwell Peterbilt, whereby it promised Caldwell Peterbilt that it could take possession of the Property on February 1, 2015. Rainey Aff., Ex. 2. There is no written evidence of this agreement.

Rather, there is only a lease agreement that states a commencement date of June 1, 2015—the month CLC began paying rent on the Property (Rainey Aff., Ex. 4 at 73:17-74:1, CALD 0218, and CALD 0220)—and only thirteen days after a Certificate of Occupancy was issued for the Property (Rainey Aff., Ex. 6). The lease agreement also states, on another page, an “incorrect” commencement date of February 1, 2008. Rainey Aff., Ex. 3, p. 2-3.

Plaintiff produced no evidence of a written agreement by and between CLC and Caldwell Peterbilt that pre-dates February 1, 2015—the date that Caldwell Peterbilt allegedly had to renew its existing lease and began losing profits because it could not move into the Property as promised. Because there is no evidence of CLC's legal obligation to

pay the damages suffered by Caldwell Peterbilt that it is attempting to pass through to JTS, all evidence of such damages should be excluded.

**B. Caldwell Land & Cattle had a duty to mitigate any avoidable damages arising from JTS's position that it had a contractual right to remain on the property until April 15, 2015.**

If CLC did, in fact, promise to deliver the Property to Caldwell Peterbilt on February 1, 2015, it did so at its own risk. Accordingly, CLC (not JTS) is liable for the damages suffered by Caldwell Peterbilt. “The duty to mitigate, also known as the ‘doctrine of avoidable consequences,’ provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts....” *U.S. Bank Nat. Ass’n v. Kuenzli*, 134 Idaho 222, 228, 999 P.2d 877, 883 (2000) (citing *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (1993)). CLC knew there was a genuine dispute regarding the date JTS would or could vacate the property. Accordingly, it was incumbent on CLC to avoid damages resulting from that risk. Promising Caldwell Peterbilt that it, CLC, could and would deliver the Property by February 1, 2015, when JTS had repeatedly told CLC that it could not possibly be out by that date is not avoiding damages—it is walking right into them. Because CLC had a duty to mitigate its damages but instead, knowingly, voluntarily, and willingly caused them to increase, it cannot recover for them.

For these reasons, Defendant JTS asks this Court for an order preventing CLC from admitting at trial any evidence of damage suffered by CLC’s tenant—Caldwell Peterbilt—because CLC failed to mitigate the clearly avoidable consequence of the dispute surrounding JTS’s right to remain on the Property until April 2015.

**C. The doctrine of voluntary payment precludes Caldwell Land & Cattle from recovering for payments made by Caldwell Peterbilt.**

JTS also seeks an order preventing CLC from presenting evidence of alleged damages that result from Caldwell Peterbilt's voluntary out-of-pocket expenditures. Specifically, CLC should not be allowed to present evidence of damages for repairs to the building, for repairs to the electric heaters, and for the cost to connect specific electrical services—all of which were paid voluntarily by Caldwell Peterbilt. Rainey Aff., Ex. 7 at 26:23-27:17, 63:20-64:24, 65:16-24, PLATINUM REMODEL 099; Ex. 8 at 86:15-87:7 and at CALD 0242-0243; and, Ex. 9. There is no evidence that CLC has a contractual obligation to reimburse Caldwell Peterbilt for these voluntary expenditures, that Caldwell Peterbilt made any demand on CLC to pay for these voluntary expenditures, or that CLC is legally responsible for these expenditures in any way. Rainey Aff., Ex. 3, p. 5 ¶ 6.2.

“The doctrine of voluntary payment provides that a person cannot, by way of set-off or counterclaim, or by direct action, recover back money voluntarily paid with full knowledge of the facts and without any fraud, duress or extortion, where no obligation to make such payment existed.” *Action Collection Serv., Inc. v. Jackson*, No. 35226, 2009 WL 9150844, at \*4 (Idaho Ct. App. July 8, 2009) (citing *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940)). “Where no obligation exists, the demand voluntarily met can be considered unjust or illegal.” *Action Collection Serv., Inc.*, 2009 WL 9150844, at \*4 (citing *Kimpton v. Studebaker Bros. Co.*, 14 Idaho 552, 560, 94 P. 1039, 1041 (1908)).

In *Kimpton v. Studebaker Bros. Inc.*, the Idaho Supreme Court adopted reasoning from Ohio applying the voluntary payment doctrine.

The reason of the rule and its propriety are quite obvious when applied to a case of payment upon a mere demand of money unaccompanied with any power or authority to enforce such demand, except by suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and, if litigation is intended by the party of whom the money is demanded, it should precede payment.

*Kimpton*, 14 Idaho at 560, 94 P. at 1042.

Here, Caldwell Peterbilt—a non-party to this lawsuit—voluntarily made the payments for the repairs, having no legal obligation to do so (indeed, most of these expenditures were made by Caldwell Peterbilt before it was even a tenant on the Property). Rainey Aff., Ex. 7 at 26:23-27:17, 63:20-64:24, 65:16-24, PLATINUM REMODEL 099; Ex. 8 at 86:15-87:7 and at CALD 0242-0243; and, Ex. 9. CLC has no contractual obligation to repay Caldwell Peterbilt for these voluntary payments. It follows, then, that CLC has no legal right to recover from JTS money voluntarily paid by Caldwell Peterbilt. Accordingly, this Court should enter an order in limine excluding evidence of damages resulting from payments voluntarily made by Caldwell Peterbilt.

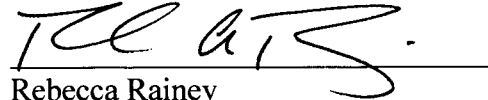
#### IV. CONCLUSION

For these reasons Defendant JTS asks this Court for an order in limine excluding from trial any evidence offered by Plaintiff regarding alleged damages incurred by entities other than Plaintiff, Caldwell Land & Cattle, LLC, or Caldwell Land & Cattle Company, LLC.



DATED this 18<sup>th</sup> day of July 2017.

FISHER RAINEY HUDSON



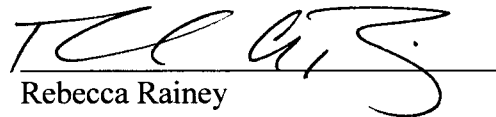
Rebecca Rainey  
*Attorney for Defendant*  
Johnson Thermal Systems

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18<sup>th</sup> day of July 2017, I caused a true and correct copy of the foregoing **DEFENDANT JOHNSON THERMAL SYSTEMS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE REGARDING EVIDENCE OF DAMAGES ALLEGED BY ENTITIES OTHER THAN PLAINTIFF** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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



Rebecca Rainey  
*Attorney for Defendant*

**FILED**  
A.M. 4:07 P.M.  
JUL 18 2017  
CANYON COUNTY CLERK  
MB DEPUTY

Kristin Bjorkman Dunn, ISB No 4613  
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Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC.  
an Idaho corporation,

Defendant,

**Case No. CV 15-587**

**MOTION IN LIMINE REGARDING  
EVIDENCE OF DAMAGES  
ALLEGED BY ENTITIES OTHER  
THAN PLAINTIFF**

COMES NOW Defendant, Johnson Thermal Systems, Inc., (“JTS”), by and through undersigned counsel of record and hereby submits this motion for an order in limine regarding evidence of damages alleged by entities other than Plaintiff.

**MOTION IN LIMINE REGARDING EVIDENCE OF DAMAGES ALLEGED BY ENTITIES OTHER THAN PLAINTIFF - 1**

**ORIGINAL**

**I. Damages Resulting from CLC's Failure to Mitigate**

JTS seeks an order in limine excluding evidence of damages allegedly sustained by Caldwell Peterbilt, Inc, the tenant to whom Caldwell Land & Cattle, LLC ("CLC") claims to have promised a February 1, 2015 delivery of the building. Damages arising from Caldwell Peterbilt's inability to move into the building on February 1, 2015 are not allowable because, rather than attempt to mitigate its damages as required by law, Plaintiff, having full knowledge of uncertainty regarding when JTS would vacate the building, knowingly, voluntarily, and willfully entered into the claimed lease agreement. It therefore assumed the risk that it would incur the damages sustained by its tenant and cannot recover said damages from JTS. This motion applies to the following categories of damages:

**a. Documents Supporting Caldwell Peterbilt's Alleged Lease Payment Damages**

CLC's summary of damages make a claim for rents paid by Caldwell Peterbilt on the Laurel Street location in the amount of 11,941.02. CALD 0066 (produced 12/1/2015) and CALD 0358 (produced 6/23/2017), attached hereto as Appendix A.

**b. Documents Supporting Caldwell Peterbilt's Alleged Utilities Damages**

CLC's summary of damages makes a claim for utilities paid by Caldwell Peterbilt at the Laurel Street location in the amount of \$1869.00 (CALD 0066) that it recently increased to \$2646.90 (CALD 0358).

**c. Documents Supporting Caldwell Peterbilt's Alleged Service Writer Damages**

CLC's summary of damages makes a claim for wages and benefits paid to a service writer in the amount of \$6,656.00 (CALD 0066) that it recently increased to \$7696.22.

**d. Documents Supporting Caldwell Peterbilt's Alleged Lost Profit Damages**

CLC's original summary of damages did not make a claim for Caldwell Peterbilt's lost profits. *See, generally*, CALD 0066. Recently, however, it has added claims for lost profits in the amount of \$45,973.00. CALD 0358.

**II. Damages from Payments Voluntarily made by Caldwell Peterbilt**

JTS also seeks an order in limine precluding evidence of damages that resulted from payments voluntarily made by Caldwell Peterbilt. These damages are impermissible because CLC has no legal basis pursuant to which it could recover the same from Caldwell Peterbilt and, accordingly, no legal basis to attempt to pass the cost of said expenditures through to JTS in this lawsuit. This motion applies to the following category of damages:

**a. Payments Voluntarily Made by Caldwell Peterbilt to Connect Additional Power**

CLC's summary of damages makes a claim for replacement of electrical transformer in the amount of \$16,000.00 (CALD 0066) that it recently decreased to \$7,292.00 (CALD 0358).

**b. Payments Voluntarily Made by Caldwell Peterbilt for other Repairs/Improvements to the Property.**

CLC's summary of damages made a claim for "other misc. items, floor repair, wall repair, etc. in the amount of "TBD". CALD 0066. It recently identified those amounts as Cost to Repair Building - \$1,500; Cost to Repair Broken Heaters - \$1,100. CALD 0358.

This motion is supported by the Memorandum in Support of Motion in Limine re. evidence of damages alleged by entities other than Plaintiff filed concurrently herewith. Specific documents subject to the present motion in limine are identified in Appendix B, attached hereto. Oral argument is requested on this motion.

DATED this 18<sup>th</sup> day of July, 2017.

FISHER RAINEY HUDSON



Rebecca A. Rainey  
*Attorney for Defendant*  
Johnson Thermal Systems

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18<sup>th</sup> day of July, 2017, I caused a true and correct copy of the foregoing **MOTION IN LIMINE REGARDING EVIDENCE OF DAMAGES ALLEGED BY ENTITIES OTHER THAN PLAINTIFF** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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



Rebecca A. Rainey  
*Attorney for Defendant*

# APPENDIX A

**Summary of damages, costs and expenses for Caldwell**

Monthly Rent of 812 W. Laurel Street location	\$3,500.00	
Monthly Property Taxes on 812 W. Laurel Street location	<u>\$480.34</u>	
Total Monthly Rent/Property Tax	<u>\$3,980.34</u>	
Number of months (60 day notice verbal to Valley)	<u>3.00</u>	
<b>Total Rent/Property Tax</b>	<b><u>\$11,941.02</u></b>	<b>\$11,941.02</b>
Monthly Property Tax on 1505 location	\$1,845.41	
Monthly Rental Fee	<u>\$6,200.00</u>	
Total Monthly Rent/Property Tax	<u>\$8,045.41</u>	
Number of months	<u>3.00</u>	
Total Rent/Property Tax	<u>\$24,136.24</u>	
Less January Rent Paid by Johnson Thermal	<u>(\$7,730.00)</u>	
Less February Rent Paid by Johnson Thermal	<u>(\$7,730.00)</u>	
<b>Rent Shortfall</b>	<b><u>\$8,676.24</u></b>	<b>\$8,676.24</b>
Power Bill Monthly Average	\$442.00	
Water Bill	<u>\$181.00</u>	
Total Monthly Utilities	<u>\$623.00</u>	
Number of months	<u>3.00</u>	
Utilities Shortfall	<b><u>\$1,869.00</u></b>	<b>\$1,869.00</b>
Monthly cost of Service Writer Hired	\$2,773.33	
Payroll Taxes and Benefits	<u>\$554.67</u>	
Total Monthly Wages & Benefits	<u>\$3,328.00</u>	
Number of months	<u>2</u>	
Total Wages & Benefits	<b><u>\$6,656.00</u></b>	<b>\$6,656.00</b>
Damage to Building		
Replacement of Electrical Transformer	\$16,000.00	
Other Misc. Items (floor repair, wall repair, etc.)	<u>TBD</u>	
	<b><u>\$16,000.00</u></b>	<b>\$16,000.00</b>
Attorneys Fees	<b>\$10,000.00</b>	<b>\$10,000.00</b>
<b>Total Damages, Costs and Expenses</b>		<b><u><u>\$55,142.26</u></u></b>

**Summary of expenses for Caldwell**

Monthly Rent of 812 W. Laurel Street location	\$3,500.00	
Monthly Property Taxes on 812 W. Laurel Street location	\$480.34	
Total Monthly Rent/Property Tax	<u>\$3,980.34</u>	
Number of months (60 day notice to Valley)	3.00	
<b>Total Rent/Property Tax</b>	<b><u>\$11,941.02</u></b>	<b>1</b>
Monthly Property Tax on 1505 location	\$1,845.41	2
Monthly Rental Fee	\$6,250.00	
Total Monthly Rent/Property Tax	<u>\$8,095.41</u>	
Number of months	4.00	
Total Rent/Property Tax	<u>\$32,381.65</u>	
Less January Rent Paid by Johnson Thermal	<u>21,726.84</u>	
Less February Rent Paid by Johnson Thermal	<u>20,619.84</u>	
Less Deposit applied towards Rent	<u>1,380.00</u>	
<b>Rent Shortfall</b>	<b><u>\$11,650.81</u></b>	<b>\$11,650.81</b>
Power Bill Monthly Average (Laurel Street)	\$479.40	3
Water Bill (Laurel Street)	\$182.32	4
Total Monthly Utilities (Laurel Street)	<u>\$661.72</u>	
Number of months	4.00	
Utilities Shortfall	<u>\$2,646.90</u>	<b>\$2,646.90</b>
Total Wages & Benefits	\$7,696.22	5
Attorneys Fees	\$35,000.00	6
Cost to reconnect electrical service	\$7,929	7
Cost to repair building	\$1,500	8
Cost to repair broken heaters	\$1,100	9
Lost Profits caused by delay	\$45,973	10
<b>Total Costs</b>	<b><u>\$125,436.95</u></b>	

- 1 See Stubblefield documents
- 2 Expired rental agreement between JTS and Gilbert Family 3rd ammendment rental amount was \$6250
- 3 Average of power bill for Laurel Street location
- 4 Average of water bill for Laurel Street location
- 5 See supporting schedule
- 6 Strong and Hanni Estimate
- 7 See "Power reconnection Charges PDF"
- 8 See "Estimate\_1072\_from\_Platinum\_Remodel\_\_Repair\_LLC" pdf
- 9 See "Heater Repair Caldwell"
- 10 See "Caldwell Peterbilt revenue loss analysis"



# APPENDIX B

## **I. Damages Resulting from CLC's Failure to Mitigate**

### **a. Documents Supporting Caldwell Peterbilt's Alleged Lease Payment Damages**

CALD 00119 - 00120	2/2/2015 Check no. 328: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 00121 - 00122	3/2/2015 Check no. 358: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0115 - 0116	1/2/2015 Check no. 306: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0286	4/1/2015 Check no. 394: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0287	2/2/2015 Check no. 328: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0288	1/2/2015 Check no. 306: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0289	3/2/2015 Check no. 358: Caldwell Peterbilt Lease Payment to Stubblefield Construction
CALD 0343 - 0344	2/24/2015 Email from Stubblefield
CALD 0346	3/18/2015 Email from Coats to Mike re Notice to Vacate
CALD 0347 - 0348	3/20/2015 Email from Bruce to Stubblefield re property vacate questions
CALD 0404-0417	6/1/2015 Lease Agreement for 1505 Industrial Way (CLC and Caldwell Peterbilt)
Stubblefield Constr. 010 - 020	12/1/2013 Property Sublease to Peterbilt
Stubblefield Constr. 021	3/2/2015 Peterbilt's Notice to Vacate

### **b. Documents Supporting Caldwell Peterbilt's Alleged Utilities Damages**

CALD 0057 - 59	2/10/2015 Caldwell City Water: \$182.99 (Laural Street)
CALD 0060 - 62	1/18/2015 Caldwell City Water: \$181.99 (Laural Street)
CALD 0063 - 65	3/16/2015 Caldwell City Water: \$35.66 (new building connect fee)
CALD 0090 - 0094	2/25/2015 Idaho Power Bill \$616.80; Peterbilt check stubs
CALD 0099 - 0105	3/31/2015 Idaho Power bill; \$615.16 (split between new and old facility)
CALD 0109 - 0111	4/10/2015 2015-04-10 Intermountain Gas invoices \$37.78
CALD 0112 - 0114	3/11/2015 2015-03-11 Intermountain Gas invoice \$19.76
CALD 0227 - 0229	3/17/2015 Invoice and Check no. 336 to Intermountain Gas
CALD 0233 - 0235	5/11/2015 Invoice and Check no. 445 to Intermountain Gas
CALD 0236 - 0238	6/17/2015 Invoice and Check no. 508 to Intermountain Gas
CALD 0239 - 0241	7/15/2015 Check no. 1070000555 to Intermountain Gas
CALD 0244 - 0245	1/26/2015 Idaho Power Bill
CALD 0246 - 0248	2/25/2015 Idaho Power Bill
CALD 0249 - 0250	3/31/2015 Idaho Power Bill
CALD 0251 - 0253	3/31/2015 Idaho Power Bill
CALD 0254 - 0255	4/30/2015 Idaho Power Bill
CALD 0259 - 0261	6/1/2015 Idaho Power Bill
CALD 0262 - 0263	6/1/2015 Idaho Power Bill
CALD 0264 - 0265	6/30/2015 Idaho Power Bill
CALD 0266 - 0269	6/30/2015 Idaho Power Bill
CALD 0276 - 0277	3/12/2015 Invoice & Check no. 368 to Idaho Power
CALD 0291	2/1/2015 Water and Garbage Bill
CALD 0292	3/1/2015 Water and Garbage Bill
CALD 0293	4/1/2015 Water and Garbage Bill
CALD 0294	4/1/2015 Water and Garbage Bill
CALD 0295	5/1/2015 Water and Garbage Bill
CALD 0296	6/1/2015 Water and Garbage Bill
CALD 0297	7/1/2015 Water and Garbage Bill
CALD 0298	8/1/2015 Water and Garbage Bill
CALD 230 - 0232	4/20/2015 Invoice and Check no. 426 to Intermountain Gas
CALD 0095 - 0098	1/26/2015 Idaho Power: \$738.26
CALD 0270 - 0271	7/30/2015 Idaho Power Bill
CALD 0272 - 0274	7/30/2015 Idaho Power Bill

c. Documents Supporting Caldwell Peterbilt's Alleged Service Writer Damages

CALD 0221	2014 Brett Johnston W-2 Wage and Tax Statement
CALD 0222	2015 Brett Johnston W-2 Wage and Tax Statement
CALD 0223	Brett Johnston Monthly Income 2015-2016
CALD 0403	Payroll Related Damages Caused by the Delay

d. Documents Supporting Caldwell Peterbilt's Alleged Lost Profit Damages

CALD 0214	5/26/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0215	3/23/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0216	2/23/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0217	8/14/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0218	7/13/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0219	4/21/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0220	6/24/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0224	Sep-15 Caldwell Peterbilt Income Statement Summary Level 9 Mo. Ending Sept. '15
CALD 0359	9/30/2015 Caldwell Peterbilt Income Statement Summary Level
CALD 0364 - 0375	6/30/2017 Caldwell Peterbilt Departmental Income and Expense
CALD 0376	3/23/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0377	4/21/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0378	5/26/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0379	6/24/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0380	7/13/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0381	8/14/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0382	9/15/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0383	10/21/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0384	11/23/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0385	12/21/2015 Caldwell Peterbilt Departmental Income and Expense
CALD 0386	1/21/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0387	2/11/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0388	3/17/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0389	4/18/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0390	5/19/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0391	6/16/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0392	7/15/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0393	8/17/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0394	9/16/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0395	10/19/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0396	11/22/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0397	12/21/2016 Caldwell Peterbilt Departmental Income and Expense
CALD 0398	2/22/2017 Caldwell Peterbilt Departmental Income and Expense
CALD 0399	Caldwell Peterbilt Income Statement Summary Level 2014-2016
CALD 0400	12/31/2014 Caldwell Peterbilt Income Statement Summary Level
CALD 0401	12/31/2015 Caldwell Peterbilt Income Statement Summary Level
CALD 0402	12/31/2016 Caldwell Peterbilt Income Statement Summary Level

**II. Documents Evidencing Payments Voluntarily Made by Caldwell Peterbilt**

**a. Payments Voluntarily Made by Caldwell Peterbilt to Connect Additional Power**

CALD 0124 - 0131	3/15/2015 Idaho Power Co. Service Request and related documents \$7,929
CALD 0280 - 0281	3/5/2015 Idaho Power Service Request
CALD 0282 - 0283	Idaho Power Customer Cost Quote
CALD 0363	3/3/2015 service request for reconnecting transformer
IPC 0012 - 0013	3/5/2015 Idaho Power Co Service Request
IPC 0014 - 0015	3/20/2015 Idaho Power Customer Cost Quote
IPC 0016	3/20/2015 Idaho Power Co Work Order Map
IPC 0017 - 0019	Photos of 1505 Industrial Way
IPC 0020	3/3/2015 Customer Consent to Proceed with Engineering /Design
IPC 0021	Engineering Worksheet
IPC 0022	3/5/2015 Construction Financing Details
IPC 0023	Construction Accounting Detail
IPC 0024 - 0025	3/23/2015 Idaho Power Bill
IPC 0026	Payment List
IPC 0027	Hand notes
IPC 0055	doc signed by Nick Schoonover
IPC 0056 - 0059	hand drawings on photo of 1505 Industrial Way
IPC 0060 - 0062	3/5/2015 Idaho Power Service Request
IPC 0063	Photo of 1505 Industrial Way
IPC 0064 - 0066	3/3/2015 Idaho Power Service Request
IPC 0067	3/3/2015 Customer Consent to Proceed with Engineering /Design
IPC 0069	Underground Cable Notes
IPC 0070	3/3/2015 Customer Consent to Proceed with Engineering /Design
IPC 0071 - 0080	3/10/2015 Email from Jeff to Nick re signed documents
IPC 0081 - 0082	Docs from Idaho Power to Nick Schoonover
IPC 0083	4/14/2015 Email from Scott to Nick re Date from Peterbilt

**b. Payments Voluntarily Made by Caldwell Peterbilt for Other Repairs/Improvements to the Property**

CALD 0089	3/5/2015 Plaintiff Remodel & Repair Estimate: \$2,125
CALD 0212 - 0213	6/26/2015 Plaintiff Remodel and Repair Invoice for \$129,495.55
CALD 0226	3/5/2015 Plaintiff Remodel & Repair Estimate: \$2,125
CALD 0242	3/3/2015 A-1 Heating and Air Conditioning Invoice
CALD 0243	3? Or 8?/26/2015 A-1 Heating and Air Conditioning Invoice

JUL 27 2017

CANYON COUNTY CLERK  
J COTTLE, DEPUTY CLERK

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiffs*

IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p>Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p>Defendant.</p>	<p><b>AFFIDAVIT OF RYAN C. BULLOCK IN SUPPORT OF MEMORANDUM IN OPPOSITION TO DEFEDANT'S MOTION IN LIMINE</b></p> <p>Civil No.: CV15-587</p> <p>Judge Nye</p>
--	--

STATE OF UTAH                    )  
  ):ss  
COUNTY OF SALT LAKE    )

COMES NOW your affiant, Ryan C. Bullock, who first being duly sworn, deposes and  
sates as follows:

1. I am over the age of 21 and am competent in every respect to make this affidavit.

2. I am an attorney of record for Plaintiff and have personal knowledge of the matters contained herein.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Lease Agreement entered into between Caldwell Peterbilt, Inc. and Caldwell Land & Cattle.

4. Attached hereto as **Exhibit 2** is a true and correct copy of the Purchase and Sale Agreement entered into between Caldwell Land & Cattle and Gilbert Family Limited Partnership.

5. Attached hereto as **Exhibit 3** is a true and correct copy of Commercial Lease Agreement entered into between the Gilbert Family Limited Partnership and Johnson Thermal Systems Inc. on or about February 23, 2012.

6. Attached hereto as **Exhibit 4** is a true and correct copy of the Third Lease Amendment dated April 18, 2014.

7. Attached hereto as **Exhibit 5** is a true and correct copy of the Notice of Termination from the Gilbert Family Limited Partnership to Johnson Thermal Systems, dated December 11, 2014.

8. Attached hereto as **Exhibit 6** is a true and correct copy of a calculation of damages prepared by Caldwell Land & Cattle.

9. Attached hereto as **Exhibit 7** is a true and correct copy of a Statement of Mortgage Payments prepared by Caldwell Land & Cattle.

10. Attached hereto as **Appendix A** are true and correct copies of deposition excerpts of Blake Jackson, Sheri Johnson, Gus Gustaveson, Jeff Johnson, Lincoln Hagood, Gary Sommercorn, and Bruce Adams

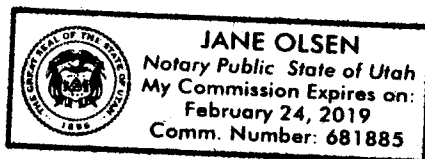
11. Attached hereto as **Appendix B** is the Declaration of Blake Jackson dated July 26, 2017.

12. Further you affiant sayeth naught.

DATED this 26<sup>th</sup> day of July, 2017

  
Ryan C. Bullock

SUBSCRIBED AND SWORN BEFORE ME this 26<sup>th</sup> day of July, 2017.



  
Notary Public State of Utah

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of July, 2017, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

Kristin Bjorkman Dunn  
Bjorkman Dunn PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email

Rebecca A. Rainey  
Allison Blackman  
Fisher Rainey Hudson  
950 W. Bannock St., Ste. 630  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email





EXHIBIT 1

LEASE

CALDWELL LAND & CATTLE COMPANY, LLC

(Lessor)

CALDWELL PETERBILT, INC.

(Tenant)

---

1905 Industrial Way  
Caldwell, ID 83605

(Location)

LEASE

ARTICLE I.  
BASIC LEASE PROVISIONS

THIS LEASE is entered into as of June 1, 2015 between Caldwell Land & Cattle Company, LLC, a Utah limited liability company ("Lessor"), and CALDWELL PETERBILT, INC., an Idaho corporation ("Tenant").

1.1 Basic Lease Provisions.

Property Location:

1905 Industrial Way  
Caldwell, ID 83605

Address of Lessor: Caldwell Land & Cattle Company, LLC  
1910 S. 5500 W.  
Salt Lake City, Utah 84104  
Phone No.: (801) 486-8781  
Fax No.: (801) 486-5907

Address of Tenant: Caldwell Peterbilt, Inc.  
1910 S. 5500 W.  
Salt Lake City, UT  
Phone No.: (801) 486-8781  
Fax No.: (801) 486-5907

Premises: The real property located at 1905 Industrial Way, Caldwell, ID together with all buildings and improvements now or hereafter situated on the real property.

Term: Ten (10) years commencing on the Commencement Date

Annual Net Rent: \$96,000.00

ARTICLE II.  
DEFINITIONS

2.1 Definitions. In this Lease:

(a) "Actual Operating Costs" means the Operating Costs actually incurred for a calendar year.

(b) "Annual Net Rent" means the amount of \$96,000.00, or \$8,000.00 a month.

(c) "Article" means an article of this Lease.

- (d) "Basic Lease Provisions" means those essential lease provisions defined in Section 1.1.
- (e) "Casualty" means a fire, explosion, tornado or other cause of damage to or destruction of the Premises.
- (f) "City" means the city where the Premises is located or other governmental authority having jurisdiction over the matter in question.
- (g) "Commencement Date" means February 1, 2008.
- (h) "Contamination" is defined in Section 6.4.
- (i) "Environmental Damages" is defined in Section 6.4.
- (j) "Environmental Regulations" is defined in Section 6.4.
- (k) An Extension Option is not referenced in this lease. Any such Extension or continuation of the agreement will be defined in a new document.
- (l) Extension Terms, if applicable, will be defined in a new lease agreement.
- (m) "Excusable Delays" means a delay occasioned by a strike, lockout, riot, act of God, or any other cause or causes, whether similar or dissimilar to those enumerated, beyond Lessor's reasonable control. When this Lease extends a deadline by reason of an Excusable Delay, the deadline will be extended by a period of time equal to the duration of the Excusable Delay, unless specified otherwise.
- (n) "Hazardous Substance" is defined in Section 6.4.
- (o) "Initial Term" means the Term without taking into account the exercise of any Extension Option for any Extension Term.
- (p) "Interest Rate" means the per annum reference rate, as publicly announced from time to time by Citibank, N.A., plus two percent (2%).
- (q) "Laws" is defined in Section 6.1.
- (r) "Monthly Net Rent" means the Annual Net Rent divided by twelve.
- (s) "Operating Costs" means all costs in connection with the operation, maintenance and repair of the Premises, except those costs specifically made the responsibility of Lessor pursuant to the terms of this Lease.
- (t) "Section" means a section of this Lease.
- (u) "Taking" means acquisition by a public authority having the power of eminent domain of all or part of the Premises by condemnation or conveyance in lieu of condemnation.

(v) "Tax Costs" means all real estate taxes, levies, charges, and installments of assessments (including interest on deferred assessments) assessed, levied or imposed on the Premises, excluding (i) taxes on rents or other income, (ii) special assessments levied, pending or a lien as of the date of execution of this Lease, or (iii) sewer, water or other utility hook-up or access charges or assessments.

(w) "Term" means the period beginning on the Commencement Date and ending five (5) years from that date.

### ARTICLE III. TERM

3.1 Initial Term. Lessor leases the Premises to Tenant, and Tenant leases the Premises from Lessor, for the Initial Term, under the terms and conditions of this Lease.

### ARTICLE IV. MONETARY OBLIGATIONS

4.1 Monthly Net Rent. Tenant will pay the Monthly Net Rent to Lessor at the Address of Lessor, or such other place as Lessor may designate, in advance on the fifth day of each calendar month during the Term, commencing on the Commencement Date, without demand, deduction or setoff, except as provided otherwise in this Lease. If the Commencement Date is a day other than the first day of a month, the Monthly Net Rent for the first partial month will be prorated on a per diem basis and paid on the Commencement Date and the next payment of Monthly Net Rent shall be due on the first day of the following calendar month, and each calendar month thereafter. Should the final day of the Term of this Lease fall on any day other than the final day of a calendar month, Monthly Net Rent for that month will be prorated accordingly and paid on the fifth day of that calendar month. All amounts to be paid by Tenant to Lessor under this Lease will be deemed to be rent for purposes of payment and collection.

4.2 Rent Adjustment. The Annual Net Rent shall be subject to an adjustment effective following fifty five (55) months from the Commencement Date. On that date (January 1, 2020), the Annual Net Rent shall be adjusted to equal \$120,000.00, or \$10,000.00 a month.

4.3 Right to Renew Lease. Tenant will have the right to renew the lease after 120 months for a period of 60 months.

4.4 Operating Costs. Tenant agrees to pay all Operating Costs attributable to the Term.

4.5 Tax Costs. Tenant agrees to pay all Tax Costs assessed during the Term directly to the taxing authority on or before the date the Premises would be subject to penalty for failure to timely pay the Tax Costs. Any partial periods at the beginning or end of the Term will be prorated between Lessor and Tenant on a per diem basis. Tenant will not be obligated to pay any special assessments related to the initial development of the Premises. The payment of any special assessments will be spread over the longest period possible. Tenant will be entitled to a prompt refund of any tax refund attributable to the Term, even after the expiration or termination of this Lease. Tenant will have the right to contest the Tax Costs with the appropriate governmental authority. Lessor warrants that the tax parcel covering the Premises contains no excess land being

held for future development.

## ARTICLE V. USE; QUIET ENJOYMENT

5.1 Use. Tenant may use and occupy the Premises for a truck sales, service, lease, storage and repair shop for trucks, parts and vehicles. Tenant will not use or occupy nor permit the Premises or any part of the Premises to be used or occupied for any unlawful business, use or purpose. Lessor further warrants and represents that both with and without regard to Tenant's contemplated uses of the Premises as described in the first sentence of this Section 5.1, the Premises will comply with all applicable laws, statutes, rules, regulations and ordinances, and that the Premises will be properly zoned and permitted for use of the Premises as intended by Tenant, as described in the first sentence of this Section 5.1. Tenant will have no obligation of continuous operation.

5.2 Title. On or before the date thirty (30) days after the date hereof, Lessor agrees to provide Tenant, at Tenant's sole expense (provided Tenant is informed of the cost before the commitment is ordered and Tenant has the right to decline coverage), with a commitment for an ALTA leasehold owner's policy of title insurance committing to insure Tenant's interest in this Lease, subject only to real estate taxes, the mortgage of the mortgagee from whom Tenant has received a nondisturbance agreement and easements which do not interfere with Tenant's intended use of the Premises. Lessor disclaims any lien (statutory or otherwise) on any of Tenant's inventory or personal property or on any trade fixtures paid for by Tenant.

5.3 Quiet Enjoyment. If Tenant pays the Monthly Net Rent and other charges and performs all of Tenant's obligations under this Lease, Lessor promises that Tenant may peaceably and quietly possess and enjoy the Premises under this Lease.

## ARTICLE VI. OPERATIONAL MATTERS

6.1 Maintenance by Lessor. Lessor, at its sole expense, will maintain in good condition and repair (including replacement, if necessary) all structural components of the Premises. Lessor, at its sole expense, also will make all repairs or replacements to the Premises, where such repairs or replacements are necessary due to design, construction or latent defects, or are subject to construction or material warranties.

6.2 Maintenance of the Premises by Tenant. Except as provided in Section 6.1, Tenant, at its sole expense, will keep the Premises, including the fixtures and equipment, the heating, ventilating and air conditioning system, the roof, paving and asphalt in as good condition and repair as they were in at the time possession of the Premises is tendered to Tenant, as later improved pursuant to the terms hereof, except for ordinary wear and tear, damage from Casualty or incidental damage caused by Tenant's removal of its trade fixtures or other property. If Tenant fails to do so, Lessor may, after ten (10) days notice (or a shorter time in the case of an emergency) enter the Premises to perform the maintenance and repairs and charge the costs to Tenant, which amount will be payable upon demand, together with interest at the Interest Rate.

6.3 Compliance with Laws. Subject to Lessor's obligations under Section 6.1, Tenant

will, at its expense, promptly comply with all laws, ordinances, rules, orders, regulations and other requirements of governmental authorities now or subsequently pertaining to Tenant's particular use (as opposed to mere occupancy) of the Premises.

6.4 Environmental. Lessor represents that Lessor has not received notice of any past or present events, conditions, circumstances, activities, practices, incidents or actions at or affecting the Premises that have not been remedied and which may result in non-compliance with Environmental Regulations or which may give rise to any common law or legal liability, or otherwise form the basis for any claim, action, suit, proceeding or investigation based on the use, treatment, release or threatened release into the environment on or adjacent to the Premises of any Hazardous Substances or the actual or alleged violation of any Environmental Regulation relating to the Premises ("Environmental Claims"). Lessor releases any direct or indirect claim or cause of action it may have against Tenant arising out of or relating to Environmental Claims, and agrees to indemnify, defend and hold Tenant harmless against, any and all Environmental Damages incurred or to be incurred as a result of the breach, by Lessor, of its representations or with respect to Environmental Claims, Existing Contamination or the failure of the Premises to comply with any Environmental Regulations, including reasonable attorneys' fees. Tenant agrees to indemnify and defend and hold Lessor harmless against, any and all Environmental Damages with respect to Contamination that is shown to be a result of Tenant's use of or activities on the Premises. "Existing Contamination" means contamination, if any, which exists on, in, below, or is migrating on, under or in the direction of the Premises, whether known or unknown, on the date Tenant takes possession of the Premises, including without limitation the environmental conditions and contamination disclosed in the Environmental Report. "Contamination" means the uncontained or uncontrolled presence of or release of Hazardous Substances into any environmental media from, upon, within, below, into or on the Premises. "Hazardous Substances" means any toxic or hazardous chemicals, wastes, materials or substances, including, without limitation, lead, radon, asbestos, asbestos containing materials, polychlorinated biphenyls, dioxin, urea-formaldehyde, nuclear fuel or waste, radioactive materials, explosives, carcinogens, petroleum products, or any pollutants or contaminants, as those terms are defined in any applicable federal, state, local or other governmental law, statute, ordinance, code, rule or regulation. "Environmental Regulations" means all laws, statutes, ordinances, codes, rules and regulations relating to Hazardous Substances or the protection of the environment. "Environmental Damages" means all claims, judgments, losses, penalties, fines, liabilities, encumbrances, liens, costs and reasonable expenses of investigation, defense or good faith settlement resulting from violations of Environmental Regulations, and including, without limitation: (i) damages for personal injury and injury to property or natural resources; (ii) reasonable fees and disbursement of attorneys, consultants, contractors, experts and laboratories; (iii) costs of any cleanup, remediation, removal, response, abatement, containment, closure, restoration or monitoring work required by any Environmental Regulation and other costs reasonably necessary to restore full economic use of the Premises; and (iv) third party claims relating to the immediately preceding subsections (i) - (iii). Lessor will perform any remediation required by any governmental authority in such a manner as to have as little impact on Tenant's business being conducted at the Premises as reasonably possible. If Existing Contamination actually prevents Tenant, or its employees or customers, from occupying any material part of the Premises in a manner that materially adversely affects Tenant's business being conducted at the Premises for any period of 60 or more continuous calendar days, Tenant will have the right to terminate the Lease by giving written notice to Lessor. Lessor's obligations and liabilities under this Section 6.4 will survive the expiration or termination of this Lease.

6.5 Alterations. It is understood that Tenant will be making alterations, additions and

improvements in or to the Premises, and that the Tenant will pay for all labor, services, materials, supplies or equipment furnished by Tenant in or about the Premises, and Tenant will pay and discharge any mechanic's, materialmen's or other lien against the Premises resulting from Tenant's failure to make such payment, or will contest the lien and deposit with Lessor, or an escrow agent or title insurance company, cash equal to 125% of the amount of the lien, or otherwise post security sufficient to release the Premises from such lien.. If the lien is reduced to final judgment and all appeals are exhausted or waived, Tenant will discharge the judgment and may use any cash deposited with Lessor for such purpose, and Lessor will return all remaining cash deposited by Tenant. Lessor may post notices of nonresponsibility on the Premises as provided by law.

6.6 Utilities. Tenant agrees to pay for all public utilities rendered or furnished to the Premises during the Term, including, but not limited to, water, sewer, gas and electricity. Lessor agrees and represents that, during the Term, the Premises will at all times be connected to water, sewer, gas and electric lines.

6.7 Entry by Lessor. Lessor and its agents and contractors will have the right to enter the Premises at reasonable times for inspecting or repairing the Premises, upon not less than 24 hours' prior written notice to Tenant (except in an emergency) and, at Tenant's election, if accompanied by an escort provided by Tenant (except in an emergency), but Lessor will have no obligation to make repairs, alterations or improvements except as expressly provided in this Lease. During the last one hundred eighty (180) days of the Term, Lessor will have the right to enter the Premises at reasonable times, subject to the same prior notice requirements set forth in the preceding sentence, for the purpose of exhibiting the Premises for leasing, provided such entry does not unreasonably interfere with Tenant's use of the Premises.

6.8 Interruption of Business. Notwithstanding any Excusable Delay, if an interruption or impairment of utilities or services provided to the Premises materially impairs Tenant's ability to conduct its business and Tenant closes its business in the Premises by reason thereof and such impairment and closure continues for three (3) consecutive days, beginning after the end of such 3-day period, all rent will abate until such utilities or services are reasonably restored to an extent to render the Premises tenantable. Lessor will use reasonable efforts to cause such utilities or services to be restored as soon as possible. If such impairment and closure continues for thirty (30) consecutive days, Tenant may, in addition to all other remedies now or hereafter afforded or provided by law or this Lease, terminate this Lease.

## **ARTICLE VII. TRANSACTIONS**

7.1 Assignment and Subletting. With Lessor's prior written consent, which consent shall not be unreasonably withheld or delayed, Tenant may assign or sublet all or any part of the Premises for any permitted use at any time during the Term. If Lessor withholds its consent for any reason other than the lack of financial ability of the proposed assignee or subtenant to meet the obligations of the Lease, the parties hereby agree that such withholding of consent is unreasonable. Tenant will be relieved of any liability under this Lease accruing after its assignment.

7.2 Subordination and Nondisturbance. At the request of any mortgagee or ground lessor, this Lease will be subject and subordinate to any mortgage or ground lease which may now or in the future encumber the Premises, and Tenant will execute, acknowledge and deliver to Lessor any document requested by Lessor to evidence the subordination. Any such future



subordination by Tenant will be subject to Tenant receiving a nondisturbance agreement from the party to whom it is subordinating, which nondisturbance agreement will recognize the rights of Tenant under this Lease so long as Tenant is not in default. Tenant's obligations under this Lease are contingent upon Lessor obtaining a nondisturbance agreement in Tenant's favor, reasonably acceptable to Tenant, from Lessor's current mortgagees or ground lessor.

7.3 Estoppel Certificates. Within twenty (20) days after written request from either party, the other party will execute, acknowledge and deliver a document furnished by the requesting party, which statement may be relied upon by the requesting party and third parties, stating (a) that this Lease is unmodified and in full force and effect (or if modified, that this Lease is in full force and effect as modified and stating the modifications), (b) the dates to which rent and other charges have been paid, (c) the current Monthly Net Rent, (d) the dates on which the Term begins and ends, (e) the existence of any unexpired Extension Options, (f) that Tenant has accepted the Premises and is in possession, (g) that neither Lessor nor Tenant is in default under this Lease, or specifying any such default, and (h) such other and further information as may be reasonably requested.

## **ARTICLE VIII. RISK SHIFTING**

8.1 Indemnification. Tenant agrees to indemnify, defend, and hold harmless Lessor and its officers, directors, shareholders; partners, employees and agents from and against all third party claims of whatever nature to the extent arising from the negligent acts or willful misconduct of Tenant, or Tenant's contractors, licensees, officers, partners, agents or employees, including reasonable attorneys' fees. Lessor agrees to indemnify, defend, and hold harmless Tenant and its officers, directors, shareholders, partners, employees and agents from and against all third party claims of whatever nature to the extent arising from the negligent acts or willful misconduct of Lessor or Lessor's contractors, licensees, officers, partners, agents or employees, including reasonable attorneys' fees.

8.2 Liability Insurance. Tenant agrees during the Term to maintain adequate liability and other insurance with duly qualified, reputable insurers authorized to do business in the state in which the Premises are located and, upon request, to furnish Lessor with certificates of insurance properly executed by Tenant's insurance companies evidencing the insurance policies in effect, which certificates will agree to provide thirty (30) days' notice to Lessor in the event of cancellation of such coverage. The minimum insurance coverage to be maintained by Tenant will be commercial general liability insurance, naming Lessor as an additional insured, including coverage against claims for bodily injury, death and property damage or personal injury occurring in or about the Premises, affording minimum limits of One Million Dollars (\$1,000,000.00) with respect to bodily injury, personal injury, death or property damage occurring or resulting from one occurrence and aggregate limits of not less than Two Million Dollars (\$2,000,000).

8.3 Lessor's Property Insurance. Lessor agrees that it will keep the Premises insured against loss or damage by those perils covered by "all risks" coverage, including, malicious mischief and vandalism, and boiler and machinery coverage, in an amount sufficient to prevent Tenant from being a co-insurer under the terms of the applicable policies, but in any event, in an amount not less than one-hundred percent (100%) of the full replacement value of the Premises, as

determined from time to time. Such insurance will be issued by financially responsible insurers duly authorized to do business in the state where the Premises are located. Lessor agrees to competitively bid all its insurance policies at least every other year. The insurance company will be required to give Lessor not less than thirty (30) days' notice in the event of cancellation, non-renewal or material alteration of such coverage. Tenant will be deemed to be a self-insurer as to the deductible or any co-insurance applicable to such insurance coverage and will pay any deductible or co-insurance amount applicable in the event of loss or damage. Tenant agrees to reimburse Lessor for the premiums paid by Lessor for the insurance referred to in this Section 8.3, within ten (10) business days after receipt of a copy of the invoice for such insurance. At Tenant's option, Tenant may elect to insure the Premises in the manner required above, at Tenant's sole expense, in which event Tenant will notify Lessor thereof, Tenant will no longer be required to reimburse Lessor for any such insurance and Lessor will cancel its property insurance on the Premises. If Tenant elects to carry its own insurance on the Premises, Tenant will cause its insurer to provide Lessor with a certificate of insurance evidencing such coverage. If Tenant elects to carry its own insurance on the Premises, Tenant will cause Lessor to be named as the loss payee on the insurance policy.

8.4 Tenant's Property Insurance. Tenant agrees to maintain, at its own expense, insurance against loss or damage by those perils covered by "all risks" coverage, including malicious mischief and vandalism, on Tenant's personal property located at the Premises. Nothing contained in this Section 8.4 will be construed as creating any liability or responsibility on the part of Lessor for the adequacy of insurance coverage on Tenant's personal property. Tenant will be deemed to be a self-insurer as to the deductible or any co-insurance applicable to such insurance coverage and will pay any deductible or co-insurance amount applicable in the event of loss or damage.

8.5 Waiver of Insurable Claims. Notwithstanding anything contained in this Lease to the contrary, Lessor and Tenant release each other and the other's agents and employees from any liability for loss or damage by fire or other casualty coverable by a standard form of "all risks" insurance policy, whether or not the loss or damage resulted from the negligence of the other, its agents or employees. Each party will use reasonable efforts to obtain policies of insurance that provide that this release will not adversely affect the rights of the insureds under the policies. The releases in this Section 8.5 will be effective whether or not the loss was actually covered by insurance.

## **ARTICLE IX. CASUALTY**

If the Premises are damaged by Casualty, the damage (excluding damage to Tenant's personal property) will be repaired by Lessor at its expense to a condition as near as reasonably possible to the condition prior to the Casualty, Lessor will begin repairs within thirty (30) days after the Casualty and complete the repairs within one hundred twenty (120) days after the Casualty, subject Excusable Delays. If Lessor fails to begin or complete the repairs as required, Tenant may give Lessor notice to do so. If Lessor has not begun the repairs or completed the repairs, as applicable, within thirty (30) days after Tenant's notice, Tenant may terminate this Lease by written notice to Lessor given within thirty (30) days after expiration of the 30-day period. If this Lease is terminated because of the Casualty, rents and other payments will be prorated as of the later of the date of such Casualty or the date when Tenant ceased doing business in the Premises

and will be proportionately refunded to Tenant or paid to Lessor, as the case may be. During any period in which the Premises or any portion of the Premises are made untenable as a result of the Casualty (whether or not the Premises themselves were damaged by the Casualty), all rent will be abated for the period of time untenable, plus thirty (30) days for Tenant to reopen all of the Premises after the completion of Lessor's repairs, in proportion to the square foot area made untenable as a result of the Casualty. In addition, if the Casualty occurs less than one (1) year prior to the end of the Term, as the same may have been extended, Tenant may terminate this Lease as of the date of the Casualty if the Premises may not reasonably be made tenantable within thirty (30) days after the Casualty.

## **ARTICLE X. EMINENT DOMAIN**

If there is a Taking that materially affects Tenant's use of the building or the Premises, either party may terminate this Lease as of the date the public authority takes possession, by written notice to the other party within thirty (30) days after the Taking. If this Lease is so terminated, any rents and other payments will be prorated as of the termination and will be proportionately refunded to Tenant, or paid to Lessor, as the case may be. All damages, awards and payments for the Taking will belong to Lessor regardless of the basis upon which they were made or awarded, except that Tenant will be entitled to any amounts specifically awarded by the condemning authority to Tenant for relocation, damage to Tenant's property or business loss. If this Lease is not terminated as a result of the Taking, Lessor will restore the remainder of the Premises to a condition as near as reasonably possible to the condition prior to the Taking (excluding Tenant's personal property) and all rent will be abated for the period of time the space is untenable in proportion to the square foot area untenable.

## ARTICLE XI. DEFAULTS

11.1 Tenant Defaults. If (a) Tenant defaults in the payment of rent or other amounts under this Lease and the default continues for ten (10) business days after written notice by Lessor to Tenant, (b) Tenant defaults in any other obligation under this Lease and the default continues for thirty (30) days after written notice by Lessor to Tenant (unless such default is of a nature that cannot be cured within such 30 day period, in which case Tenant will have such time to cure the default as is reasonably necessary, provided Tenant commences to cure such default within the original 30 day period and continues to diligently and continuously pursue the cure thereof to completion), (c) any proceeding is begun by or against Tenant to subject the assets of Tenant to any bankruptcy or insolvency law or for an appointment of a receiver of Tenant or for any of Tenant's assets and with respect to proceeding against Tenant is not discharged within sixty (60) days, or (d) Tenant makes a general assignment of Tenant's assets for the benefit of creditors, then Lessor may, with or without terminating this Lease, cure the default and charge Tenant all costs and expenses of doing so, and Lessor also may, by process of law, re-enter the Premises, remove all persons and property, and regain possession of the Premises.

11.2 Lessor Defaults. If Lessor fails or neglects to keep and perform any of the covenants or agreements in this Lease on the part of Lessor to be kept and performed, Tenant may notify Lessor thereof and if Lessor does not cure such default within thirty (30) days (or such shorter period as may be reasonable under the circumstances, in the event of an emergency) after the date of receiving such notice (or if the default is of such a character as to require more than thirty (30) days to cure, Lessor does not commence to cure such default within thirty (30) days and proceed with the cure with reasonable diligence), Tenant may, in addition to all other remedies now or hereafter afforded or provided by law, perform such covenant or agreement for or on behalf of Lessor or make good any such default, and any amount or amounts which Tenant advances on Lessor's behalf will be repaid by Lessor to Tenant on demand, together with interest thereon at the Interest Rate from the date of such advance to the repayment thereof in full, and if Lessor does not repay any such amount or amounts upon demand, Tenant may, without forfeiture of its rights under this Lease, deduct the same, together with interest thereon as provided above, from the next installment or installments of rent to accrue under this Lease.

11.3 Remedies. In the event of material breach or default under the terms of this Lease, either party shall have all rights and remedies available to them under law or equity in Utah.

## ARTICLE XII. BOILERPLATE

12.1 Waiver of Lease Provisions. No waiver of any provision of this Lease will be deemed a waiver of any other provision or a waiver of that same provision on a subsequent

occasion. The receipt of rent by Lessor with knowledge of a default under this Lease by Tenant will not be deemed a waiver of the default. Neither party will be deemed to have waived any provision of this Lease unless it is done by express written agreement. Any payment by Tenant and acceptance by Lessor of a lesser amount than the full amount of all rent then due will be applied to the earliest rent due. No endorsement or statement on any check or letter for payment of rent or other amount will be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to its right to recover the balance of any rent or other payment or to pursue any other remedy provided in this Lease.

12.2 Surrender. On expiration of the Term or sooner termination of this Lease, Tenant will return possession of the Premises to Lessor, without notice from Lessor, in good order and condition, except for ordinary wear and damage. Casualty or conditions Tenant is not required to remedy under this Lease. If Tenant does not so return possession of the Premises to Lessor, Tenant will pay Lessor all resulting damages Lessor may suffer and will indemnify Lessor against all claims made by any new tenant of all or any part of the Premises. Any property left in the Premises after expiration or termination of this Lease will be deemed abandoned by Tenant and will be the property of Lessor to dispose of as Lessor chooses.

12.3 Holding Over. If Tenant remains in possession of the Premises after expiration of the Term without a new lease, it may do so only with the consent of Lessor, and, any such holding over will be from month-to-month, subject to all the same provisions of this Lease, except that the rental rate will be 125% of the then Monthly Net Rent. The month-to-month occupancy may be terminated by Lessor or Tenant on the last day of any month by at least thirty (30) days prior written notice to the other.

12.4 Notices. Any notice under this Lease will be in writing, and will be sent by prepaid certified mail or reputable overnight courier or by facsimile confirmed by certified mail or reputable overnight courier, addressed to Tenant at the Address of Tenant, with a copy Lessor at the Address of Lessor, with a copy to Blair Jackson, Esq., 360 South Technology Court, Suite 200, Lindon UT 84042 or to such other address as is designated in a notice given under this Section 12.4, which change of address will be effective ten (10) days after the giving of notice of such change. A notice will be deemed given on the date of first attempted delivery (if sent by certified mail or overnight courier) or upon completed facsimile transmission to the proper fax number. Routine mailings by either party may be sent by regular mail.

12.5 Governing Law. This Lease will be construed under and governed by the laws of the state of Utah. If any provision of this Lease is illegal or unenforceable, it will be severable and all other provisions will remain in force as though the severable provision had never been included.

12.6 Entire Agreement. This Lease contains the entire agreement between Lessor and Tenant regarding the Premises. This Lease may be modified only by an agreement in writing signed by Lessor and Tenant. This Lease was thoroughly negotiated by Lessor and Tenant and no inference will be drawn based on which party drafted the original version of this Lease.

12.7 Successors and Assigns. All provisions of this Lease will be binding on and for the benefit of the successors and assigns of Lessor and Tenant, except that no person or entity holding under or through Tenant in violation of any provision of this Lease will have any right or interest in this Lease or the Premises.

12.8 Brokers. Each party represents to the other that it has not dealt with any brokers in connection with the negotiation or execution of this Lease.

12.9 Consent Not Unreasonably Withheld. Lessor and Tenant agree that whenever under this Lease provision is made for securing the consent or approval of the other, such consent or approval will not be unreasonably withheld or delayed. If either party believes the other has unreasonably withheld or delayed its consent or approval, an action for declaratory judgment or specific performance will be the sole right and remedy in any dispute as to whether the other has breached such obligation.

12.10 Short Form Lease. Upon the request of either Lessor or Tenant, Lessor and Tenant will enter into a Short Form Lease, in recordable form, which will set forth the parties to this Lease, the Premises, the Initial Term and the Extension Options, but will incorporate the balance of this Lease only by reference. Either party, at its cost, may record such a Short Form Lease.

12.11 Attorneys' Fees. In any dispute between Lessor and Tenant, the reasonable attorneys' fees of the prevailing party will be paid by the non-prevailing party.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Lessor and Tenant have executed this Lease to be effective as of the date stated in the first paragraph of this Lease.

**LESSOR:**

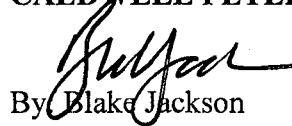
**CALDWELL LAND & CATTLE COMPANY,  
LLC**



By: Blake Jackson  
Title: Manager

**TENANT:**

**CALDWELL PETERBILT, INC.**



By: Blake Jackson  
Title: President/CEO

EXHIBIT 2





behalf of the SELLER(S)

- D.  The broker working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he or she has received read and understood the Agency Disclosure Brochure, attached as Exhibit C, and has elected the relationship confirmed above. In addition, each party confirms that the brokers agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE/SHE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKER UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

4. RESPONSIBLE BROKER. The Responsible Broker in this transaction is George Hiff, Designated Broker for Seller and Buyer.

5. EARNEST MONEY.

(i) Within **Three (3) business days** of the execution of this Agreement, Buyer shall deposit **One Ten Thousand and NO/100 Dollars (\$10,000.00)** in the form of cash (the "Earnest Money Deposit") as earnest money with Carrie Homburg, or assignee, Pioneer Title Canyon, 5680 E Franklin RD Nampa, ID 83687 Phone: **(208) 442-4807** Email: chomburg@pionertitle.com (the "Title Company" and/or "Escrow Agent" as applicable). Subject only to the Buyer's Conditions Precedent set forth in Section 8 of this Agreement, and absent Seller's breach or inability to perform, the Earnest Money Deposit is non-refundable but such Earnest Money Deposit and the accumulated interest thereon shall be applied against the Purchase Price at closing and refunded to Buyer only in the event this Agreement is terminated as a result of the Seller's breach hereunder. In the event this Agreement is terminated after Buyer's Conditions Precedent have been waived or satisfied, or the sale fails to close, by reason of a breach by Buyer, The Earnest Money Deposit shall be paid to Seller.

(ii) Earnest Money Deposit shall be deposited with the Escrow Agent upon acceptance by Seller and Buyer of this Agreement and shall be held in trust in accordance with the terms and conditions of this Agreement.

6.  PRICE/TERMS. Total Purchase Price is **One Million Two Hundred Thousand-NO/100 Dollars (\$1,200,000.00)**.

(i) **\$ 10,000.00** Earnest Money Deposit

(ii) **\$1,190,000.00** Balance of the purchase price to be paid as follows:

**[\$1,190,000.00]** In Cash at Closing

7. INCLUDED ITEMS. All easement rights, mineral rights, other appurtenances, water and water rights appurtenant to or used on the Premises including, but not limited to, any right Seller may have to receive natural flow and/or stored water delivered through any ditch, canal or water

Page 2 of 12

Buyer Initials

Seller Initials

CALD 0133

company's facilities, or under entitlements held by a third party for use on the Premises, and all shares, certificates, and other documents evidencing such water rights.

Other items specifically included in this sale: **All Real Property**

Items specifically excluded from this sale: **None**

8. **ADDITIONAL TERMS, CONDITIONS, AND CONTINGENCIES.** The date upon which all conditions and contingencies must either be satisfied or waived shall be 21 days from mutual execution of this Agreement (the "**Satisfaction Date**").

8.1 **BUYER CONDITIONS:** The closing of this transaction is contingent upon satisfaction or waiver by Buyer of the following conditions:

Inspection: Upon mutual execution of this Purchase Agreement Buyer shall be given full opportunity to inspect and investigate and to accept to Buyer's satisfaction, each and every aspect of the Property independently or through agent(s) of Buyer including, but without limitation with regard to:

- i. All matters relating to title together with all governmental and other legal requirements such as taxes, assessments, zoning, environmental studies, use permit requirements and codes.
- ii. Buyer shall further be granted access to inspect the physical condition of the Premises and all matters relating to the internal and external maintenance of any improvements of the structures and/or grounds related to the Premises.
- iii. Approval of the Due Diligence Materials set forth in Exhibit B attached hereto that shall be delivered to Buyer **within five (5) days** of the mutual execution of this Agreement.

If any of the foregoing conditions remain unsatisfied and unwaived by Buyer on the Satisfaction Date this Agreement shall terminate, provided Buyer has given written notice of such unsatisfied and unwaived conditions to Seller by the Satisfaction Date, and the Earnest Money shall be returned to Buyer. Failure of Buyer to give written notice to Seller of unsatisfied conditions by the Satisfaction Date shall be deemed to be waiver by Buyer of all such conditions.

9. **TITLE COMPANY/ESCROW AGENT.** The parties agree that the TITLE COMPANY/ Escrow Agent as defined in Section 5, shall provide any required title policy and preliminary report or commitment. Each party agrees to pay one-half of the Escrow Agents fee.

10. **TITLE INSURANCE.** Seller shall provide and pay for an ALTA Owner's or Purchaser's Standard Coverage Title Policy insuring the Buyer for the amount of the purchase price. Extended coverage required  Yes  No. Additional premiums for extended coverage and any survey required by the Title Company shall be paid by Buyer. Seller shall cause the Title

Page 3 of 12



Buyer Initials



Seller Initials

CALD 0134

Company to provide Buyer with a preliminary title report or commitment together with copies of all underlying documents giving rise to any exceptions listed therein on **within five (5) business days** of the execution of this Agreement. Buyer shall have until the Satisfaction Date to object, by written notice to Seller, to the condition of title as set forth in the report. In the event the Buyer makes written objection to any exception to title, Seller shall have a reasonable time, not to exceed **ten (10) business days**, to remove any such objection to exception or provide affirmative title insurance coverage, and in the event the Seller cannot remove, or is unwilling to remove, such objected to exceptions or provide affirmative title insurance coverage, the Buyer may elect, as its sole remedy, to (a) either terminate this Agreement or (b) proceed to closing, taking title subject to such exceptions. If the Buyer does not object within the time frame set out above, the Buyer shall be deemed to have accepted the condition of the title. In the event Buyer elects to terminate this Agreement as provided herein, the Buyer shall be entitled to the return of all refundable deposits made by Buyer. The final title insurance policy shall be delivered to the Buyer by the Title Company as soon as possible after closing.

11. **CLOSING DATE.** On or before "**Closing**" ("**Closing**" shall be deemed to be the date on which the deed is recorded and the sales proceeds are available for disbursement to Seller and as otherwise directed by the parties) Buyer and Seller shall deposit with the Escrow Agent all funds and instruments necessary to complete the sale. Closing shall occur no later than **31 December 2014**.
12. **DOCUMENTS TO BE DELIVERED AT CLOSING.** On the date of Closing, Seller shall have executed, or caused to be executed, and delivered to the Closing Agent the following documents, if required by Buyer, in a form reasonably acceptable to Buyer and Seller:
  - (a) General Warranty Deed
  - (b) FIRPTA
  - (c) An Assignment and assumption of all leases, warranties, contracts, and guarantees that effect the Premises in a form mutually agreed to between the parties, (if applicable)
  - (d) Bill of Sale (if applicable)
  - (e) Any other instruments or documents reasonably requested by Buyer.
13. **POSSESSION/PRORATION/CLOSING COSTS.** Buyer shall be entitled to possession on the day of Closing. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest and reserves on obligations assumed and utilities shall be prorated as of Closing. Any tenant deposits held by Seller shall be credited to Buyer at Closing. All standard closing costs shall be shared by Buyer and Seller on a 50/50 basis, except the cost of an ALTA Standard Coverage Title Insurance policy as outlined in section 11 above and brokerage commissions outlined in section 23 below.
14. **ACCEPTANCE.** Buyer's offer is made subject to the acceptance of seller's on or before **5:00 PM MST on 19 November, 2014**.
15. **DEFAULT.** If Seller executes this Agreement and title to the Premises is marketable and insurable in the conditions approved under Section 8 hereof and all Buyer's contingencies have

  
Buyer Initials

  
Seller Initials

been removed or waived, and Buyer neglects or refuses to comply with the terms of or any condition of sale by the date on which such term or condition is to be complied with, then the Earnest Money Deposit shall be forfeited to Seller and Buyer's interest in the Premises shall be immediately terminated. Such forfeiture and acceptance by Seller of the Earnest Money Deposit does not constitute a waiver or election of other remedies available to Seller and Seller shall have the right, at his option, to bring any action at law or equity to enforce the term of this contract or seek restitution for damages including any unpaid brokerage fee. In the event of default by either of the parties in their performance of the terms or conditions of this Agreement, the defaulting party agrees to pay all attorney fees and costs incurred by the non-defaulting party and in the event of suit the prevailing party shall be entitled to its reasonable attorney fees and costs.

In the event of a dispute between the parties as to the Earnest Money Deposit deposited hereunder by Buyer, the Escrow Agent holding the Earnest Money Deposit may file an interpleader action in a court of competent jurisdiction to resolve any dispute between the parties.

The Buyer and Seller authorize the Escrow Agent holding the Earnest Money Deposit to utilize as much of the Earnest Money Deposit as may be necessary to advance the costs and fees required for filing of any such action. The cost of such action shall be paid by the Party which is not the prevailing party.

16. **TITLE CONVEYANCE.** Title to the Premises is to be conveyed by warranty deed and is to be marketable and insurable except for rights reserved in federal patents, building or use restriction, building and zoning regulations and ordinances of any governmental unit, rights of way and easements established or of record, and any other liens, encumbrances or defects approved by Buyer. In the event any personal property is included as part of the contemplated sale, it shall be conveyed by bill of sale and shall be free and clear of all liens, claims and encumbrances.
17. **RISK OF LOSS.** Seller shall keep the Premises insured against loss by fire and other casualty usually insured against in the market area of the Premises until the Closing. Should the Premises be materially damaged by fire or other cause prior to closing and such damage is ten percent (10%) of the Purchase Price or less, then Seller shall pay or assign the proceeds of the insurance to Buyer (and pay to Buyer the amount of any deductible in cash) at Closing and Seller and Buyer shall proceed with Closing without adjustment to the Purchase Price. If such damage exceeds ten percent (10%) of the Purchase Price, then this Agreement shall be voidable at the option of the Buyer by written notice to Seller **within ten (10) days** of the date Buyer receives notice of such damage, however, Buyer may elect to proceed with Closing without adjustment to the Purchase Price (either by written notice of such election or by failure to timely send written notice of the voiding of this Agreement as provided above) and Seller shall pay or assign the proceeds of the insurance to Buyer (and pay to Buyer the amount of any deductible in cash) at Closing.
18. **CONDEMNATION.** Should any entity having the power of condemnation decide prior to Closing to acquire any portion of, or interest in, the Premises with a value of ten percent (10%)

or less of the Purchase Price. Seller shall pay or assign the proceeds of the taking to Buyer at Closing and Seller and Buyer shall proceed with Closing without adjustment to the Purchase Price. If such taking exceeds ten percent (10%) of the Purchase Price, Buyer at Buyer's sole option may either (a) elect to terminate Buyer's obligation to purchase the Premises by giving written notice to Seller at any time prior to Closing and Seller shall promptly return the Earnest Money Deposit or (b) elect to complete the purchase of Premises and require Seller to immediately appoint Buyer as its attorney-in-fact to negotiate with said condemning entity, and, in such event, Buyer shall receive all sums awarded in such condemnation proceeding of the Premises, excluding any amounts attributable to adverse impacts on other property owned by Seller. Seller hereby agrees to immediately give notice to Buyer of any condemnation or contemplated condemnation of the Premises and Buyer hereby agrees to, **within ten (10) days** of such notice, give written notice to Seller of Buyer's election with respect thereto.

19. **CONDITION OF PREMISES AT CLOSING.** Buyer agrees to purchase the premises in as is (existing) condition, where is, with all faults. Buyer will assume those obligations with respect to the Premises as are expressly stated in Section 7. Buyer does not agree to assume any other obligations with respect to the Premises except for those obligations stated in Section 7. Seller shall maintain the premises until the closing in its present condition, ordinary wear and tear excepted, subject to the provisions of Section 19 on casualty and condemnation.
20. **INSPECTION.** The buyer hereby acknowledges further that Buyer is not relying upon any statement or representations by the Broker or Broker's representatives or by the Seller which are not herein expressed. The Buyer has entered into this Agreement relying upon information and knowledge obtained or to be obtained from Buyer's own investigation or personal inspection of the premises.
21. **ADDITIONAL PROVISIONS.** Additional provisions of this Agreement, if any, are attached hereto by an addendum consisting of 0 pages.
22. **COMMISSION.** A commission of Six percent (6%) of the selling price shall be paid to Colliers Paragon out of the first monies received by Seller at the time of Closing.
23. **CONSENT TO LIMITED DUAL REPRESENTATION:** The undersigned have received, read and understand the Agency Disclosure Brochure. The undersigned understand that the brokerage involved in this transaction will be or may be providing agency representation to both Purchaser(s) and the Seller(s). The undersigned each understand that as agents for both Purchaser and Seller, the brokerage(s) will be limited dual agents and negotiations, terms or factors motivating the Purchaser to buy or the Seller to sell without specific written permission of the disclosing party. The specific duties, obligations and limitations of a limited dual agent are contained in the Agency Disclosure Brochure as required by Section 54,2063, Idaho Code. The undersigned each understand that a limited dual agent does not have a duty of undivided loyalty to either client.
24. **ESCROW INSTRUCTIONS.** The Escrow Agent is instructed to, in a manner consistent with the terms hereof: receive and hold deposits and other funds; disburse such funds in accordance with separate authorization signed by Buyer and Seller; prepare closing statements for execution

  
Buyer Initials

  
Seller Initials

by Buyer and Seller: receive documents, secure their execution and acknowledgement, record them in the proper sequence, deliver originals to the appropriate parties, and deliver copies of all documents signed by either party to that party. If a dispute arises regarding any funds held by the closing agent, such agent shall have no obligation to resolve such dispute but shall hold the same pending resolution of such dispute, and may at its option bring an action in interpleader.

25. GOVERNING LAW. This Agreement shall be governed by the laws of the State of Idaho.
26. TIME, SEVERABILITY. Time is of the essence of this Agreement, and each party hereto agrees to promptly perform such acts as are reasonably required in connection herewith. If any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby.
27. NOTICES. All notices required hereunder shall be given in writing and shall be deemed effective (a) upon delivery, if delivered in person, or by electronic transmission with receipt acknowledged by the recipient thereof; (b) one business day after deposited for overnight delivery with any reputable overnight courier service; or (c) two business days after deposited with the US Postal Service registered or certified mail and addressed to the parties at the addresses set forth below.
28. ENTIRE AGREEMENT - CONSTRUCTION. This Agreement constitutes the entire agreement between the parties, has been entered into in reliance solely on the contents hereof, and supersedes any previous agreements, written or oral, between the parties hereto. This Agreement shall not be modified except in writing signed by both parties. This Agreement shall be construed neutrally rather than strictly for or against either party.
29. BINDING EFFECT - SURVIVAL. This Agreement shall be binding upon the heirs, administrators, executors, successors and assigns of the parties hereto and shall survive the closing of this transaction.
30. LEGAL REPRESENTATION. The parties expressly acknowledge they have been represented by counsel of their own choice in connection with this Agreement and have discussed the terms of this Agreement with such counsel to the extent each party believes it to have been necessary to fully understand the terms hereof. In entering into this Agreement, the parties represent and declare that each of them fully understands the terms and effect of this Agreement.
31. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

THIS IS A LEGALLY BINDING AGREEMENT. PRIOR TO SIGNING THIS AGREEMENT, BUYER AND SELLER ARE ADVISED TO SEEK THE ADVICE OF COMPETENT LEGAL COUNSEL. WRITTEN INFORMATION PROVIDED BY BROKER IS BELIEVED TO BE RELIABLE BUT INDEPENDENT VERIFICATION BY BUYER SHOULD BE UNDERTAKEN.

[END OF TEXT SIGNATURES NEXT PAGE]

  
Buyer Initials

  
Seller Initials

IN WITNESS WHEREOF, Buyer and Seller have executed this Agreement as of the last signature date below.

**BUYER:** CALDWELL LAND AND  
CATTLE COMPANY,  
LLC

**SELLER:** GILBERT FAMILY  
LIMITED PARTERSHIP

Seller's signature is contingent upon Buyers  
Acceptance of Counter Offer #1.

By: [Signature]  
Print Name: Bled Jackson  
Its: Manager  
Date: 11/17/14  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_

By: [Signature]  
Print Name: Arlene T. Gilbert  
Its: Member  
Date: 11-20-14  
Address: 650 N. Highland Parkway  
Washington, UT 84780  
Telephone: 208-250-3339

[Signature]      [Signature]  
Buyer Initials      Seller Initials



EXHIBIT A  
LEGAL DESCRIPTION OF PREMISES

"16.475sf Building and 2.01 acres"

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

EXCEPTING THEREFROM

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

BEGINNING at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.

"2.31 acre Land parcel"

A part of Lot 2, Block 5, INDUSTRIAL SITE NUMBER 5, Canyon County, Idaho, according to the plat filed in Book 18, Page 4, records of said County.

BEGINNING at the most northerly corner of said Lot 2, Block 5, the REAL POINT OF BEGINNING; thence

South 24° 44' 50" East a distance of 152.64 feet along the Northeasterly boundary of said Lot 2; thence

South 65° 15' 10" West a distance of 377.19 feet parallel with the Northerly boundary of said Lot 2 to a point of curvature on the Northeasterly right of way of Industrial Way; thence 10.11 feet along the arc of a 50-foot radius, tangent curve right, the long chord of which bears North 30° 32' 25" West a distance of 10.09 feet along the Northeasterly right of way of said Industrial Way; thence

North 24° 44' 50" West a distance of 142.60 feet along the Northeasterly right of way of said Industrial Way to the Northwesterly corner of said Lot 2; thence

North 65° 15' 10" East a distance of 377.04 feet along the Northerly boundary of said Lot 2 to the REAL POINT OF BEGINNING.

  
Buyer Initials

  
Seller Initials

**EXHIBIT B  
DUE DILIGENCE MATERIALS**

1. ALTA Surveys if available.
2. An itemized list of all personal property to be included in the sale.
3. Copies of any existing tenant leases and amendments or rental agreements. Statement of all current rents, deposits, advance fees, and delinquencies pertaining to the Property (Rent Roll).
4. Summary of insurance cost and coverage.
5. Copy of any warranties, maintenance, service, supply, management or other agreements presently in effect, or which may come into effect, of whatsoever nature affecting the Property.
6. Complete record of income and expenses for the three most recent three (3) calendar years and the most current monthly statement of income and expenses for the current year.
7. Copy of real estate tax bills and assessments for the last year and current year.
8. Current commitment for title insurance from the Title Company, together with the copies of all documents referred to therein and all documents giving rise to exceptions to title.
9. Soils, asbestos, hazardous waste, and Level 1 environmental assessment reports.
10. Licenses, permits, and certificates of occupancy.
11. An aerial photo and other promotional photos if available.
12. Copy of all recent appraisals.

**THE NEXT DOCUMENT**

**IS THE**

**BEST POSSIBLE IMAGE**

EXHIBIT C  
AGENCY DISCLOSURE

**Agency Disclosure Brochure**



**A Consumer Guide to Understanding  
Agency Relationships in Real Estate  
Transactions**



This document is intended to provide you with information about the various agency relationships that may exist in a real estate transaction. It is not intended to provide legal advice. For more information, please contact your real estate professional.

Effective July 1, 2014

**Right Now You Are a Customer**

When you are a customer, you are not a client. You are not entitled to the same level of service and representation that a client would receive. You are not entitled to the same level of loyalty and confidentiality that a client would receive. You are not entitled to the same level of advocacy that a client would receive.

As a customer, your best interests are not the primary concern of the real estate professional. Your best interests are the interests of the real estate professional. Your best interests are the interests of the real estate professional. Your best interests are the interests of the real estate professional.

**You May Become a Client**

When you become a client, you are entitled to the same level of service and representation that a client would receive. You are entitled to the same level of loyalty and confidentiality that a client would receive. You are entitled to the same level of advocacy that a client would receive.

## These Are Your Agency Options

### Agency Representation (Single Agency)

If you are a seller

If you are a buyer

### Limited Dual Agency

Limited Dual Agency with Disclosed Agent

Limited Dual Agency with Disclosed Agent

### What to Look For in Any Written Agreement with a Brokerage

- 
- 
- 
- 

Buyer Initials / Seller Initials

RECEIVED ADDITIONAL INFO

*[Handwritten Signature]*

*11/18/11*



Counter-Offer #1  
Colliers Paragon, LLC

This is a Counter-Offer to that certain Purchase and Sale Agreement for the property located at 1505 Industrial Way Caldwell, ID (Parcel #R0280071300 and R02800713B0) and dated 11/17/14 for the purchase of that certain Property described therein ("Offer"). In case of any conflicts between this Counter-Offer, the Agreement, and previous Counter Offers, the terms of this Counter-Offer shall prevail.

The Offer is hereby accepted with the following amendments:

- 1. Purchase Price: One Million Two Hundred and Fifty Thousand Dollars and Zero/100 Cents (\$1,250,000.00). ✓
- 2. Exhibit B: Due Diligence Materials: Seller will provide only those items listed in the Exhibit B which are in Seller's possession. ✓

[End of Text]

**ACCEPTANCE:** Unless this Counter-Offer is signed unchanged by Buyer on or before 11/21/14 at 5p.m. MST this offer shall be deemed revoked and shall become null and void.

Approved this 21 day of November, 2014.

Approved this 20 day of November, 2014.

BUYER:	Caldwell Land and Cattle Company, LLC	SELLER:	Gilbert Limited Partnership
BY:	<i>[Signature]</i>	BY:	Arlene T. Gilbert
DATE:	11/21/14	DATE:	11-20-14
BY:			
DATE:			
ADDRESS:	1505 S. 5500w/Sec 17	ADDRESS:	650 N. Highland Parkway Washington, Utah 84780
PHONE:	801-486-8781	PHONE:	208-250-3339
FAX:		FAX:	

1505 Industrial Way Caldwell, Idaho - Clearwire.net - Clearwire.net Mail

11/19/2014

CALD 0144

EXHIBIT 3

**COMMERCIAL LEASE AGREEMENT**

THIS AGREEMENT made and entered into this the 10<sup>th</sup> day of February, 2012 by and between **GILBERT FAMILY LIMITED PARTNERSHIP** the party of the first part, hereinafter referred to as **LESSOR**, and **JOHNSON THERMAL SYSTEMS, INC.**, the party of the second part, hereinafter referred to as **LESSEE**.

**WITNESSETH:**

WHEREAS, the Lessor is the owner of certain real property located at 1505 Industrial Way, Caldwell, State of Idaho, more particularly described hereinafter and

WHEREAS, the Lessee desires to lease said property referred to above and more particularly described below, and

WHEREAS, the Lessor desires to lease said property to the Lessee upon the terms and conditions hereinafter enumerated.

IT IS HEREBY SPECIFICALLY COVENANTED AND AGREED by and between the parties hereto as follows:

**PREMISES:** Lessor hereby agrees to lease that certain real property in Canyon County, State of Idaho, more particularly described as follows:

A 16,475sf building on 2.01 acres at 1505 Industrial Way, Caldwell, Idaho Further described under Exhibit A – Legal Description.

**RENT:** Lessee agrees to pay to the Lessor as rent for the premises the sum of \$5,270.84 per month, with the first payment to be paid on or before April 15, 2012.

**TERM OF LEASE:** Lessee shall be entitled to exclusive possession of the premises for a period of thirteen (13) months commencing on March 15, 2012 and terminating on April 15, 2013. The base rent for the first month of the initial term (3/15/2012 – 4/15/2012) shall be waived. At least sixty (60) days prior to the expiration of the lease term, the Lessee shall give the Lessor written notice of his intention to renew the lease.

Rent Schedule (Initial Term)

Months	Rate/SF	Monthly Rent	Monthly NNN's	Monthly Total
1	\$0.00	\$0.00	\$1,729.16	\$1,729.16
2-13	\$0.32	\$5,270.84	\$1,729.16	\$7,000.00
			Total	\$85,729.16



**ADDITIONAL RENT:** This lease is an absolutely triple net lease and in addition to the rents, due hereunder, Lessee shall be responsible for all insurance, taxes, and maintenance (excluding exterior and roof) of the premises. It is generally understood and agreed that Lessor shall not be responsible for any costs or expenses in connection with the premises (except for the structure and roof) during the term of this lease and shall be entitled to a net return of the rental herein specified undiminished by the cost of insurance, taxes, and assessment or water, electrical, gas, sewer or other utility charges, and operation, repair, upkeep, renewal, improvement, or alteration thereto, now or at any time hereafter, during the term of this Lease or any renewal or extension thereof. The estimated cost for these expenses for 2012 is \$1,729.16 per month (\$0.105 PSF) reconciled annually.

**OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

**UTILITIES:** Lessee shall be responsible for payment of all utilities and services used for the premises, including all telephone services, electrical, water, sewer and trash services.

**LIABILITY INSURANCE:** Lessee agrees to carry full Comprehensive General Liability Insurance and policy limits no less than \$1,000,000.00 per single occurrence. Lessee at all times shall provide Lessor upon request with a certificate of insurance evidencing compliance with this Section and showing the Lessor as additional named insured under the insurance policy declarations of coverage. Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee's agents, employees or customers or Lessee's guests caused by either negligent or intentional acts.

**USE OF PREMISES:** The premises shall be used and occupied by the Lessee exclusively for the purpose of Light Industrial Manufacturing and assembly and related uses. The Lessee shall not be permitted to engage in any other activities or businesses without the express written consent of the Lessor. The use and occupation of the premises by the Lessee shall, at all times, be conducted in compliance with all applicable Federal, State and Municipal statues, ordinances and regulations. The Lessee shall not permit upon the premises any debris or waste

material or any commodity or article which the Lessor shall consider extra-hazardous.

**OCCUPANCY PERMIT:** Lessee shall submit and pay for an occupancy permit. In the event the city refuses to provide tenant with an occupancy permit the Lessee shall have the option to terminate this contract. Lessee shall be responsible for all costs associated with an occupancy permit.

**ASSIGNMENT:** The Lessee shall not assign this Lease or sub-lease the premises without the written consent of Lessor, which will not be unreasonably withheld or delayed. In the event the sublease exceeds the current lease amount the difference shall be split 50/50 between Lessor and Lessee (after deducting leasing costs for the sublease).

**MAINTENANCE AND REPAIR:** The Lessor shall provide the building in a broom clean condition with mechanical system (including warehouse heating units), electrical system, plumbing system, and grade level doors to be in good working order upon the lease commencement date. The concrete in the warehouse is to be repaired from the removal of bolts. Lessor shall be responsible for the maintenance, repair and replacement of the structure and roof. The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted. Lessor will provide a one-year warranty on the existing HVAC system serving the Premises ("HVAC Warranty"), provided that Lessee maintains such systems as required under the Lease and provides written notice to Lessor of a need for repair during such warranty period. Warranty period will expire upon sale of the property. Outside of the one-year warranty period, Lessee shall only be responsible for repairs and maintenance to the HVAC System up to a maximum of seven hundred-fifty dollars (\$750.00) annually ("HVAC Cap"). Lessor shall be solely responsible for any costs in excess of the HVAC Cap.

**EXAMINATION OF PREMISES:** The Lessee has examined the premises hereby leased and relies upon Lessee's judgments as to its condition and no representations, either express or implied, have been made by Lessor as to its condition or the fitness for which it is leased. The Lessee acknowledges and accepts said property as in "AS IS" condition, except that the Lessor does warrant that the electrical, HVAC, plumbing, grade level doors, and structural components of the premises are in good and working order at the time of lease signing.

**IMPROVEMENTS:** The Lessee shall not reconstruct, remodel or change any part of the premises without consent of the Lessor, which consent shall not be unreasonable withheld or delayed.

**RIGHT OF INSPECTION:** Lessor and Lessor's agents shall have the right at all reasonable times to enter the premises for the purpose of examining its condition. Regular business hours shall be deemed a reasonable time for such inspection.

**SIGNS:** Signs designating the nature of Lessee's business may be placed on the exterior of the premises by Lessee with the understanding and agreement that Lessee will remove the same at the termination of the tenancy herein created and repair any damage or injury to the premises caused thereby and if not so removed by Lessee, the Lessor may have same removed at Lessee's expense. Lessee shall have the exclusive use of the small monument sign located on the property. Lessee shall have the option of leasing the large sign on the property to the East of the subject property for \$1,000/yr.

**DEFAULT:** Default by either the Lessor or the Lessee in the performance of any of the terms, covenants or conditions of this Lease which it has agreed to keep and perform, as well as any of the following acts, shall constitute a breach of this Lease Agreement.

- (1) The filing of a petition by or against such party for the adjudication of bankruptcy under the bankruptcy laws of the United States;
- (2) The appointment of a receiving or trustee for liquidation of such party's business;
- (3) The taking of possession of such party by any government office or agency pursuant to statutory authority for dissolution or liquidation of such party for the benefit of creditors.
- (4) The making of any assignment by such party for the benefit of creditors.

If any default is made in the payment of rent, or any part thereof, at the times hereinbefore specified, or any default is made in the performance of or compliance with any other term or condition hereof, the Lease, at the option of the Lessors, shall terminate and be forfeited and the Lessors may re-enter the premises and remove all persons there from. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the Lease shall not result if, within ten (10) days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to affect such correction within a reasonable time.

**NOTICES:** Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepaid, addresses to the other party at the following addresses:

**Lessor**  
**Gilbert Family Limited Partnership**  
**P.O. Box 1064**  
**Caldwell, Idaho 83606**

**Lessee**  
**Johnson Thermal Systems, Inc.**  
**22228 Hoskins**  
**Caldwell, ID 83607**

Either party, through written notice, may change such addresses from time to time to the other party.

**LIENS:** The Lessee shall not cause, suffer or allow any liens to attach or affect the premises, and a violation of this provision shall render this Lease subject to cancellation by the Lessor at his option. And the Lessee shall become liable to the Lessor for all damages and cost of litigation and attorney's fee caused by such violation by Lessee.

**INDEMNIFICATION OF LESSOR:** Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of this Lease.

**SURRENDER OF PREMISES:** Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

**TIME OF ESSENCE:** Time is of the essence in all provisions of this lease.

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

**FINAL AGREEMENT:** This agreement supersedes all agreements between the parties made prior to the date of the execution of this agreement. All prior contracts and agreements, whether written or oral, heretofore made by the parties hereto, or their agents, are merged into and superseded by this agreement, which constitutes the sole and the entire contract between the parties.

**Grant of Option to Purchase:** In consideration for entering into this Lease, Lessor hereby grants to Lessee the exclusive right and option to purchase the Premises (the "Premises Option") during the Option Term (as defined below) at the Option Purchase Price (as defined below) and on the other terms and conditions as set forth herein:

**Option Term:** The term of the Premises Option shall commence on the Effective Date of this Commercial Lease Agreement and shall remain in effect until April 15, 2013 (the "Option Term").

**Option Purchase Price:** If Lessee exercises the Option, the purchase price to be paid by Lessee to the Lessor on the Closing Date, as defined below, shall be Eight Hundred and Fifty Thousand Dollars (\$850,000) in the event that the Closing Date is on or before April 15, 2013. The Option Purchase Price shall be paid in cash on the Closing Date.

**Earnest Money:** In the event Lessee exercises the Option, the Security Deposit (\$5,270.84) for the Commercial Lease Agreement shall be applied as a credit to the Option Purchase Price at Closing.

**Exercise of Option:** The Premises Option may be exercised by Lessee by delivery of written notice to Lessor at any time during the Option Term, stating that the Option is exercised with the condition that the closing of the purchase and sale of the Property pursuant to the Premises Option shall occur upon thirty (30) days of receipt of such written notice (the "Closing Date").

**Closing:** The closing on the Closing Date shall occur at a location mutually agreed to by the parties. On the Closing Date, Lessee shall deliver to Lessor (i) the Option Purchase Price. On the Closing Date, Lessor shall deliver to Lessee a Warranty Deed in the form approved by Lessee and All normal closing costs shall be shared by the parties on a 50/50 basis except the costs of ALTA Standard Coverage Title Insurance, and brokerage commissions, which shall be the sole responsibility of the Landlord.

**Condition of the Premises:** On the Closing Date, Lessee shall accept the Premises in its "As-Is, Where-Is" condition, with all patent and latent defaults, whether known or unknown.

**Termination:** If Lessee fails to exercise the Option in accordance with its terms the Option and the rights of Lessor shall automatically terminate and be of no further force or effect.

**FIRST RIGHT OF REFUSAL:** Lessee shall have a first right of refusal to purchase the property at any time during the two option terms.

**BINDING EFFECT:** This agreement shall inure to and be binding upon the parties hereto, their respective heirs, executors, administrators and assigns.

**BROKERAGE:** Each party hereunder represents and warrants to the other that it has not incurred and will not incur any liability for finder's or brokerage fees or commissions in connection with the Option as set forth in this document, other than Collier Paragon LLC. The Lessor agrees that if Lessee delivers an Option Notice to Lessor and the transaction contemplated hereunder proceeds to closing, a brokerage commission of six percent (6%) of the Option Purchase Price shall be owed to Colliers and shall be paid by Lessor at closing. Any commissions paid by Lessor to Colliers International shall be deducted from the commission paid for the Purchase Option. Each party agrees to indemnify and hold the other party harmless from and against any and all claims or demands to any finder's or brokerage fees or commissions or other compensation asserted by any person, firm or corporation in connection with the exercise of an Option.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and were first above written.

<b>LESSOR:</b>	<u><i>Bill Gilbert</i></u> <b>Gilbert Family Limited Partnership</b> <b>Bill Gilbert</b>	<u>2-23-12</u> <b>Date</b>
	<u><i>Arlene T. Gilbert</i></u> <b>Gilbert Family Limited Partnership</b> <b>Arlene T. Gilbert</b>	<u>2-23-12</u> <b>Date</b>
<b>LESSEE:</b>	<u><i>Shen Johnson for</i></u> <u><i>Johnson Thermal Systems Inc.</i></u> <b>Johnson Thermal Systems Inc.</b>	<u><i>2/23/12</i></u> <b>Date</b>

Lessor: Gilbert Family Limited Partnership

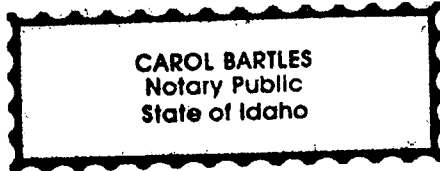
STATE OF IDAHO )

:SS

County of Canyon)

On this 23<sup>rd</sup> day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Bill & Arlene Gilbert proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Gilbert Family Limited Partnership

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal  
The day and year in this certificate above written.



Carol Bartles  
Notary public for Idaho  
Residing at: Wilder ID  
My commission expires: 2-28-13

Lessee: Johnson Thermal Systems, Inc.

STATE OF IDAHO )

:ss

County of Canyon)

On this 21 day of February 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared Sheri Johnson proved to me by sufficient evidence to be the person who executed the foregoing document and acknowledged to me that he executed the same on behalf of Johnson Thermal Systems Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Teresa Squibb  
Notary Public of Idaho  
Residing at Nampa Idaho  
My commission expires: 9 Feb. 2016

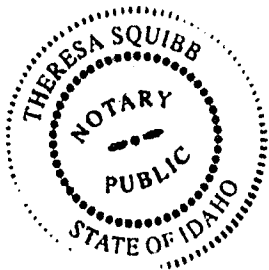




Exhibit A  
"Legal Description"

Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Caldwell, Canyon County, Idaho, being a replat of Lot 1, Block 5, INDUSTRIAL SITE NO. 5, according to the plat filed in Book 20 of Plats, Page 35, records of said County.

EXCEPTING THEREFROM

A part of Lot 4, Block 1, INDUSTRIAL SITE NO. 8, Canyon County, Idaho, according to the plat filed in Book 20 of Plats, Page 35, records of said County, located in a part of the Southeast Quarter of the Northeast Quarter, Section 26, Township 4 North, Range 3 West, Boise Meridian, Caldwell, Canyon County, Idaho.

BEGINNING at the Southeasterly corner of said Lot 4, Block 1, INDUSTRIAL SITE NO. 8, said point monumented with a 5/8-inch diameter iron pin; thence

North 24° 44' 50" West a distance of 60.50 feet along the Easterly boundary of said Lot 4 to a 5/8-inch diameter iron pin; thence

South 65° 15' 10" West a distance a 377.04 feet parallel with the Southerly boundary of said Lot 4 to a point on the Easterly right-of-way of Industrial Way, said point monumented with a 5/8-inch diameter iron pin; thence

South 24° 44' 50" East a distance of 60.50 feet along the Easterly right-of-way of said Industrial Way to the Southwesterly corner of said Lot 4, said corner monumented with a 5/8-inch diameter iron pin; thence

North 65° 15' 10" East a distance of 377.04 feet along the Southerly boundary of said Lot 4 to the POINT OF BEGINNING.

EXHIBIT 4

THIRD LEASE AMENDMENT

THIS THIRD LEASE AMENDMENT, ("Amendment") is made and entered into this 15<sup>th</sup> day of April, 2014 by and between GILBERT FAMILY LIMITED PARTNERSHIP, hereinafter called "Landlord", and JOHNSON THERMAL SYSTEMS, INC., hereinafter called "Tenant", collectively referred to as the "Parties".

Recitals

WHEREAS, Landlord and Tenant entered into that certain lease agreement dated February 10, 2012 ("Lease"), pertaining to those certain premises known as 1505 Industrial Way, Caldwell, ID ("Leased Premises"); and

WHEREAS, Tenant desires to extend the term of the Lease, upon the terms and conditions set forth in this Amendment.

Agreement

NOW, THEREFORE, for good and valuable consideration, including the recitals above which are incorporated below, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree to amend the Lease Agreement as follows:

1. Extension of Term. The Lease Term of the Lease is hereby extended Six (6) months, effective as of April 16, 2014. The Lease Term, as extended by this Amendment, shall expire upon October 15, 2014.
2. Commencing April 16, 2014, the monthly rent shall be \$6,000.00 per month for rent plus the NNN expenses which are estimated at \$1,730.00/mo.
3. At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
  - a. Six Month Term: Base Rent = \$6,000.00/mo
  - b. Month to Month Term: - Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

4. All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect.

IN WITNESS WHEREOF, the parties execute this Third Amendment to be effective as of the date of the last party to sign.

LANDLORD: Gilbert Family Limited Partnership

TENANT: Johnson Thermal Systems Inc.

Sign: Arlene Gilbert

Sign: Sheri Johnson for Johnson Thermal Systems Inc.

Print: Arlene Gilbert

Print: Sheri Johnson

Date 4-18-14

Date 4/15/14

EXHIBIT 5

VIA E-MAIL AND CERTIFIED MAIL

Johnson Thermal Systems, Inc.  
1505 Industrial Way  
Caldwell, ID 83605  
Attention: Darrell "Gus" Gustaveson  
gusg@johnsonthermal.com

Re: NOTICE OF TERMINATION  
1505 Industrial Way, Caldwell, ID

Dear Mr. Gustaveson:

This Notice of Termination is given by GILBERT FAMILY LIMITED PARTNERSHIP ("Lessor") to JOHNSON THERMAL SYSTEMS, INC. ("Lessee"), with reference to that certain Commercial Lease Agreement, dated February 10, 2012, and the First, Second and Third Amendments thereto (collectively, the "Lease").

NOTICE IS HEREBY GIVEN that, pursuant to Idaho Code § 55-208, Lessor has the right to terminate the Lease upon written notice to Lessee to remove from the Premises within a period of not less than one (1) month. Accordingly, as of midnight on January 31, 2015, the Lease with Lessee shall TERMINATE and not be renewed or extended, and Lessee shall no longer be entitled to possession of the Premises. Accordingly, Lessee is hereby requested to vacate and surrender possession of the Premises to Lessor on or prior to January 31, 2015, which shall include the Lessee's removal of all of its trade fixtures, fencing, and personal property of any kind, and surrender of the Premises in the same condition, reasonable wear and tear excepted, as the Premises were in at the beginning of the Lease.

Please note that pursuant to the Lease and despite Landlord's termination of the Lease, monthly rent will continue to be due and payable if Lessee continues in possession of the Premises. In the event that Lessee holds over and rent payment is not made, Landlord intends to pursue all remedies under the Lease despite Landlord's termination of the Lease as set forth herein. This includes, without limitation, rent pursuant to the Second Amendment, both unpaid and coming due and payable for any further period of possession by Lessee.

Please also note that in the event that Lessor is required to commence a lawsuit for possession of the Premises upon termination of the Lease or otherwise (including, but not limited, to non-payment of rent for all or any part of the Premises), that Lessor will pursue attorneys' fees and costs pursuant to the Lease and/or applicable Idaho Code, including, but not limited to, Idaho Code §§ 6-324, 12-120 and/or 12-121.

The Third Amendment to the Lease provides that Lessee had the option to extend the Lease for an additional period of either six (6) months or on a month to month basis. The Lease provides that any notice given under the terms of the Lease shall be deemed delivered when mailed by certified mail. The Lease further provides that any modification to the Lease must be in a writing by all parties. Lessee did not timely or properly exercise the option.

That the option to extend the Lease was not timely or properly exercised is evidenced by the following:

(i) Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Amendment. No notice of exercise, written or verbal, was ever provided. Rather, Lessee simply continued to hold over upon the Premises and pay monthly rent in the same amount as paid for the last month of the previous extended term.

(ii) Lessee did not obtain a writing signed by all parties that would modify the Lease in any way that would support the payment of rent after the conclusion of the Third Amendment's lease extension as being an effective exercise of the lease extension option.


(iii) Time is of the essence of the Lease, as specifically set forth in the Lease.

(iv) Verbal communication from Lessee to Lessor or its agents after the conclusion of the lease extension under the Third Amendment (i.e. after October 15, 2014) indicated that Lessee intended to vacate the Premises as soon as Lessee completed the construction of a new building, thereby evidencing that Lessee did not intend a six month extension, but intended to hold over for a shorter duration.

Lessor reserves all its right and remedies, whether under the Lease or at law or in equity, whether or not mentioned herein, to terminate the Lease and cause Lessee to vacate the Premises.

Please be guided accordingly.

Sincerely,

  
\_\_\_\_\_  
Arlene Gilbert  
Gilbert Family Limited Partnership

12-11-14

EXHIBIT 6

Summary of expenses for Caldwell

Monthly Rent of 812 W. Laurel Street location	\$3,500.00		
Monthly Property Taxes on 812 W. Laurel Street location	\$480.34		
Total Monthly Rent/Property Tax	<u>\$3,980.34</u>		
Number of months (60 day notice to Valley)	3.00		
Total Rent/Property Tax	<u>\$11,941.02</u>	\$11,941.02	1

Monthly Property Tax on 1505 location	\$1,845.41		2
Monthly Rental Fee	<u>\$6,250.00</u>		
Total Monthly Rent/Property Tax	<u>\$8,095.41</u>		
Number of months	4.00		
Total Rent/Property Tax	<u>\$32,381.65</u>		
Less January Rent Paid by Johnson Thermal	<u>(\$7,730.00)</u>		
Less February Rent Paid by Johnson Thermal	<u>(\$7,730.00)</u>		
Less Deposit applied towards Rent	<u>(\$5,770.84)</u>		
Rent Shortfall	<u>\$11,650.81</u>	\$11,650.81	

Power Bill Monthly Average (Laurel Street)	\$479.40		3
Water Bill (Laurel Street)	\$182.32		4
Total Monthly Utilities (Laurel Street)	<u>\$661.73</u>		
Number of months	4.00		
Utilities Shortfall	<u>\$2,646.90</u>	\$2,646.90	

Total Wages & Benefits		\$7,696.22	5
------------------------	--	------------	---

Attorneys Fees		\$35,000.00	6
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Cost to reconnect electrical service		\$7,929	7
--------------------------------------	--	---------	---

Cost to repair building		\$1,500	8
-------------------------	--	---------	---

Cost to repair broken heaters		\$1,100	9
-------------------------------	--	---------	---

Lost Profits caused by delay		\$45,973	10
------------------------------	--	----------	----

Total Costs		<u>\$125,436.95</u>	
-------------	--	---------------------	--

- 1 See Stubblefield documents
- 2 Expired rental agreement between JTS and Gilbert Family 3rd ammendment rental amount was \$6250
- 3 Average of power bill for Laurel Street location
- 4 Average of water bill for Laurel Street location
- 5 See supporting schedule
- 6 Strong and Hanni Estimate
- 7 See "Power reconnection Charges PDF"
- 8 See "Estimate\_1072\_from\_Platinum\_Remodel\_\_Repair\_LLC" pdf
- 9 See "Heater Repair Caldwell"
- 10 See "Caldwell Peterbilt revenue loss analysis"



EXHIBIT 7

### 2015 Caldwell Land & Cattle Loan Payments

Date	CHECK_NUMBER	Ref	Amount
02/03/2015	329	Feb pmt	5,726.86
03/02/2015	357	Mar pmt	5,726.86
04/01/2015	395	Apr pmt	5,726.86
05/01/2015	434	May pmt	5,726.86
05/07/2015	auto pay	Jun pmt	5,726.86
06/10/2015	auto pay	Jul pmt	5,726.86
08/03/2015	auto pay	Aug pmt	5,726.86
09/01/2015	auto pay	Sep pmt	5,726.86
10/01/2015	auto pay	Oct pmt	5,726.86
11/01/2015	auto pay	Nov pmt	5,726.86
12/01/2015	auto pay	Dec pmt	5,726.86

Loan Payments began in February  
February through May were paid by Caldwell Peterbilt

Loan payments on the 1505 Industrial Way property began February 1, 2015. The first four loan payments were made by Caldwell Peterbilt (CP) directly as Caldwell Land & Cattle, LLC (CL&C) did not have sufficient capital or cash inflow without CP as a tenant to make the payments.

As CP managers' bonus payments are tied to Net Income the excess rent payments were not expensed on CP's income statement for those four months they were treated as a distribution of capital relating to the CL&C project. As such CL&C loan payments were made from owner capital for the first four months.

\* Total capital contribution by owners on this project is approximately \$400,000

# APPENDIX A

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
)  
Plaintiff/Counter-Defendant, )Case No. CV 15-587

vs. )  
)  
)

JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
)  
Defendant/Counterclaimant )  
Third-Party Plaintiff, )

vs. )  
)  
)

COLLIERS PARAGON, LLC, an Idaho )  
limited liability company, )  
)  
Third-Party Defendant. )  
\_\_\_\_\_)

DEPOSITION OF BLAKE JACKSON  
RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
Fisher Rainey Hudson  
950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
Beginning at 9:34 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.

com

(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)

1 A. We checked all e-mails. Most of the  
2 documentation was with me, other than some supplemental  
3 e-mails which we have provided. I only had to talk to a  
4 handful of people.

5 Q. In your efforts to locate documents, do you  
6 feel like you found everything there was that speaks to  
7 your efforts to mitigate damages?

8 A. I would say yes.

9 Q. As you sit here today, is there any type of  
10 document that you thought might be out there that simply  
11 is not?

12 A. No.

13 Q. Is there any particular document that you  
14 thought might exist that you just could not find or  
15 could not put your hands on?

16 A. No.

17 Q. As you sit here today, as the person who  
18 rounded all of these up, you think that we have got a  
19 full and complete set and that this is as good as we are  
20 going to get?

21 A. Yes, ma'am.

22 Q. The documents that you were looking for --  
23 there is so much cross-referencing in these -- to  
24 respond to Request No. 19 were documents that support  
25 the efforts described in Interrogatory No. 16. So now I

1 it to yourself, and let me know when you are done.

2 A. Oh, sorry. Okay.

3 Q. As you look at the answer contained in  
4 Interrogatory No. 16, is there anything that you would  
5 like to change, add, or delete, as you sit here today?

6 A. Is there anything that I would like to add or  
7 delete in reference --

8 Q. Or change?

9 A. -- or change in reference to what, in  
10 particular?

11 Q. Any of that answer. Is it 100 percent full,  
12 accurate, and complete?

13 A. Are you asking me is this -- so you spent a  
14 great deal of time asking Bruce about our damage  
15 claim --

16 Q. Yes.

17 A. -- which takes -- to go through that sheet  
18 takes explanation. Those explanations are not fully  
19 comprised in this; correct?

20 Q. To be fair, this question just talks about  
21 efforts to mitigate damages --

22 A. Correct.

23 Q. -- whereas that sheet represents all damages  
24 suffered.

25 A. Right. But you went piece-by-piece with Bruce.

1 want you to go to Exhibit 22 and look at Interrogatory  
2 No. 16.

3 A. Sorry. Which exhibit are we going to?

4 Q. Exhibit 22. You will want to go to page four  
5 of that exhibit.

6 A. (Witness complies.)

7 Q. Did you find it?

8 A. Yes, ma'am.

9 Q. Interrogatory No. 16 reads:

10 "Describe each and every effort made by you  
11 to mitigate the damages you claim to have  
12 suffered as a result of Johnson Thermal  
13 Systems' alleged holding over in the property  
14 located at 1505 Industrial Way, Caldwell,  
15 Idaho."

16 Do you see that?

17 A. Uh-huh.

18 Q. Is that a yes?

19 A. Yes.

20 Q. Would you read the answer? I am not going to  
21 read it into the record. If you would, read the answer  
22 that starts on page four and continues on page five.  
23 Let me know when you have finished reading that.

24 A. "Without waiving the general objections..."

25 Q. You don't have to read it out loud. Just read

1 Q. Right.

2 A. I'm probably the better person. Obviously, I  
3 am the --

4 Q. To go piece-by-piece with?

5 A. Yes. So I guess I would say, when I read this,  
6 this is correct; but it also would be in accompaniment  
7 with that document. Is that helpful?

8 Q. That's why I am asking the question.

9 A. What's on that document is our damages.

10 Q. I am talking more about mitigating damages.

11 A. Correct. Yeah.

12 Q. So we will kind of talk about those because you  
13 have been designated to talk about both sort of pieces  
14 of it. Before getting to that, I want to look at the  
15 sentence on page five in response to Interrogatory No.  
16 16. That reads:

17 "Because Defendant would not vacate the  
18 building by January 31, 2015, Plaintiff was  
19 forced to renew its lease at its old building  
20 but successfully negotiated with the owner to  
21 extend the lease on a month-to-month basis."  
22 Do you see that?

23 A. Yes, ma'am.

24 Q. Is that a true statement?

25 A. Yes.

1 Q. Bruce testified earlier that the reason for  
2 renewing the lease on the old building was the removal  
3 of the temporary transformer. Do you recall that  
4 testimony?

5 A. Yes.

6 Q. Which of the two issues caused you to renew the  
7 lease on the old building?

8 A. Well, you are blending two extensions.

9 Q. So was it --

10 A. We --

11 Q. Go ahead and explain.

12 A. We extended the lease the first time to the end  
13 of February. That's when your client didn't vacate.

14 Q. Okay.

15 A. Then when you pulled the power -- or when your  
16 client pulled the power, we extended the lease another  
17 sixty days. So there were two extensions.

18 Q. Two extensions?

19 A. Yes.

20 Q. Were there more than two extensions?

21 A. There might have been. Bruce talked  
22 extensively with John Stubblefield, who owned the  
23 building, the Laurel building.

24 Q. What was the mechanism pursuant to which those  
25 extensions were made?

1 A. Phone, e-mail. I would say it comprised both  
2 of them.

3 Q. Sometimes the extensions may not have been in  
4 writing?

5 MR. JACKSON: Objection. Mischaracterizes  
6 testimony.

7 THE WITNESS: I don't think I said that.  
8 That's a question you probably should have asked Bruce  
9 because Bruce dealt with John. I didn't deal with John.  
10 I dealt with John in the beginning but not as we moved  
11 through the process.

12 Q. BY MS. RAINEY: You were not the one making  
13 those extensions?

14 A. No.

15 Q. If the extensions were made in writing, those  
16 documents would have been the type of documents that you  
17 would have sought to acquire and provide to us in  
18 response to these requests; correct?

19 A. Yes.

20 Q. So is it fair to say that since you have done  
21 such a comprehensive review of attempting to find those  
22 documents, if I do not have a written extension, then an  
23 extension was done without a writing?

24 A. It's possible. I don't remember all of the  
25 e-mails and stuff. I know there was one specifically on

1 the day the power was pulled, and that was a letter that  
2 Bryan sent. I know you have that.

3 Q. Right.

4 A. But I don't remember the other documents.

5 Q. Yes, I do have that one. My concern is I don't  
6 have any other extension documents.

7 A. Yeah. You understand that John passed away;  
8 right?

9 MS. RAINEY: I do, yes.

10 (Exhibit 25 was marked.)

11 Q. BY MS. RAINEY: You have just been handed what  
12 has been marked as Exhibit 25. That is a one-page  
13 document marked CALD 0345. Is that what you have been  
14 handed?

15 A. Yes.

16 Q. Is this the extension document that you were  
17 specifically referring to?

18 A. Yes.

19 Q. Other than this Exhibit 25, do you specifically  
20 recall seeing any other written extensions to extend the  
21 lease at the Laurel Street property?

22 A. Not that I recall. Again, that was Bruce.

23 Q. Right. Or maybe Bryan? Bryan did this one?

24 A. The reason Bryan did this one is because, as I  
25 remember, we were both traveling or -- no. I say

1 that -- I don't remember. For some reason, we needed  
2 him to do it because we were occupied with something.  
3 That is the reason Bryan sent that that day. I don't  
4 remember if we were traveling or -- something prevented  
5 Bruce and I from doing it.

6 Q. Something prevented Bruce from doing it?  
7 Because you didn't do it; correct?

8 A. Correct.

9 Q. Did you ever do any extensions on the Laurel  
10 Street property?

11 A. Was I involved in that?

12 Q. Yes.

13 A. No. I delegated that to Bruce.

14 Q. Did you have any involvement at all with  
15 respect to your lease on the Laurel Street property?

16 A. Well, I make all of the decisions. So Bruce  
17 would consult with me before we did anything.

18 Q. Do you know when your lease on the Laurel  
19 Street property expired?

20 A. I don't, but it's in that document that you  
21 have in front of you.

22 (Exhibit 26 was marked.)

23 Q. BY MS. RAINEY: Before we get into this  
24 document, you said that Bruce consults with you before  
25 making all of the decisions; correct?

Page 22

1 A. Yes.

2 **Q. Why was it decided on that March 2nd date to**  
 3 **extend for sixty days?**

4 A. Because your client pulled the power on March  
 5 2nd.

6 **Q. No. Why was it decided to extend for sixty**  
 7 **days?**

8 A. Because we didn't know when the power was going  
 9 to be turned back on. Idaho Power could not guarantee a  
 10 reinstall date.

11 **Q. Why didn't you pick thirty days?**

12 A. We are mitigating our damages. It is so  
 13 fortunate that that building was still available or the  
 14 damages from your client would be even more.

15 **Q. I just want to know why the decision to extend**  
 16 **for sixty days as opposed to thirty days was made.**

17 A. Because we didn't know when the power was going  
 18 to be turned back on.

19 **Q. It could have been turned on within thirty**  
 20 **days? You simply didn't know?**

21 A. We did not know. Gratefully, we had a facility  
 22 to continue to operate.

23 **Q. It is tough when you get kicked out of a**  
 24 **facility when you don't know when you might be able to**  
 25 **move into a new facility; correct?**

Page 23

1 A. That's right.

2 **Q. It is very difficult to operate under such**  
 3 **circumstances, is it not?**

4 A. Absolutely. That's why I tried to work with  
 5 your client.

6 **Q. So let's talk about that a little bit. Look at**  
 7 **Exhibit 26 and tell me if you can glean from that when**  
 8 **your lease on the Laurel Street property expired.**

9 **MR. JACKSON:** Objection. Calls for a legal  
 10 conclusion. The document speaks for itself.

11 **Q. BY MS. RAINEY: If you can't figure it out,**  
 12 **just let me know; and we will skip on to the next**  
 13 **question.**

14 A. Do you want me to spend time reading this  
 15 document, or do you want to just tell me?

16 **Q. Go to the thing that says "Term." It says that**  
 17 **it expires on October 31, 2014. Do you see that?**

18 A. Yes.

19 **Q. Do you have any reason to believe that the term**  
 20 **of your lease on the Laurel Street property did not**  
 21 **expire on October 31, 2014?**

22 A. No.

23 **Q. Had there been written extensions made after**  
 24 **the October 31, 2014, date, you would have made every**  
 25 **effort to find those written extensions and provide them**

Page 24

1 to us; correct?

2 A. Yes.

3 **Q. We talked about you deciding to extend for**  
 4 **sixty days when the power was pulled. What do you know**  
 5 **about terms of extensions prior to the date that the**  
 6 **power was pulled and for how long those might have been?**

7 A. Well, I know we extended --

8 **Q. Do you know for how long?**

9 A. I wasn't done.

10 **Q. Okay.**

11 A. I know we extended at the end of January when  
 12 we realized your client was not going to vacate, and we  
 13 pushed out -- I don't know -- indefinite -- I don't know  
 14 if we were definitive on thirty days or sixty days.

15 I know Bruce was talking with John. I don't  
 16 know the date he told him, but I do know that we  
 17 reaffirmed on March 2nd that we would be leaving in  
 18 sixty days.

19 **Q. Why was it indefinite at the end of January but**  
 20 **definitive as of March 2nd?**

21 A. Because of your client.

22 **Q. Why?**

23 A. Your client was still in the building when  
 24 we -- John knew we had bought the building.

25 **Q. Right.**

Page 25

1 A. He knew that your client would not leave our  
 2 building.

3 **Q. Right.**

4 A. So Bruce was talking with him.

5 **Q. I get that you believe that it is all my**  
 6 **client's fault. So that's okay.**

7 I want to understand why decisions were made to  
 8 take certain actions for certain periods of time. Let's  
 9 back up. As of January 31st, when did you think you  
 10 were going to be able to get into the building?

11 A. April 15th, because of Kristin's -- is that her  
 12 name?

13 **Q. Yes.**

14 A. Because of Kristin's e-mail.

15 **Q. So why did you not extend your lease until**  
 16 **April 15th at that time?**

17 A. I didn't say we didn't.

18 **Q. You don't know whether you did?**

19 A. I just don't know. I don't know.

20 **Q. As you sit here today, do you have any idea**  
 21 **what actions were taken with respect to extending the**  
 22 **lease as of that January 31st time frame?**

23 A. From January 31st, no. March 2nd, yes.

24 **Q. I want to go back to Exhibit 14.**

25 A. I don't see it. Oh, sorry.

1 A. Yes.

2 **Q. You would agree with me that that is relatively**

3 **the fair market value for that property?**

4 A. I would agree that that's the appraised value.

5 **Q. Within that realm of -- you are not giving your**

6 **related entity a sweetheart deal?**

7 A. I am just charging them the cost to service

8 that debt.

9 **Q. What you testified earlier is that has been**

10 **consistently -- or it is your intent that that be right**

11 **around the fair rental value at or slightly below fair**

12 **rental value?**

13 A. I don't go out and conduct a survey. I am just

14 telling you that a third party came in. Their analysis

15 was that I was at fair market value or slightly below.

16 I don't go out and calculate that.

17 **Q. Okay. Can --**

18 A. When I --

19 **Q. Keep going.**

20 A. When I calculate rents, it's based upon debt

21 service. That's how I calculate the rent. Generally

22 speaking, at least according to that third party, we

23 have been at fair market value or below.

24 **Q. I think that gets me to how I can appreciate**

25 **the numbers that you are coming up with here on this**

1 **June income and expense.**

2 **Does money actually change hands between your**

3 **operating companies and your real estate holding**

4 **companies?**

5 A. Absolutely.

6 **Q. Were you involved in calculating the lost**

7 **profits caused by the delay that we see on Exhibit 20?**

8 A. Yes.

9 **MS. RAINEY:** I feel like I understand how you

10 are going about the process, but I want to talk through

11 it with you a little bit. We are going to mark Exhibit

12 34 and Exhibit 35.

13 (Exhibit 34 and Exhibit 35 were marked.)

14 **Q. BY MS. RAINEY: All right. You have just been**

15 **handed Exhibit 34 and Exhibit 35. These are two**

16 **different calculations based on the same numbers.**

17 **Exhibit 35 is CALD 0224. Does that match up with what**

18 **you have got?**

19 A. Yes.

20 **Q. Exhibit 34 is CALD '0359. Does that match up**

21 **with what you have got?**

22 A. Yes.

23 **Q. Have you seen Exhibit 34 and Exhibit 35**

24 **before?**

25 A. Yes.

1 **Q. Were you, in fact, involved in creating Exhibit**

2 **34 and Exhibit 35?**

3 A. More Exhibit 34 than Exhibit 35.

4 **Q. Let's start with Exhibit 35. No, no. Let's**

5 **start with Exhibit 34. When you look at Exhibit 34 --**

6 **why do you say that you were more involved with creating**

7 **Exhibit 34 than Exhibit 35?**

8 A. I didn't like how Bryan, my CFO, calculated the

9 numbers on Exhibit 35.

10 **Q. What didn't you like about it?**

11 A. He didn't include June, and he spread the

12 period of time past what I believe to be our damages.

13 **Q. So you said Exhibit 35 --**

14 A. Correct, Exhibit 35.

15 **Q. On Exhibit 35, you said he did not include**

16 **June. How is June not included?**

17 A. Well, he took the average of July, August, and

18 September; and that came to \$25,567.

19 **Q. Hang on just one second. When you say --**

20 A. Right there.

21 **Q. When you say he did not include June --**

22 A. Correct.

23 **Q. It is in the calculation for --**

24 A. It's not in the calculation for the average.

25 **Q. For the average of months seven through nine?**

1 A. Yes.

2 **Q. It is in the calculation of the average of one**

3 **through six?**

4 A. It is. Correct.

5 **Q. You thought June should be in the seven through**

6 **nine average?**

7 A. Correct. As Bruce said, we just want exactly

8 what we think we were damaged.

9 **Q. Right.**

10 A. Bryan, when he calculated it, said, well, we

11 were not fully at max strength with technicians; and we

12 were in July. That was his thought process.

13 **Q. Okay.**

14 A. In my mind, what we are really talking about is

15 the first part of the year versus when we took

16 possession.

17 **Q. So you think the inclusion of just July,**

18 **August, and September, when you had full technicians,**

19 **fully operational, pushed the damages a little too high**

20 **because you were totally up and running by then?**

21 A. You could make the argument for what Bryan was

22 trying to do.

23 **Q. Right.**

24 A. I was just trying to be fair. That is why you

25 get the revision on Exhibit 34.



1 went up two times before the transaction was completed.

2 While we were there on November 13th, as I  
3 recall, we verified what he had already understood  
4 because that was before we entered into the contract to  
5 purchase the property.

6 **Q. I just want to make sure that I am clear. The  
7 one thing that we have spoken about earlier was Jeff's  
8 conversation with somebody at JTS about what the power  
9 source to the property was.**

10 **In addition to that, you visited the property  
11 on two prior occasions --**

12 A. Prior to close.

13 **Q. -- prior to closing and confirmed what Jeff had  
14 advised you?**

15 A. Correct. We are going back two and a half  
16 years.

17 **Q. Right. I get that.**

18 A. The conversation that Jeff had with somebody at  
19 JTS could have occurred on the 13th. That was one of  
20 the things we had to verify --

21 **Q. December 13th?**

22 A. No. No. November 13th.

23 **Q. Okay. Okay.**

24 A. It could have occurred at the same time.

25 **Q. I'm tracking with you now.**

1 **Conversations about coordinating with Johnson Thermal --  
2 let's get back to the issues with Johnson Thermal. It  
3 is my understanding that the issue was they couldn't  
4 give you a hard, confirmed move-out date; correct?**

5 A. Correct.

6 **Q. Do you have an understanding as to why they  
7 couldn't commit to a particular date?**

8 A. Absolutely.

9 **Q. What is your understanding?**

10 A. That they were building a building.

11 **Q. Why does building a building make it not  
12 possible for them to commit to a move-out date?**

13 **MR. JACKSON:** Objection to form. Calls for  
14 speculation.

15 If you know?

16 **Q. BY MS. RAINEY: Did you believe that Johnson  
17 Thermal was being honest with you that it didn't know  
18 when it would be able to move into the new building?**

19 A. I don't think Johnson Thermal has been honest,  
20 no.

21 **Q. Is it your testimony here today that when  
22 Johnson Thermal was representing that they could not  
23 move into a new building until they got a certificate of  
24 occupancy for that building that they were lying to you  
25 about it?**

1 A. There are certain things that we have to have  
2 in facilities to make them functional for our business,  
3 and so we run through a list to verify.

4 **Q. Do you have a list? A written list?**

5 A. It's up here (indicating).

6 **Q. Okay.**

7 A. We have bought enough buildings. It's kind of  
8 the same list all the time.

9 **Q. Fair enough.**

10 **You didn't buy the Laurel Street building?  
11 That was just a temporary deal?**

12 A. Correct. Correct.

13 **Q. Is that because you had your eye on this  
14 particular building?**

15 A. We didn't know it was available until October.  
16 We had looked at it before. I met with Mrs. Gilbert a  
17 couple of times.

18 **Q. Topic 8?**

19 A. Is this on Exhibit 23 again?

20 **Q. No. We are on Exhibit 14.**

21 A. Exhibit 14. Okay.

22 A. I did it again -- Becky, my mind is OCD. When  
23 you jump around like this, you are making it hard for me  
24 to stick together.

25 **Q. All right. Topic 8 is where we are going next.**

1 A. I never had -- I can't answer that question  
2 because I didn't have that discussion with them the way  
3 you just described it.

4 **Q. Is it your testimony, then, that nobody ever  
5 told you the reason they couldn't commit is because they  
6 were waiting on certificates of occupancy?**

7 A. Can I change your question?

8 **Q. Sure. Yes.**

9 A. When we entered into the contract on November  
10 20th, I asked the agent at Colliers when your --

11 **Q. Which agent? Lincoln or Devin?**

12 A. Mike.

13 **Q. Oh, Mike?**

14 A. Mike Pena. We actually had met with Lincoln in  
15 that time frame, too. I asked what date the tenant was  
16 going to be out, and they told me December 31st.

17 **Q. Mike told you the tenant would be out by  
18 December 31st?**

19 A. Correct.

20 **Q. Okay.**

21 A. He told me -- and I said, "You guys pick the  
22 date on the close, and then I will ramp up to take  
23 control of the building and move my people."

24 So when I entered the contract, I was told they  
25 were building a building. I was told that they had --

Page 94

1 that they had intended to vacate on December 31st. So  
2 that's when I entered into the contract.

3 So there was no disputation on the day I  
4 entered the contract. I signed the contract. I think  
5 I'm going to be a building owner in forty-some-odd days  
6 and we are going to move.

7 **Q. When you sign that contract and you are ready  
8 to ramp up and move in forty days, other than closing on  
9 the building, what actions do you undertake to go  
10 through that ramp-up and let's-get-moved process?**

11 A. I hired a technician. We started working with  
12 Bryan on getting the plans laid out.

13 **Q. Right.**

14 A. We contacted CDK.

15 **Q. What is CDK?**

16 A. It's our operating system. We let them know we  
17 were going to have additional log-ons. We were getting  
18 ready to order computers. Gary Sommercorn went up  
19 there.

20 We ordered equipment based on the three-phase  
21 480 power. It's a process. Everyone has assignments.  
22 We move forward. We make sure we have got trucks, that  
23 we have forklifts.

24 **Q. Do you have a checklist for that process?**

25 A. No. It's just -- in 2001, we had two

Page 96

1 **with Jeff Johnson? Why were you starting to feel like  
2 you were being lied to?**

3 A. On December 5th, Mike Pena sent me an e-mail  
4 and told me that I had agreed to accept Johnson Thermal  
5 as my tenant after I took control of the building.

6 **Q. So following that, you are upset because you  
7 don't want the tenant in the building; correct?**

8 A. I am the tenant.

9 **Q. Right.**

10 A. Yes.

11 **Q. So you went to talk to Jeff?**

12 A. Correct.

13 **Q. And what did Jeff tell you in response to that  
14 inquiry?**

15 A. He explained he was building a building. I  
16 said, "Hey, I was just there."

17 **Q. Just where?**

18 A. In the same position.

19 **Q. Oh, okay.**

20 A. I was in Salt Lake City. We were building a  
21 new facility. I had a leased facility in Salt Lake.  
22 The building was behind schedule. I told him, "I am a  
23 reasonable guy. Let me help you. Let's work this out."

24 **Q. Did you think he was lying to you at that  
25 point?**

Page 95

1 dealerships. When I took over, we had four. We have  
2 thirteen. So I have opened a ton of these types of  
3 stores. So we have a rhythm. We know how to do this.  
4 This is what we do.

5 **Q. I want to get back to your representation that  
6 Johnson Thermal has not been honest with you about  
7 anything. The December 31st move-out date came from the  
8 mouth of Mike Pena; correct?**

9 **MR. JACKSON:** Objection. Argumentative.

10 **Q. BY MS. RAINEY: Is that correct? Who said  
11 those words to you?**

12 A. Mike Pena.

13 **Q. Did you ever personally have communications  
14 with anybody at Johnson Thermal about their move-out  
15 dates?**

16 A. Yes.

17 **Q. With whom did you have those conversations?**

18 A. I met with Jeff Johnson on December 10th.

19 **Q. What conversations did you have with Jeff  
20 Johnson on December 10th?**

21 A. I asked him -- I think the exact phrase was, "I  
22 feel like I am being lied to by multiple parties here,  
23 and I am trying to find out who's who at the zoo." I  
24 think that is, basically, what I said.

25 **Q. What precipitated you having that conversation**

Page 97

1 A. No, not at that point. I don't think --

2 **Q. Let's just walk through it. At that point, you  
3 felt like Jeff was being honest with you, that he was  
4 building a building and that it was behind schedule?**

5 A. Correct.

6 **Q. What else did you gather from that particular  
7 conversation with Jeff?**

8 A. Jeff was not definitive on a date. He told me  
9 he had no authority to make this decision and told me  
10 that Gus Gustavsen would call me back.

11 **Q. Who was the next person at Johnson Thermal that  
12 you spoke with regarding the issue?**

13 A. Gus Gustavsen, December 22nd.

14 **Q. When was this conversation with Jeff?**

15 A. December 10th.

16 **Q. Tell me about your conversation with Gus on the  
17 22nd.**

18 A. He explained the problem that they had, and I  
19 offered a solution.

20 **Q. What problem did Gus explain on December 22nd?**

21 A. That the building was not complete and they  
22 couldn't move out.

23 **Q. Did Gus tell you why they couldn't move out?**

24 A. I just said that. He said the building wasn't  
25 completed.

Page 98

1       **Q. Did he tell you they didn't have a certificate**  
 2 **of occupancy?**  
 3       A. I don't recall that. He said he couldn't move.  
 4       **Q. Did you believe that they were unable to move**  
 5 **at that time?**  
 6       A. Yes. I believed that part.  
 7       **Q. What part didn't you believe?**  
 8       A. When he told me that he had a contract.  
 9       **Q. A contract?**  
 10      A. A lease extension.  
 11      **Q. What did he tell you about the lease**  
 12 **extension?**  
 13      A. He said that you guys had -- excuse me -- that  
 14 JTS had extended their lease and that it went out until  
 15 April 15th and that they were going to stay in the  
 16 building until April 15th.  
 17      **Q. You felt that he was lying to you about that?**  
 18      A. Yes.  
 19      **Q. Why did you feel he was lying to you about**  
 20 **that?**  
 21      A. Because I read the contract.  
 22      **Q. What was it about the contract that caused you**  
 23 **to believe that he was lying about them having extended**  
 24 **the lease?**  
 25      A. It says there that the contract cannot be

Page 99

1       amended except in written form and agreed by all  
 2 parties. He could provide no written documentation. He  
 3 also e-mailed Lincoln Hagood and stated the same. I  
 4 have no written communication.  
 5       **Q. So the absence of the written communication**  
 6 **caused you to believe that Gus was lying about having**  
 7 **extended the lease?**  
 8       A. Correct.  
 9       **Q. What was your next move in response to getting**  
 10 **that information from Gus?**  
 11      A. I said to him that I would give them a contract  
 12 and let them stay in the building if they gave me a  
 13 determined exit date. I told them that they could not  
 14 stay in the building without a lease agreement between  
 15 me and them.  
 16      **Q. Did you ever provide them with a written**  
 17 **contract?**  
 18      A. No, because he told me he wouldn't sign it.  
 19      **Q. Was that in that December 22nd conversation?**  
 20      A. Correct.  
 21      **Q. What was the next thing that happened in the**  
 22 **sequence of events?**  
 23      A. Well, in that discussion, he asked me what the  
 24 rent factor was. I told him, "Gus, it's very easy.  
 25 Take the building price, put it in your HP calculator,

Page 100

1       and it comes out to about \$8,300 a month," mas y menos.  
 2       Do you have Spanish on there? I'm sorry. I  
 3 keep doing that.  
 4       **Q. We can sort through it. That's fine.**  
 5       A. I said, "Triple net, which is the provisions  
 6 you are under right now."  
 7       He said, "I pay only \$6,300 now."  
 8       I said, "Gus, this isn't about me making a  
 9 margin. This is about me servicing my debt. If you  
 10 want me to let you stay in the building until your  
 11 building gets finished" -- he had a sympathetic  
 12 ear because I was in the same position the year prior --  
 13 "then you have to pay at least what my cost is to stay  
 14 in."  
 15      **Q. And that is the same deal that you make with**  
 16 **your current tenant?**  
 17      A. Correct. Correct.  
 18      **Q. So the deal you offered to Gus was \$8,300, more**  
 19 **or less?**  
 20      A. More or less.  
 21      **Q. Plus triple net?**  
 22      A. Correct. The same -- right. The same  
 23 provisions, right.  
 24      **Q. You were not trying to overcharge him for the**  
 25 **space?**

Page 101

1       A. No. I just wanted to have a definitive exit  
 2 date, and I wanted to know -- I just wanted to be able  
 3 to plan when we were going to be in there. I didn't  
 4 want to lose money. Right? I didn't want to have a  
 5 building with an individual who was squatting in my  
 6 facility and not paying.  
 7       **Q. So you and Gus discussed rent. Did you discuss**  
 8 **anything else at that December 22nd meeting?**  
 9       A. He told me that he would -- that he wouldn't  
 10 pay it.  
 11      **Q. He wouldn't pay that much because he was only**  
 12 **paying --**  
 13      A. He said, "I won't pay that. I won't sign a  
 14 contract because we have a contract."  
 15       I told Gus -- no offense. I said, "Gus, I hate  
 16 attorneys. I hate the courtroom. I try everything I  
 17 can do to not end up there. But if you stay in my  
 18 building past the date of January 31st," I said, "I will  
 19 file suit."  
 20      **Q. That was all in that December 22nd**  
 21 **conversation?**  
 22      A. Yes.  
 23      **Q. Anything else discussed in that December 22nd**  
 24 **meeting?**  
 25      A. I gave him an example.

1 like the repairs to the building -- you know, we were  
2 trying to get that done as quickly as possible. There  
3 was lots of e-mail traffic between Graden and your  
4 group.

5 **Q. Right.**

6 A. We were trying to get you guys to fix the  
7 building. We pursued Idaho Power. We got the bill  
8 reduced. We pursued them trying to get the power  
9 reinstated quicker than the April 30th date.

10 **Q. I am going to stop you here because we have  
11 talked about all of these things that you did to  
12 mitigate. My question was a little bit different than  
13 that.**

14 A. Okay.

15 **Q. My question is: Did you do anything different  
16 to mitigate, based on the February 11th move-out event,  
17 than you did based on the January 28th e-mail?**

18 A. I think it kind of all blends together.

19 **Q. That's kind of how I looked at it. I just  
20 wanted to have an appreciation as to whether you made  
21 one course of action on January 28th and then tacked  
22 when Johnson Thermal move out two weeks later?**

23 A. The only thing I would say was a definitive  
24 moment was when we reaffirmed that we were staying in  
25 the building through April 30th, or however that

1 A. It's the release.

2 **Q. What was going on with respect to this  
3 release?**

4 **MR. JACKSON:** I will object to the extent calls  
5 for a legal conclusion.

6 Go ahead, if you know.

7 **THE WITNESS:** I don't know if I am answering  
8 from a legal conclusion, but I will tell what I do know.  
9 How is that?

10 **Q. BY MS. RAINEY: That's what I want to know.**

11 A. Okay. As I said before, when we entered into  
12 the contract November 20th, we were going to possess the  
13 building January 1st.

14 **Q. That was the intent?**

15 A. That was the intent, yes. On November 5th,  
16 Colliers told us that we had agreed to accept a tenant,  
17 which we had not.

18 **Q. November 5th or December 5th?**

19 A. Excuse me. December 5th. Thank you. December  
20 5th we had agreed to accept a tenant, which we had not.  
21 There was some communication back and forth.

22 On December 10th, when I flew up and met with  
23 Jeff, I also met with Colliers. I was unhappy, to say  
24 the least, because they were trying to change the  
25 agreement --

1 terminology is, with Stubblefield.

2 **Q. That was the most significant change of your  
3 decision-making process?**

4 A. Correct.

5 **Q. I think that covers all of the topics that I  
6 needed to cover with you for your 30(b)(6) portion of  
7 the deposition.**

8 You have also been noticed to be deposed  
9 individually, which we have kind of mixed into this a  
10 little bit. I do have some additional questions that I  
11 want to go through with you that were not necessarily --

12 A. Before you ask that question, can we take a  
13 break?

14 **MS. RAINEY:** Yes. This is a really great spot  
15 for a break. Let's do about five minutes or so.

16 (Break taken.)

17 (Exhibit 37 was marked.)

18 **Q. BY MS. RAINEY: I am handing you what has been  
19 marked as Exhibit 37. That is a two-page document  
20 marked CALD 0151 and '152. Is that what you have been  
21 given?**

22 A. Yes.

23 **Q. Do you recognize this document?**

24 A. I do.

25 **Q. What do you recognize it to be?**

1 **Q. Colliers?**

2 A. -- between me and Mrs. Gilbert.

3 **Q. Okay. I'm following.**

4 A. When we realized that they had not notified  
5 your client to vacate the building, we asked them for a  
6 copy of the notice to vacate.

7 **Q. Did you actually receive a copy of that?**

8 A. We did. We did.

9 In trying to find some way to not be in your  
10 office today, I had told Colliers and Mrs. Gilbert that  
11 I would give up ten to fifteen days in January if  
12 everyone would just get out and leave me alone.

13 **Q. Right.**

14 A. When we found out on December 10th that they  
15 hadn't even given notice, they then gave notice; and  
16 they gave your client until January 31st without  
17 consulting me.

18 **Q. Okay.**

19 A. I thought that thirty days would be January  
20 10th or January 15th, which I had already acquiesced to  
21 just give all parties -- as a chance for us all to avoid  
22 being here.

23 **Q. Okay.**

24 A. So I was as surprised as your client was on  
25 January 31st.

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.

Plaintiff, ) CV15-587

)

vs. )

)

JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)

Defendant. )

DEPOSITION OF SHERI JOHNSON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 2:10 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

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DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 most part?

2 A. It usually had to do with something we wanted  
3 to do with the building or if we had been late on a rent  
4 payment, which happened once or twice because our  
5 payment gal forgot to do it or whatever. It was pretty  
6 to the point.

7 **Q. Typically, it had something to do with the  
8 tenant-landlord relationship?**

9 A. The tenant-landlord relationship, correct.  
10 (Exhibit 1 was referenced.)

11 **Q. BY MR. BULLOCK: There is a pile of exhibits  
12 here that have been marked. I think we have Exhibit 1  
13 through Exhibit 9. We will go through some of those or  
14 maybe all of them. I would like to have you look at  
15 Exhibit 1, right there on top.**

16 A. Okay.

17 **Q. It says "Commercial Lease Agreement," entered  
18 into on February 10, 2012, between the Gilbert Family  
19 Limited Partnership and Johnson Thermal Systems. Have  
20 you seen this document before?**

21 A. Yes.

22 **Q. Did you assist in the preparation of this  
23 document in any way?**

24 A. No.

25 **Q. How did Johnson Thermal receive this document?**  
**DEPOSITION OF SHERI JOHNSON (11.17.2015)**

1 term of the lease, the rent, or the premises? Did you  
2 have any input on any points of this agreement?

3 A. Yes.

4 **Q. What were those?**

5 A. Negotiating dollar amounts and lease terms.

6 **Q. Did you negotiate that on behalf of Johnson  
7 Thermal or through your agent?**

8 MS. RAINEY: Object to form.

9 THE WITNESS: Through our agent.

10 **Q. BY MR. BULLOCK: At the time the agreement was  
11 executed -- if you would, look at the bottom of the  
12 page. In 2012, what was your position at Johnson  
13 Thermal?**

14 A. Do you mean the last page?

15 **Q. Yes. On the date that it was entered in  
16 2012 -- or executed -- I see here that you signed on  
17 behalf of Johnson Thermal; is that correct?**

18 A. I don't remember what my title was at that  
19 point.

20 **Q. Were you an owner at the time?**

21 A. Yes.

22 **Q. During the course of your ownership, did you  
23 have different titles --**

24 A. Yes.

25 **Q. -- as it related to the company?**

**DEPOSITION OF SHERI JOHNSON (11.17.2015)**

1 **Who did you receive it from? I guess that is the better  
2 question.**

3 A. I am not positive, but I would assume it was  
4 Lincoln. I don't think -- yeah. We didn't get it  
5 directly from him. It came through Colliers.

6 **Q. Colliers. Okay. Did you have an agent with  
7 Colliers?**

8 A. Yes.

9 **Q. Do you recall his or her name?**

10 A. Devin Ogden.

11 **Q. How did you come about finding this property on  
12 1505 Industrial Way? Were you looking for a new place  
13 to rent?**

14 A. Yes.

15 **Q. Who approached you, Johnson Thermal, with that  
16 property?**

17 A. I don't remember.

18 **Q. Was it Devin?**

19 A. I don't remember.

20 **Q. Does that date look about the correct time  
21 frame? Was it about 2012 when you moved into the  
22 property at 1505 Industrial Way?**

23 A. Yes.

24 **Q. Did you have any input on anything that is on  
25 any portion of the document in here? For example, the  
DEPOSITION OF SHERI JOHNSON (11.17.2015)**

1 A. Yes.

2 **Q. What are some of the titles that you held?**

3 A. Owner, president, and any number of other  
4 titles that named the duties I did, depending on which  
5 customer or person I was dealing with.

6 **Q. You wore many hats during your time at Johnson  
7 Thermal?**

8 A. Uh-huh.

9 **Q. At this time, you are not sure what title you  
10 were holding, when entering into the agreement; is that  
11 correct?**

12 A. Correct.

13 **Q. I would like to just go over this really  
14 quickly. If you would, look at the first page, page  
15 one, the term of the lease. Originally, this was a  
16 thirteen-month lease; is that correct?**

17 A. It appears so.

18 **Q. Do you know what the time period of that was?**

19 A. Based on the document, it says March 15, 2012,  
20 through April 15, 2013.

21 **Q. Prior to executing this agreement on behalf of  
22 Johnson Thermal, did you review its terms?**

23 A. Yes.

24 **Q. Did you consult with an attorney prior to --  
25 did you have an attorney review it for you prior to**

**DEPOSITION OF SHERI JOHNSON (11.17.2015)**

1 A. No.

2 **Q. Did you have any input on whether it was**  
3 **reduced to writing or not?**

4 A. No.

5 (Exhibit 3 was referenced.)

6 **Q. BY MR. BULLOCK: Let's go to Exhibit 3, I**  
7 **believe.**

8 **Were there other amendments to the lease**  
9 **agreement, other than this one, the first amendment**  
10 **here, that you are aware of?**

11 A. I don't recall.

12 (Exhibit 6 was referenced.)

13 **Q. BY MR. BULLOCK: Let's look at Exhibit 6. Have**  
14 **you seen this document before?**

15 A. It appears I have. That's my signature.

16 **Q. Can you tell me what it is?**

17 A. If I recall correctly, when we were getting  
18 ready to move into the building, because of other things  
19 going on in our business -- I don't recall if it was the  
20 lease that we were in at the time, but we had to change  
21 the date.

22 Instead of March 15th, it looks like we changed  
23 it to April 1st. It was probably because we weren't  
24 going to be able to move, if my memory serves me  
25 correctly. Based off of what these two documents are  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 A. Yes. It was adjacent to what we were renting,  
2 yes.

3 **Q. It says that the rent period would be from**  
4 **February to August. Was it ever extended beyond that**  
5 **date? Did you continue to use this property after**  
6 **August 30, 2014?**

7 A. I was no longer working in the business after  
8 that date. So I don't know.

9 **Q. When was your last day at Johnson Thermal?**

10 A. Somewhere around the end of July of 2014.

11 **Q. So just prior to this?**

12 A. Correct.

13 **Q. You signed this; right?**

14 A. Correct.

15 **Q. On behalf of Johnson Thermal?**

16 A. Correct.

17 **Q. Let's look at Exhibit 3, please. This is a**  
18 **one-page document entitled "Third Lease Amendment."**  
19 **Have you seen this document before?**

20 A. Yes.

21 **Q. Did you participate in its negotiation?**

22 A. Yes.

23 **Q. In what fashion were you specifically involved**  
24 **in negotiating this agreement?**

25 A. Lincoln and I discussed the term, the length of  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 saying, that's what I remember.

2 **Q. So it was just to change the beginning of the**  
3 **lease date?**

4 A. And to finalize who was doing what before we  
5 moved in. Uh-huh.

6 **Q. And did you have any input on the terms of this**  
7 **first amendment?**

8 A. Yes.

9 **Q. What did you have input on? Points one through**  
10 **five, I guess, there?**

11 A. I think one through five -- we negotiated all  
12 of those together, back and forth.

13 **Q. Ultimately, you agreed upon those; and this was**  
14 **the finalized agreement?**

15 A. Correct.

16 (Exhibit 7 was referenced.)

17 **Q. BY MR. BULLOCK: If you would, go to Exhibit 7.**  
18 **It's on Johnson Thermal letterhead. Have you seen this**  
19 **exhibit before?**

20 A. Yes.

21 **Q. What was this about?**

22 A. We needed space for equipment; and so we asked  
23 the landlord if we could rent the adjacent lot, the dirt  
24 lot.

25 **Q. This was a lot next to the building?**  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

1 the lease, the extension of the term, and the pricing.

2 **Q. So points one and two?**

3 A. And three.

4 **Q. And three, as well?**

5 A. Yes.

6 **Q. Why was it important for -- let me back up a**  
7 **little bit. I'm sorry.**

8 **Why was this amendment necessary? Why was it**  
9 **necessary to amend the lease agreement a third time with**  
10 **this amendment?**

11 A. We were preparing to build a new building, and  
12 it wasn't going to be ready. So we needed to negotiate  
13 the remaining months until the new building would be  
14 ready.

15 **Q. Did the Gilberts originally want a longer lease**  
16 **term than this additional six months? Do you recall?**

17 A. I don't know.

18 **Q. Was that not brought into the discussion with**  
19 **the negotiations?**

20 A. Not that I recall. I don't know.

21 **Q. Did Johnson Thermal want a longer extension**  
22 **than the six months, or was it willing to accept the six**  
23 **months with the option to extend?**

24 MS. RAINEY: Object to form and foundation.

25 THE WITNESS: I don't know how to answer that  
DEPOSITION OF SHERI JOHNSON (11.17.2015)

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.

Plaintiff, ) CV15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)  
Defendant. )

DEPOSITION OF DARRELL "GUS" GUSTAVESON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Wednesday, November 18, 2015  
Beginning at 9:00 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

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DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)



1 A. Three years.  
 2 **Q. It's a three-year lease?**  
 3 A. (Nods head affirmatively.)  
 4 **Q. With an option to renew, as well?**  
 5 A. Yes.  
 6 **Q. At the end of this third lease amendment in**  
 7 **October of 2014, were you involved in any discussions on**  
 8 **whether Johnson Thermal intended to extend the lease or**  
 9 **exercise an option to extend the lease?**  
 10 A. We did exercise an option to extend the  
 11 lease.  
 12 **Q. How did you do that?**  
 13 A. We continued to make the payments as specified  
 14 in the third lease amendment for the six-month base  
 15 rent.  
 16 **Q. Did you have any communications with the**  
 17 **landlord, Arlene Gilbert, regarding the option to**  
 18 **extend?**  
 19 A. Just the check that we send every month.  
 20 **Q. You never communicated to her in writing or**  
 21 **orally that you had exercised the option to extend the**  
 22 **lease?**  
 23 A. No.  
 24 **MS. RAINEY:** Objection. Foundation.  
 25 **Q. BY MR. BULLOCK: How many additional payments**  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 **did you make to Arlene Gilbert beyond October of 2014?**  
 2 A. November's, December's, and January's payments.  
 3 **Q. Is it your contention that Johnson Thermal**  
 4 **exercised -- let me go back a little bit. Let's look at**  
 5 **paragraph three in the first lease agreement. It says:**  
 6 **"At the conclusion of this lease extension,**  
 7 **the Tenant shall have the option to extend the**  
 8 **lease agreement for an additional period of**  
 9 **either six months or on a month-to-month basis**  
 10 **at the following rates."**  
 11 **It gives a six-month term with a base rent of**  
 12 **\$6,000 and a month-of-month term with a base rent of**  
 13 **\$6,250.**  
 14 **Is it your contention that Johnson Thermal**  
 15 **exercised the option to extend on the six-month term?**  
 16 A. That's correct.  
 17 **Q. It did that by making the payments of \$6,000 a**  
 18 **month?**  
 19 A. Correct.  
 20 **Q. Essentially, Johnson Thermal's position is that**  
 21 **it had an additional extension on the lease until April**  
 22 **15, 2014?**  
 23 A. That's correct.  
 24 **Q. Previously, you said that Johnson Thermal had**  
 25 **made payments up until January of 2015; is that**  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 **correct?**  
 2 A. That is correct.  
 3 **MS. RAINEY:** Object to foundation.  
 4 **THE WITNESS:** Sorry.  
 5 **MS. RAINEY:** It's okay. Let him get his full  
 6 question out so I have time to object.  
 7 **THE WITNESS:** Okay.  
 8 **Q. BY MR. BULLOCK: Why were no additional**  
 9 **payments made in February, March, or April?**  
 10 **MS. RAINEY:** Object to foundation.  
 11 **THE WITNESS:** The Gilbert Family Partnership no  
 12 longer owned the property.  
 13 **Q. BY MR. BULLOCK: But you still had a lease with**  
 14 **them; correct?**  
 15 A. Correct.  
 16 **MS. RAINEY:** Object to foundation.  
 17 **Q. BY MR. BULLOCK: Who owned the property at that**  
 18 **time?**  
 19 **MS. RAINEY:** Object to form.  
 20 **THE WITNESS:** Our understanding was that it was  
 21 Peterbilt.  
 22 **Q. BY MR. BULLOCK: At some point, there was a**  
 23 **transaction between the Gilbert Family Limited**  
 24 **Partnership and Peterbilt. Are you aware of a**  
 25 **transaction between them to purchase the property?**  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 A. I believe there was a transaction. I don't  
 2 have any details on it.  
 3 **Q. Do you know when that happened?**  
 4 A. I do not.  
 5 **Q. Did you have conversations with anyone at**  
 6 **Peterbilt regarding their purchase of the property?**  
 7 A. Prior to the purchase of the property, once we  
 8 received our eviction notice, I did reach out to Blake  
 9 Jackson.  
 10 **Q. Who did you converse with prior to them**  
 11 **purchasing the property?**  
 12 A. Blake Jackson.  
 13 **Q. Do you know when that was?**  
 14 A. It would have been the week of December 12th.  
 15 **Q. Where did you have that conversation with**  
 16 **Blake?**  
 17 A. By phone.  
 18 **Q. By telephone?**  
 19 A. (Nods head affirmatively.)  
 20 **Q. Did you ever meet Blake in person?**  
 21 A. No.  
 22 **Q. And what was the substance of the conversation**  
 23 **that you had with Blake Jackson?**  
 24 A. We had been served with our eviction notice,  
 25 and I was reaching out to Blake to see if there was a  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 way that we could avoid legal action.

2 **Q. What did your discussion entail with him? What**  
3 **was his response?**

4 A. His response was, "We want you out of the  
5 building. I have the money. I'm coming after you."

6 **Q. Was there any discussion with you and Blake**  
7 **about the possibility of extending the close date on the**  
8 **purchase and sale agreement?**

9 A. Not with Blake, no.

10 **Q. Did you have a conversation about that with**  
11 **someone else?**

12 A. With Lincoln and George Iloff.

13 **Q. When did you have those conversations with**  
14 **them?**

15 A. After I spoke to Blake Jackson. I believe it  
16 was before the end of the year.

17 **Q. Many conversations? One conversations?**

18 A. There were several.

19 **Q. Were those conversations typically with George**  
20 **or with Lincoln?**

21 A. Both.

22 **Q. At the same time?**

23 A. No. Separately.

24 **Q. And what did you discuss with George about**  
25 **extending the date of the closing of the building?**

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 **Q. Had you ever communicated a date? Are you**  
2 **aware of any date that was communicated to Peterbilt**  
3 **about the time when Johnson Thermal would leave the**  
4 **building?**

5 A. Not specifically. There were a range of dates  
6 that we offered.

7 **Q. What are some of those dates?**

8 A. March 1st. March 15th.

9 **Q. Who communicated those to Peterbilt?**

10 A. I did.

11 **Q. You did?**

12 A. (Nods head affirmatively.)

13 **Q. Who did you communicate with at Peterbilt?**

14 A. Actually, at that point, I think we were  
15 communicating through our attorneys.

16 **Q. Prior to that, had you given dates to George or**  
17 **Lincoln? Any other dates that were a potential for**  
18 **leaving the building?**

19 A. Same ranges. Of course, April 15th was our end  
20 date.

21 **Q. But you didn't stay until March 1st either;**  
22 **correct?**

23 A. No. We did pay rent to March 1st, though.

24 **Q. I thought you only paid rent until January?**

25 MS. RAINEY: Object to foundation.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 A. That wasn't actually the topic of our  
2 discussion. Our discussion was about what time did we  
3 have to vacate the building.

4 **Q. What did you tell him?**

5 A. That we had a lease until April.

6 **Q. Did Johnson Thermal, in fact, stay in the**  
7 **building until April of 2015?**

8 A. No.

9 **Q. When did they leave?**

10 A. February 12th. There might be a day either way  
11 on that.

12 **Q. Why didn't it stay until the end of the lease**  
13 **term?**

14 A. We had been served with a legal action. We  
15 believed that we had a lease, but we couldn't take the  
16 chance that we might lose that action because a six-week  
17 down-time would be catastrophic for our business. We  
18 would lose millions of dollars in revenue.

19 **Q. When you say --**

20 A. So we --

21 **Q. I'm sorry. Go ahead.**

22 A. So we accelerated our moving plan. We worked  
23 overtime, hired subcontractors, rented equipment --  
24 trucking -- and moved out of the building as fast as we  
25 could so that we could continue to operate.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 **THE WITNESS:** We only paid rent to Arlene until  
2 January.

3 **Q. BY MR. BULLOCK: After that, you made**  
4 **additional payments?**

5 A. Yes.

6 **Q. To whom?**

7 A. To Caldwell Land & Cattle.

8 **Q. That was just to February of 2015?**

9 A. February and -- yes. February.

10 **Q. Did you have any discussion with anyone about**  
11 **possibly leaving the building by the end of January**  
12 **2015?**

13 A. No. It wasn't possible.

14 **Q. What was the earliest date that you discussed**  
15 **with anyone about the possibility of Johnson Thermal**  
16 **vacating the building?**

17 A. March 1st.

18 **Q. Who did you have that discussion with?**

19 A. We had discussed it amongst ourselves, and Jeff  
20 had that discussion with Blake when he came and toured  
21 the building.

22 **Q. Are you aware of any potential negotiations**  
23 **between Peterbilt and Johnson Thermal in an attempt to**  
24 **resolve the dispute before a lawsuit was filed?**

25 A. Yes.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 **MS. RAINEY:** Object to foundation.  
 2 **THE WITNESS:** Sorry.  
 3 **MS. RAINEY:** That's okay.  
 4 **Q. BY MR. BULLOCK:** Who did you have those  
 5 conversations with?  
 6 A. Several of those discussions were with our  
 7 attorney and also with George Iliff.  
 8 **Q. What were some of the possibilities that were**  
 9 **discussed?**  
 10 A. The possibility was that they would consider  
 11 whatever we had to offer as long as we paid them a check  
 12 to do so.  
 13 **Q. Who would consider that?**  
 14 A. Peterbilt.  
 15 **Q. What kind of amounts were discussed?**  
 16 A. I think we were anywhere between \$10,000 and  
 17 \$15,000 for the privilege of moving out of the building.  
 18 **Q. Did you have any other discussions with Lincoln**  
 19 **about the time that Johnson Thermal would leave the**  
 20 **building?**  
 21 A. The only reason I moved to George Iliff is  
 22 because Lincoln was ineffective in that discussion.  
 23 **Q. When did you begin communicating with George?**  
 24 A. Prior to the end of the year.  
 25 **Q. Prior to December of 2015 [sic]?**  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 hit with a mammoth snowstorm. One of the components  
 2 of this building is a large asphalt paving pad.  
 3 So we didn't have a good handle on when we  
 4 could actually put the paving down. The city was  
 5 unwilling to issue our certificate of occupancy until  
 6 the parking lot was paved. Asphalt paving companies  
 7 typically shut their batch plants down once it becomes  
 8 untenable to actually pave.  
 9 **Q. Right.**  
 10 A. That was one issue. Another issue was our  
 11 powder coating unit, which is the last thing that we had  
 12 to move from building to building. In the new  
 13 building -- and in the old building, we had that  
 14 temporary canopy over the top of that.  
 15 In the new building, we had a permanent  
 16 structure with a roof, but we couldn't get a permit on  
 17 the new building until the roof was in place. We  
 18 couldn't move the powder coating in unless we flew it in  
 19 over the top. So we had to leave the roof off.  
 20 That particular point of contention cost us a  
 21 lot of time and work. We couldn't stop production any  
 22 longer than we possibly could without suffering economic  
 23 damages.  
 24 So we had to wait until the last second, pick  
 25 that up, bring it over, and drop it over into the deal.  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 A. (Nods head affirmatively.)  
 2 **MS. RAINEY:** Do you mean 2014?  
 3 **MR. BULLOCK:** Excuse me. Yes. Thank you.  
 4 December 2014. We haven't even hit December 2015.  
 5 (Exhibit 13 was marked.)  
 6 **Q. BY MR. BULLOCK:** I would like to go over a  
 7 couple of e-mails with you here. This is an e-mail  
 8 chain that looks like it's between you, Dave, and Jeff  
 9 Johnson. It looks like Lincoln is involved, as well.  
 10 What was the reason -- let me start with  
 11 that -- that Johnson Thermal couldn't give a specific  
 12 date as to when they would be able to move out of the  
 13 building?  
 14 A. There were still many unknowns. What is the  
 15 date of this? December 6th. There were still many  
 16 unknowns about the construction process. We were not  
 17 actually issued a permit to build until -- and Dave can  
 18 verify this -- I believe, September.  
 19 **Q. Of 2014?**  
 20 A. Right. So we acquired the property in May.  
 21 Between May and September, we had been working with  
 22 Caldwell City on building permits. That particular  
 23 process was very onerous and unpredictable.  
 24 Of course, we had weather coming in. I believe  
 25 that fall -- you may recall that last November we were  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 We couldn't get a permit on that section of the building  
 2 until it was roofed because there's electrical for  
 3 lights and things like that.  
 4 So that compromise was uncertain at this time.  
 5 We didn't know whether we could get that done or not.  
 6 I'm sorry. What was the question again?  
 7 **MS. RAINEY:** Why couldn't you give a date  
 8 certain?  
 9 **THE WITNESS:** Oh, well, those are a couple of  
 10 reasons. You know, another reason is we had some very  
 11 significant pieces of equipment that are just not easy  
 12 to pick up and haul.  
 13 For example, the plas-table is a piece of  
 14 equipment that must be mounted to the floor and must be  
 15 vented to the outside. I don't know what the weight is.  
 16 Dave can probably tell you.  
 17 You know, it's not something you throw in the  
 18 back of the pickup and go. You have to have a crane.  
 19 You have to have a semi. You have to have escorts up  
 20 and over the top of the interstate. There were a lot of  
 21 issues with that move date.  
 22 **Q. BY MR. BULLOCK:** It looks like Lincoln was  
 23 trying to resolve some of those issues by getting a  
 24 temporary occupancy issued through the city?  
 25 A. Right.  
**DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)**

1 Q. Did you ever work with the city on obtaining  
2 that?

3 A. Constantly. By the way, Lincoln's attempt to  
4 do that was with Steve Fultz; and he is not in any way  
5 authorized to discuss that particular issue. Steve  
6 Fultz is the economic development person.

7 All he can do is go to the permitting circle.  
8 There's a variety of -- you know, the fire chief, the  
9 electrical inspector, the plumbing inspector, the  
10 building inspector, the planning and zoning, the city  
11 engineer. All of those individuals are the ones that  
12 work on permitting.

13 All Steve Fultz could do is go to them and say,  
14 "Hey, we need to help this company out," which he had  
15 already done. Lincoln's efforts, while heartfelt, were  
16 virtually ineffective.

17 Q. So did you work with someone at the licensing  
18 commission to do that?

19 A. Oh, yes.

20 Q. Who are those people? All of those --

21 A. The plumbing inspector, planning and zoning,  
22 engineers, the building permit department, the fire  
23 chief -- there's one other person. The process of that  
24 permit is a roundtable. It's a series of roundtable  
25 meetings to review the progress and the permits on that.

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 A. Yes.

2 Q. If you would, look on page two, paragraph (i).  
3 It looks like she was discussing the option to extend  
4 the lease on the third amended lease -- or the third  
5 lease amendment. It says:

6 "Lessee did not provide timely written  
7 notice of the exercise of the option at the  
8 conclusion of the lease extension under the  
9 Third Amendment. No notice of exercise,  
10 written or verbal, was ever provided. Rather,  
11 Lessee simply continued to hold over upon the  
12 Premises and pay monthly rent in the same  
13 amount as paid for the last month of the  
14 previous extended term."

15 Do you see that there?

16 A. Yes.

17 Q. Previously, didn't you say that you never --  
18 isn't it correct you didn't express any desire to the  
19 Gilbert Family Limited Partnership, written or  
20 otherwise, to extend the lease agreement an additional  
21 six months after October 2014?

22 MS. RAINEY: Object to foundation.

23 THE WITNESS: Could you do that again?

24 Q. BY MR. BULLOCK: Sure.

25 Previously, you had indicated to me that the  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 There were several meetings.

2 Q. You attended those meetings on behalf of  
3 Johnson Thermal?

4 A. A couple of them. It was really on behalf of  
5 Erlebach Properties.

6 Q. Because they are the owner?

7 A. Correct.

8 (Exhibit 9 was referenced.)

9 Q. BY MR. BULLOCK: if you would, look at Exhibit

10 9. Do you recall receiving or viewing this document  
11 before?

12 A. Yes, I do.

13 Q. When did you receive this?

14 A. I think it was hand-delivered to us on December  
15 6th. It was early December.

16 Q. What is it?

17 A. It's the notice of termination of our lease.

18 Q. And that was sent by Arlene Gilbert; correct?

19 A. I don't have first-hand knowledge of that. It  
20 was delivered to us by Lincoln.

21 Q. If you would, look at the second page there.

22 It's signed by Arlene Gilbert. Do you see that?

23 A. Yes.

24 Q. She was the tenant at that time -- excuse me.

25 She was the landlord at that time?

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 reason why Johnson Thermal had extended the lease was  
2 because it continued to make payments, the same payments  
3 as it had made prior to October of 2014; correct?

4 A. We continued to make the payments for the  
5 tenant option to extend that lease at the base rent of  
6 \$6,000.

7 Q. That was the same amount as the previous rent  
8 amount?

9 A. Correct.

10 Q. And you indicated that you did not communicate  
11 with Arlene Gilbert or anyone at the Gilbert Family  
12 Limited Partnership on your desire to extend the lease  
13 an additional six months?

14 MS. RAINEY: Object to foundation.

15 THE WITNESS: Except by virtue of that check,  
16 yes.

17 Q. BY MR. BULLOCK: Do you disagree or disagree  
18 that no notice of exercise, written or verbal, was ever  
19 provided?

20 MS. RAINEY: Object to foundation.

21 THE WITNESS: We believe that the third  
22 amendment gave us the right to exercise that option, and  
23 we did.

24 Q. BY MR. BULLOCK: Your position is that you  
25 exercised the option by continuing to make the

DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 Q. No additional rent payments were made after  
2 February 2014 [sic]?

3 A. That's correct. Well, February of --

4 Q. February 2015?

5 A. Yes.

6 Q. So no rent payments were made under the lease  
7 agreement in March and April of 2015; is that correct?

8 A. That is correct.

9 Q. Did you have any discussions with anyone at  
10 Peterbilt regarding decisions that Peterbilt had made  
11 regarding their -- let me back up a little bit.  
12 Did Peterbilt ever express to you their need to  
13 be in the building by a certain date, by January or the  
14 end of December, because they had a prior lease that  
15 they were leaving and that it was the end of that lease  
16 term?

17 A. There were a lot of reasons that they proposed.  
18 That might have been one of them.

19 Q. Who would have proposed that to you?

20 A. I believe that came through their counsel,  
21 Graden Jackson.

22 Q. That was not directly communicated to you;  
23 correct?

24 A. No. Correct.

25 Q. Are you aware that they had to renew their  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 worked overtime to get the building finished so that we  
2 could have a temporary certificate of occupancy.

3 We just accelerated all of our plans which cost  
4 us a lot of money. It cost us disruption in our current  
5 plan because we had to maintain -- in our original plan,  
6 there was a spot there where we had planned to stop  
7 production, to be able to facilitate the move.

8 In the accelerated plan, we had to still  
9 deliver our commitments to our customers. So we had to  
10 figure out a way to pre-build a whole bunch of frames,  
11 pre-build a whole bunch of assemblies, and then be able  
12 to move those over and still use those in construction  
13 while we were setting up our equipment.

14 Again, the catastrophic risk of the bullying  
15 tactics that Peterbilt employed frightened us. You  
16 know, we had to accelerate it.

17 Q. When did Johnson Thermal know that it would be  
18 able to leave the building by the middle of February?

19 A. About February 9th.

20 Q. Do you know when the exact date was that they  
21 left the building?

22 A. If I had a calendar --

23 MS. RAINEY: Do you want me to get you a  
24 calendar?

25 THE WITNESS: It's going to be that week -- I  
DEPOSITION OF DARRIGUS" GUSTAVESON (11.18.2015)

1 lease on their previous place because Johnson Thermal  
2 was not out by January 31, 2015?

3 MS. RAINEY: Object to form and foundation.

4 THE WITNESS: No.

5 Q. BY MR. BULLOCK: That has never been expressed  
6 to you either through your attorneys or by Peterbilt?

7 A. As I said, there were a variety of claims, none  
8 of which were substantiated by any documentation.

9 Q. Who made those claims? You said there were a  
10 variety of claims. What are some of the other claims?

11 A. It was, you know, damage to the building. It  
12 was bad faith.

13 Q. I am just trying to understand why, at the end  
14 of January, it was communicated to Peterbilt that  
15 Johnson Thermal would not be out of the building until  
16 April 15, 2015, but less than two weeks later they were  
17 gone?

18 MS. RAINEY: Object to foundation. Misstates  
19 what the e-mail says.

20 THE WITNESS: You are trying to understand  
21 that?

22 Q. BY MR. BULLOCK: Sure.

23 A. Okay. Again, we couldn't take the risk of not  
24 moving the building. We incurred additional expense.  
25 We worked overtime, around the clock. The builder  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 believe there's a Friday on February 12th or 13th.

2 MS. RAINEY: Here is February.

3 THE WITNESS: We were out on the 12th of  
4 February.

5 Q. BY MR. BULLOCK: That's a Friday?

6 MS. RAINEY: No.

7 THE WITNESS: No.

8 Q. BY MR. BULLOCK: Sorry. When is that?

9 A. That's a Wednesday. We were planning on going  
10 back that weekend to repair the building.

11 Q. And did you go back?

12 A. We did.

13 Q. Were you able to make repairs to the  
14 building?

15 A. No. The locks had been changed.

16 Q. And you went back during the weekend? Would  
17 that have been on Saturday or Sunday?

18 A. It would have been Friday, the 14th.

19 Q. The 14th?

20 A. Yes.

21 Q. Do you know who changed the locks?

22 A. I do not.

23 Q. Did you have any communications with Peterbilt  
24 after February 12, 2015?

25 A. Through our attorney.  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 Q. Just through attorneys?

2 A. Yes.

3 MR. BULLOCK: Do you mind if we take a  
4 five-minute break?

5 MS. RAINEY: Sure.  
6 (Break taken.)

7 Q. BY MR. BULLOCK: I would like to go back to the  
8 time when Johnson Thermal was having discussions about  
9 whether to exercise the option to extend the lease  
10 beyond October 14, 2014.

11 Can you give me a specific date on when Johnson  
12 Thermal made that decision to exercise the option?

13 A. No, I can't.

14 Q. When did it become an issue on whether Johnson  
15 Thermal had actually, in fact, extended the lease beyond  
16 April 2015?

17 MS. RAINEY: Object to foundation and form.

18 THE WITNESS: It was never an issue with us.

19 Q. BY MR. BULLOCK: When did it become apparent to  
20 Johnson Thermal about whether it had, in fact, extended  
21 the lease beyond October 2014?

22 A. We saw that there was a differing opinion when  
23 we were served our eviction notice.

24 Q. So prior to receiving the eviction notice, you  
25 had no communications with anyone that you had not, in  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 Q. BY MR. BULLOCK: Is that the reason you  
2 continued to make payments, to extend the lease an  
3 additional six months?

4 A. Yes.

5 Q. Not to just continue making payments under the  
6 previous lease agreement, the third lease agreement?

7 A. No. We were following the terms of the six  
8 months after the October -- the initial October term.

9 Q. Do you know if Johnson Thermal ever had the  
10 option to purchase the building, the Gilberts' building,  
11 that they were leasing?

12 A. I did not know that.

13 Q. Was that ever considered? Did you ever have  
14 discussions with Jeff or anyone at Johnson Thermal  
15 regarding the potential to purchase the property?

16 A. It was apparent that building was too small for  
17 our needs.

18 Q. When did that become apparent?

19 MS. RAINEY: Object to foundation.

20 THE WITNESS: When we arrived in November and  
21 decided to bring in the manufacturing of our frames, we  
22 knew it was too small.

23 Q. BY MR. BULLOCK: So prior to --

24 A. November of 2013.

25 Q. When you became CFO? About at that time?  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 fact, exercised the option?

2 A. That is correct.

3 Q. You never received communications from Arlene  
4 Gilbert or the brokers at Colliers that you hadn't  
5 extended the lease beyond October 2014 -- or that  
6 Johnson Thermal hadn't extended the lease beyond October  
7 of 2014?

8 MS. RAINEY: Object to form and foundation.

9 THE WITNESS: I'm sorry. Can you say that  
10 again?

11 Q. BY MR. BULLOCK: You hadn't received  
12 communications at all from the Gilbert Family on their  
13 position that Johnson Thermal had not extended the lease  
14 beyond October of 2014?

15 A. That's correct.

16 Q. So was it at the time that you received the  
17 notice of termination that Johnson Thermal took the  
18 position that it had extended the lease six months?

19 A. No. We had taken that position when we paid  
20 our November rent.

21 Q. Just by making the payment? That position had  
22 not been expressed to anyone?

23 MS. RAINEY: Objection to foundation.

24 THE WITNESS: Except by the terms of the lease  
25 which we were following for an extension.  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

1 A. Right.

2 Q. Prior to that, the frames were manufactured at  
3 a different location?

4 A. We had a vendor manufacturing them.

5 Q. After November of 2013, the entire  
6 manufacturing process was brought in house; is that  
7 correct?

8 A. After that date but not -- like, November 14th.  
9 We had to order equipment and install the equipment.

10 Q. Just generally, that time frame is when  
11 everything was brought in house?

12 A. It would have been -- it would have been, I  
13 believe, May of two-thousand-and -- whatever -- 2014 is  
14 when we brought all of that stuff in house.

15 (Exhibit 11 was referenced.)

16 Q. BY MR. BULLOCK: If you could, look at Exhibit  
17 11. It's an e-mail chain between you, Jeff Johnson,  
18 Lincoln Hagood, it looks like, and a couple of other  
19 people. On the first page here, it says, "Met with the  
20 owner of Jackson Peterbilt."

21 Excuse me. This is on the bottom half of the  
22 page. It's from Jeff Johnson to you. It looks like  
23 it's dated December 10th.

24 "Met with the owner of Jackson Peterbilt,  
25 seems like a reasonable enough guy. Didn't  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

**DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

**CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )**

) Civil Action No.

**Plaintiff, ) CV15-587**

**vs.**

**JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )**

) **Defendant. )**

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**DEPOSITION OF JEFF JOHNSON**

**Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho**

**Tuesday, November 17, 2015  
Beginning at 3:03 p.m.**

**QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR**

**354**

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DEPOSITION OF JEFF JOHNSON (11.17.2015)**

- 1 Q. Why did he not seem happy?  
2 A. Because he wanted us out of the building.  
3 Q. Did he say when he wanted you out? Did he give  
4 you a date when he wanted you out of the building at  
5 that time?  
6 A. No, he didn't give us a date.  
7 Q. He just was not happy that --  
8 A. I don't recall him saying -- no. He just  
9 wasn't happy.  
10 Q. Did he express any interest in having you out?  
11 Did he give a date earlier than that that would have  
12 worked for them?  
13 MS. RAINEY: Object to foundation.  
14 THE WITNESS: I don't recall him supplying a  
15 date.  
16 Q. BY MR. BULLOCK: There is a pile of exhibits  
17 there. They are listed, down there at the bottom, as  
18 Exhibits 1 through 10, I believe. If you could, turn to  
19 Exhibit 3. That's all one exhibit there. Sorry.  
20 A. Sorry.  
21 (Exhibit 3 was referenced.)  
22 MS. RAINEY: That's all right. You haven't  
23 been here all day like the rest of us.  
24 Q. BY MR. BULLOCK: Have you seen this document  
25 before?

DEPOSITION OF JEFF JOHNSON (11.17.2015)

- 1 A. I think so.  
2 Q. Were you involved in any way in its negotiation  
3 or creation?  
4 A. No.  
5 Q. Are you aware that Johnson Thermal had a lease  
6 and that this lease was from April until October of  
7 2014?  
8 MS. RAINEY: Object to foundation. Form.  
9 THE WITNESS: I don't -- I would say, you know,  
10 no. The lease -- all of the negotiation -- I was told  
11 this is where we are and this is what's done. I can't  
12 say exact dates of this, that, and what happened.  
13 Q. BY MR. BULLOCK: All right. What is your  
14 understanding of why Peterbilt -- let me restate the  
15 question. Sorry.  
16 What is your understanding of why Peterbilt had  
17 an issue with the March 1st date?  
18 MS. RAINEY: Object to foundation.  
19 THE WITNESS: As Blake explained to me, he had  
20 spent a considerable amount of money hiring people that  
21 needed to be working right now and couldn't be.  
22 Q. BY MR. BULLOCK: Do you know when the close  
23 date was on the property -- to sell?  
24 A. I believe it was December 31st.  
25 Q. December 31st. Did Peterbilt express an

DEPOSITION OF JEFF JOHNSON (11.17.2015)

- 1 interest to have Johnson Thermal out by that date?  
2 A. No.  
3 Q. No?  
4 A. Not to me.  
5 Q. You did not have any discussions about that  
6 specific date?  
7 A. (Shakes head negatively.)  
8 Q. Did you have any other discussions with anyone  
9 else at Peterbilt besides Blake Jackson? Any  
10 conversations?  
11 A. No, not about any timing or anything like that.  
12 Q. You spoke with other individuals at Peterbilt?  
13 A. Earlier, one of the employees, I believe, from  
14 one of their other offices came by to look at the place  
15 at some point in time. I think I opened the door and  
16 said, "Have a nice day," or some pleasantry or let him  
17 in or something to that effect.  
18 Q. Was that prior to your visit with Blake  
19 Jackson?  
20 A. I don't remember. There was some before and  
21 some after that date.  
22 Q. Were you ever involved in the discussions with  
23 Peterbilt or Colliers after December 31st about when  
24 Johnson Thermal would be vacating the building?  
25 A. No.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

- 1 Q. Who was having those conversations?  
2 MS. RAINEY: Object to foundation.  
3 Q. BY MR. BULLOCK: Do you know who was having  
4 those conversations?  
5 A. It only would have been -- between whom?  
6 Q. Between Peterbilt and Johnson Thermal?  
7 A. That would all have been done by -- if it was  
8 done by anyone, it was done by Gus Gustaveson.  
9 Q. Were you involved in any way with the close-out  
10 of the building, the clean-up of the building after  
11 Johnson Thermal left?  
12 A. Somewhat.  
13 Q. Do you know the date that they left?  
14 A. I know that we were out of the office by  
15 February -- it was the first Monday in February.  
16 Q. 2015?  
17 A. 2015.  
18 Q. Why did they leave prior to the March 1st date?  
19 A. Because this is not moving a two-bedroom  
20 apartment. It's lots of moving parts and pieces. It's  
21 a process. We have to have -- you have to cut the phone  
22 lines over. You have to cut the Internet access over.  
23 So we had to pick somewhat of a clean date to  
24 be able to do that. At some point, you have to make the  
25 transition. So that was just a date when we were

DEPOSITION OF JEFF JOHNSON (11.17.2015)



1 wanting to move forward.  
 2 **Q. Did you have any conversations with anyone**  
 3 **regarding whether Johnson Thermal had extended the lease**  
 4 **from October 2014 to April 2015?**

5 A. Well, internally, that was the -- yes, we did.

6 **Q. Who did you have those conversations with?**

7 A. Gus Gustaveson and Dave Erlebach.

8 **Q. What was the opinion of you and those**  
 9 **individuals on whether the lease was extended?**

10 **MS. RAINEY:** Object to form and foundation.

11 **THE WITNESS:** The fact was that we had a lease  
 12 extended to later in the year, until -- I believe it was  
 13 April.

14 **Q. BY MR. BULLOCK:** Johnson Thermal's opinion is  
 15 that the lease was extended from October 2014 to April  
 16 of 2015?

17 **MS. RAINEY:** Object to form.

18 **THE WITNESS:** That is correct.

19 **Q. BY MR. BULLOCK:** If the lease was extended  
 20 until that time, why didn't Johnson Thermal stay in the  
 21 building until then?

22 **MS. RAINEY:** Object to foundation.

23 **THE WITNESS:** As I said earlier, moving a  
 24 manufacturing facility is a very complicated process.

25 There's lots of parts and pieces to be moved. To be  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 **Q. How long did the process take to move some of**  
 2 **the bigger equipment? You mentioned the bigger**  
 3 **equipment is needed inside of the building. How long**  
 4 **did that process take to move that equipment?**

5 **MS. RAINEY:** Object to form and foundation.

6 **THE WITNESS:** It was -- well --

7 **Q. BY MR. BULLOCK:** Let me rephrase.

8 **You said there are a lot of moving parts and a**  
 9 **lot of different things that needed to be moved from one**  
 10 **building to the next?**

11 A. Yes.

12 **Q. You said that, in December, you started kind of**  
 13 **packaging up a few things here and there?**

14 A. Uh-huh.

15 **Q. Was there ever a time that you had to shut down**  
 16 **the manufacturing processes that you use to move the**  
 17 **building?**

18 A. Yes, there was.

19 **Q. When was that?**

20 A. I can't give you exact dates. It's all a  
 21 big -- you know, on a weekly basis, something was being,  
 22 you know, shut down. I mean, I can't move a turret  
 23 press without shutting it down at some point.

24 **Q. A better question is: Is it possible to shut**  
 25 **down certain portions of the manufacturing process and**  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 able to move, we have several very complicated  
 2 processes, both in terms of personnel and in terms of  
 3 equipment and machinery.

4 There was also -- we still have to produce  
 5 equipment and provide equipment to our customers. So  
 6 that was -- that was why we had -- you know, there was  
 7 always some overlap.

8 **Q. BY MR. BULLOCK:** When did Johnson Thermal begin  
 9 **the process of moving out of the building?**

10 A. Some things we had started moving in -- you  
 11 know, it was a very long process. Realistically, we  
 12 started moving some equipment -- or material -- mostly  
 13 parts -- I don't remember. We were starting to pack  
 14 stuff up in December.

15 **Q. Did you move it to the new building?**

16 A. No. We really didn't have -- at that time, no,  
 17 we didn't.

18 **Q. Where did you take it?**

19 A. We didn't take it anywhere. It was packed,  
 20 palletized, and wrapped up.

21 **Q. And left at the current location -- or the**  
 22 **previous location?**

23 A. Correct.

24 **Q. Left inside? Outside?**

25 A. Some inside. Some in Connexes.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 **move that and then continue working on other parts of**  
 2 **the process to do the manufacturing?**

3 A. Yes. It's possible to do that.

4 **Q. Is that how Johnson Thermal moved the building,**  
 5 **kind of in a piecemeal process?**

6 A. Yes.

7 **Q. Generally, that happened from December until**  
 8 **February?**

9 A. I would say nothing really was -- there is a  
 10 distinction between packing your house and -- if you  
 11 were to move, you may pack up all of your clothes or  
 12 things you don't use very often; and you usually move  
 13 your bed the day you move. That would be the best way I  
 14 can describe it.

15 **Q. Sure.**

16 A. We have lots of material that we may not need  
 17 immediately or other equipment we don't use often that  
 18 we need, and it was packaged up. Any actual disassembly  
 19 of equipment really didn't start until maybe in  
 20 February.

21 **Q. It was done by February 15th? Is that what you**  
 22 **said?**

23 A. Approximately.

24 **Q. And how long was it before you were completely**  
 25 **moved into the new building?**

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 A. Within, essentially, that time period. I would  
2 say it was that February 15th date. I mean, that's when  
3 everything -- it's not really valid to say when we were  
4 fully moved in. It was more when we were moved out of  
5 1505.

6 **Q. At that same time, were you able to continue  
7 the manufacturing process at the new building, after  
8 February?**

9 A. Yes. We were able to resume.

10 **MR. BULLOCK:** This is kind of a chunk of  
11 e-mails here. I don't know if we will go over all of  
12 them.

13 (Exhibit 11 was marked.)

14 **Q. BY MR. BULLOCK: I would first like to focus on  
15 this first page. It has a Bates number down at the  
16 bottom; it's JTS 0012. Do you see that?**

17 A. Correct.

18 **Q. Do you recognize this e-mail?**

19 A. Yes.

20 **Q. Is this an e-mail that you sent to Darrell  
21 "Gus" Gustaveson on or about December 10, 2014?**

22 A. Yes.

23 **Q. In it, it references the meeting that you had,  
24 the meeting that I think you already told me about, with  
25 Blake Jackson; right?**

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 we're going to go with."

2 **Q. Who told you to use March 1st? Did someone  
3 tell you that?**

4 A. I can't remember if someone said that. It was  
5 just based on discussions. "How is the building doing?  
6 How is the building moving along? What is reasonable?"

7 **Q. Do you know if any other dates besides March  
8 1st were communicated to Blake Jackson or anyone at  
9 Peterbilt?**

10 **MS. RAINEY:** Object to form and foundation.

11 **THE WITNESS:** I do not know that.

12 **Q. BY MR. BULLOCK: You didn't communicate any  
13 other dates besides March 1st?**

14 A. No, sir.

15 (Exhibit 9 was referenced.)

16 **Q. BY MR. BULLOCK: Did you ever see or  
17 receive Exhibit 9? At the top, it says, "VIA E-MAIL AND  
18 CERTIFIED MAIL." It's a letter.**

19 A. I don't have it here -- I don't think.

20 **Q. It should be.**

21 A. It's right here. It's right here.

22 **Q. Have you ever seen that document before?**

23 A. Yes, I remember seeing this.

24 **Q. When did you see it?**

25 A. Probably the day it came in.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 A. Yes.

2 **Q. It says, "Didn't waiver from March 1st, didn't  
3 concede anything." Correct?**

4 A. Correct.

5 **Q. If you would, look to the next page, JTS 0013.**

6 A. Okay.

7 **Q. Is this an e-mail that you wrote?**

8 A. Correct.

9 **Q. You said, "We can't waver from this  
10 position" -- from March 1st. Why is that?**

11 A. Because we weren't sure about whether or not --  
12 you know, when the facility was going to be completed.  
13 Construction and weather is something beyond our  
14 control.

15 Mostly, we were trying to be -- we were trying  
16 to accommodate Peterbilt as best we could. The worst  
17 thing we could do is have a bunch of different dates and  
18 have a bunch of different stories.

19 A lot of this was, as well -- as you have seen  
20 by the questions, I really had very little to do with  
21 any of the negotiations and discussions. Based on just  
22 the dates, I was the one stuck with having to meet with  
23 Blake Jackson.

24 Really, I was the one least involved in any of  
25 this. That's why I wanted to go, "This is the date

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 **Q. Was it received by you? Who was it received  
2 by?**

3 A. I don't remember. I might have received it.

4 **Q. Were there internal discussions at -- were you  
5 involved in internal discussions at Johnson Thermal  
6 regarding receipt of this letter?**

7 A. Of course, yes.

8 **Q. Who did you have discussions with?**

9 A. Dave Erlebach and Gus Gustaveson.

10 **Q. What did you guys discuss about the letter?**

11 A. What are we going to do from here?

12 **Q. Do you recall when you received the letter,  
13 approximately?**

14 A. I'm guessing -- it was certified mail. So I  
15 saw it either the day it was officially received or  
16 within a day of that.

17 **Q. It would have been December 2014?**

18 A. I don't recall the exact date.

19 **Q. What was Johnson Thermal's response to this  
20 letter? What was the game plan that you and Gus and  
21 Dave came up with to respond to this letter?**

22 A. Get an attorney.

23 **Q. And what did you direct them to do?**

24 **MS. RAINEY:** Object to form and foundation.

25 You don't have to answer.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 A. Not exactly. In February sometime, I think.  
 2 **Q. Did Johnson Thermal remove it?**  
 3 A. No. It was not our property.  
 4 **Q. Whose property was it?**  
 5 A. Idaho Power's.  
 6 **Q. Did Johnson Thermal instruct Idaho Power to**  
 7 **remove it?**  
 8 A. No.  
 9 **Q. Idaho Power just showed up on its own and**  
 10 **removed it?**  
 11 A. We didn't need the power anymore.  
 12 **Q. Did Johnson Thermal transfer its power bill, I**  
 13 **guess you could say, from one property to the next and**  
 14 **at that time --**  
 15 A. No, not in that --  
 16 **MS. RAINEY:** Object to foundation.  
 17 Make sure he finishes the question before you  
 18 answer.  
 19 **THE WITNESS:** I'm sorry. I apologize.  
 20 **MS. RAINEY:** That's okay.  
 21 **THE WITNESS:** No. It's not from transferring  
 22 power to a new service. It's not in that form.  
 23 **Q. BY MR. BULLOCK: Do you know why it was**  
 24 **removed?**  
 25 A. Because it was intended as temporary power, and  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 A. Yes.  
 2 **Q. Your understanding, if I'm correct, is that,**  
 3 **when Johnson Thermal left the building, there was no**  
 4 **need for that additional power; and so Idaho Power had**  
 5 **it removed?**  
 6 **MS. RAINEY:** Object to foundation.  
 7 **THE WITNESS:** I am not able to evaluate a need  
 8 beyond what we used. The building had its own power.  
 9 This was additional for a supplemental piece of  
 10 equipment.  
 11 **Q. BY MR. BULLOCK: It operated only one piece of**  
 12 **equipment or several?**  
 13 A. A couple.  
 14 **Q. Do you know how that transformer was connected**  
 15 **to the building?**  
 16 A. Wire.  
 17 **Q. Was it underground wire? Exposed? How was it**  
 18 **connected?**  
 19 A. Underground.  
 20 **Q. Do you know if that wire was removed at the**  
 21 **same time as the transformer?**  
 22 A. I do not remember if it was or not.  
 23 **Q. Did Johnson Thermal install that wire to the**  
 24 **transformer?**  
 25 A. A contractor installed that.  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 we were no longer using it. It was not the main power  
 2 supply to the building. It was additional power.  
 3 **Q. Did Johnson Thermal request that it be**  
 4 **installed?**  
 5 A. Yes.  
 6 **Q. And when was that?**  
 7 A. I believe it was sometime around -- I believe  
 8 it was around February of 2014.  
 9 **Q. Were you involved in the process to request**  
 10 **additional power?**  
 11 A. No, I was not.  
 12 **Q. Who was? Do you know who was?**  
 13 A. I believe it was Dave Erlebach.  
 14 **Q. Do you have any understanding of why the**  
 15 **temporary power was needed?**  
 16 A. Yes.  
 17 **Q. Why was that?**  
 18 A. Because we needed 460-volt power. The building  
 19 did not have 460-volt power to it through the  
 20 transformer. It was additional power for some equipment  
 21 we purchased.  
 22 **Q. It was based on the equipment that was being**  
 23 **used in the building that needed additional power? In**  
 24 **order to supply that power, you needed to have the**  
 25 **temporary transformer installed?**  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 **Q. Johnson Thermal had someone install it?**  
 2 A. That's correct.  
 3 **Q. Idaho Power only installed the transformer**  
 4 **itself, and Johnson Thermal was required to provide the**  
 5 **means to get the power to the building?**  
 6 A. I'm not exactly sure where the scope of  
 7 responsibility changed, if it was from the transformer  
 8 to the meter or from the meter to the street. But, yes,  
 9 at the very least, downstream at the meter was our  
 10 responsibility.  
 11 **Q. You had a contractor perform that**  
 12 **installation?**  
 13 A. Correct.  
 14 **Q. Did you have a contractor remove that wiring**  
 15 **that was installed, as well?**  
 16 A. I'm not sure if the wiring was removed or not.  
 17 **Q. You mentioned some damage to concrete. Was**  
 18 **that inside the building or outside the building?**  
 19 A. It wasn't damage to concrete. The concrete was  
 20 modified to accommodate a piece of equipment.  
 21 **Q. How was the concrete modified?**  
 22 A. A slot was saw-cut into the floor.  
 23 **Q. So there was a portion of the floor where the**  
 24 **concrete was cut and removed?**  
 25 A. Correct.  
 DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 Q. Was that repaired -- are you aware if that was  
2 repaired after the building -- let me rephrase the  
3 question.

4 Did Johnson Thermal intend to repair the cut in  
5 the concrete?

6 A. Yes. We intended to repair it.

7 Q. Did they ever repair the concrete?

8 A. No, we did not.

9 Q. You mentioned a hole in the side of the  
10 building. What was that related to?

11 A. A dust collector.

12 Q. Is that something that Johnson Thermal  
13 installed?

14 A. Yes.

15 Q. When was that installed?

16 A. I believe, February or March of 2014.

17 Q. And were you ever involved in discussions with  
18 the landlord about installing new equipment, the dust  
19 collector or these types of things, to the building?

20 A. No.

21 MS. RAINEY: Object to form.

22 Q. BY MR. BULLOCK: Have you been made aware of  
23 any concerns regarding zip-ties that were somehow  
24 connected to the heating elements throughout the  
25 property?

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 an idea of what they --

2 A. Two of them are forced-air unit heaters, such  
3 as you would find in a residence. Two of them are what  
4 is generally referred to as a unit heater which hangs  
5 from the ceiling.

6 Q. Do you know if the concern regarding the  
7 elements was about the two from the ceiling or the  
8 forced-air ones?

9 A. I'm not sure.

10 Q. They didn't specify?

11 A. No.

12 Q. Just generally, the heating elements?

13 A. I don't know if "heating elements" was the term  
14 used. It doesn't make any sense. "Heating elements"?  
15 I'm not sure of the exact verbiage that was used.

16 Q. The heater, I guess?

17 A. The heater.

18 Q. Did Johnson Thermal add those to the  
19 building -- any of those heaters -- or were they already  
20 installed with the building when they started the lease?

21 A. They were installed when we moved in.

22 Q. All four of them?

23 A. Correct.

24 Q. Did you use them during the --

25 A. Yes.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 A. I heard mention of it.

2 Q. Who did you hear that from?

3 A. Gus Gustaveson.

4 Q. What did he tell you?

5 A. That there was a complaint made about zip-ties  
6 in the building.

7 Q. Did he express any concerns that someone had  
8 expressed to him about that?

9 A. I don't know about expressing concern. He  
10 simply mentioned that someone had raised the issue.

11 Q. Did he explain what the issue was or why the  
12 concern was raised?

13 A. Something about it -- there was a claim that it  
14 had caused something to malfunction.

15 Q. Was there a fire in the building that you are  
16 aware of?

17 A. Not that I'm aware of.

18 Q. Were you involved in putting black zip-ties on  
19 the heating elements?

20 MS. RAINEY: Object to foundation.

21 THE WITNESS: No, I was not.

22 Q. BY MR. BULLOCK: How many heating elements are  
23 within the building? Do you know?

24 A. There were four.

25 Q. Are they kind of like space heaters? Give me

DEPOSITION OF JEFF JOHNSON (11.17.2015)

1 Q. -- tenancy?

2 A. Yes.

3 Q. Regularly? During the winter? Was it just  
4 specifically to heat the building, or was there some  
5 other process that required the heaters in the  
6 building?

7 A. Simply for space heat.

8 (Exhibit 12 was marked.)

9 Q. BY MR. BULLOCK: Exhibit 12 is an e-mail dated  
10 February 5, 2015. It looks like it's from you, as the  
11 author, to Darrell Gustaveson and Glen Wagoner, I  
12 believe?

13 A. Uh-huh.

14 Q. Who is Glen?

15 A. Glen is our operations manager.

16 Q. He is an employee of Johnson Thermal?

17 A. Correct.

18 Q. Currently, he is an employee?

19 A. Correct.

20 Q. And Heather Reece, as well?

21 A. Yes.

22 Q. Is she currently an employee?

23 A. Correct.

24 Q. What is her position?

25 A. Office manager.

DEPOSITION OF JEFF JOHNSON (11.17.2015)

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.

Plaintiff, ) CV15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)  
Defendant. )

DEPOSITION OF LINCOLN HAGOOD

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 12:00 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

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DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 any concern to you after October 2014 that there was not  
2 an extension to the lease agreement?

3 A. Only when it was brought to our attention by  
4 Peterbilt that there wasn't.

5 Q. They continued to accept payments from Johnson  
6 Thermal after October of 2014?

7 A. Correct.

8 Q. Do you know the amount of those payments?

9 A. I do not know the exact payments.

10 Q. I guess, was it just a continuation? Did they  
11 continue with the same payments they were making prior  
12 to the lease?

13 A. I didn't help with payments.

14 Q. The payments didn't go through you?

15 A. No.

16 Q. In your experience, was Ms. Gilbert familiar  
17 with the language of the lease agreement?

18 MS. RAINEY: Object to foundation.

19 THE WITNESS: No.

20 Q. BY MR. BULLOCK: When was the first time that  
21 you became aware that Johnson Thermal claimed to have  
22 extended the lease agreement beyond October of 2014?

23 A. I believe, in December.

24 Q. December of 2014?

25 A. Uh-huh.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. BY MR. BULLOCK: Do you recognize this e-mail?

2 A. I do.

3 Q. This looks like an e-mail from you to George.  
4 If you would, look at the second sentence -- the second  
5 line. It says:

6 "Arlene asked me what right Johnson Thermal  
7 had to make such a claim that they have a  
8 lease."

9 Do you recall that conversation with Arlene?

10 A. I do.

11 Q. What was the substance of that conversation?  
12 What brought about that conversation with Arlene?

13 A. Peterbilt wanted Johnson Thermal out of the  
14 building, and Arlene wanted the building sold.

15 Q. It says:

16 "Arlene asked me what right Johnson Thermal  
17 had to make such a claim that they have a  
18 lease."

19 At that point, was Johnson Thermal saying that  
20 they had extended the lease beyond October 2014?

21 A. Yes.

22 Q. What were they saying?

23 A. They said, per the other exhibit, that they  
24 wanted -- that they were in the building for another six  
25 months.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. And how was that expressed to you?

2 A. In an e-mail.

3 Q. Was that the exhibit -- that one, right there?

4 A. Yes.

5 MS. RAINEY: Exhibit 5.

6 Q. BY MR. BULLOCK: If you would, look at the top.

7 A. Yes.

8 Q. So that's the first time that you were aware  
9 that Johnson Thermal intended to exercise their option  
10 to extend for this full six-month period; is that  
11 correct?

12 MS. RAINEY: Object to form and foundation.

13 THE WITNESS: I wasn't involved in all of  
14 Arlene's lease renewal decisions.

15 Q. BY MR. BULLOCK: Do you have an opinion on  
16 whether the lease was extended beyond October of 2014?

17 A. I don't have an opinion.

18 MR. BULLOCK: Can we take a break for a minute?

19 MS. RAINEY: Sure.

20 (Break taken.)

21 Q. BY MR. BULLOCK: Lincoln, I would like to show  
22 you an e-mail here. This is an e-mail --

23 MS. RAINEY: Can we mark that?

24 MR. BULLOCK: Yes.

25 (Exhibit 8 was marked.)

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. So they were telling Arlene that they had  
2 exercised their option to extend the full six-month  
3 period?

4 A. Yes.

5 Q. Had you had previous conversations with Johnson  
6 Thermal about when they were planning to leave the  
7 building?

8 A. Yes.

9 Q. What dates had they given you as to when they  
10 expected to leave the building?

11 MS. RAINEY: Object to foundation.

12 THE WITNESS: At the signing of the first  
13 extension -- sorry -- the third extension, they were  
14 uncertain about when their building was going to be  
15 completed.

16 So they signed a six-month lease. Then they  
17 had those other two options set up, the six-month option  
18 and the month-to-month option, because they were  
19 uncertain about when their building would be done.

20 At that point in time, they thought it may be  
21 as soon as October or November; but that was -- that was  
22 the reason that we were putting the building on the  
23 market at that time.

24 Q. BY MR. BULLOCK: Later on, did the dates when  
25 they expected to leave the building change?

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 MS. RAINEY: Object to foundation.

2 THE WITNESS: As I understand it, they were  
3 changing, yes.

4 Q. BY MR. BULLOCK: Changing, as in getting later  
5 in the year or into the next year? How were they  
6 changing?

7 A. I never received a firm date. It was always,  
8 "The end of January," kind of thing, as the plan.

9 Q. Do you know if there was an issue of why there  
10 couldn't be a fixed date for Johnson Thermal to move  
11 into their new building? Was it ever expressed to you  
12 why they were not able to do that?

13 A. Not by Johnson Thermal. The only reason I  
14 received had something to do with asphalt. So I called  
15 the city to make sure they would work with them to try  
16 and help.

17 Q. Who did you contact at the city? Do you  
18 recall?

19 A. An economic development officer, I believe,  
20 because he tries to help businesses get open.

21 Q. Do you know what the issue was with the  
22 asphalt?

23 A. The plants aren't open in the winter.

24 Q. So they couldn't lay the asphalt in the parking  
25 lot?

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. And this is a notice of termination of the  
2 property on Industrial Way. It says:

3 "This Notice of Termination is given by  
4 Gilbert Family Limited Partnership to Johnson  
5 Thermal..."

6 A. Yes.

7 Q. "...with reference to that Commercial Lease  
8 Agreement...and the First, Second, and Third Amendments  
9 thereto." They are to terminate or leave the property  
10 by January 31, 2015.

11 Do you know what precipitated the Gilberts  
12 wanting to send this notice of termination?

13 A. Peterbilt asked them to or they said they  
14 wouldn't close on the property.

15 Q. In order for them to close, they sent this  
16 notice of termination?

17 MS. RAINEY: Object to form.

18 THE WITNESS: I wouldn't say, "In order for  
19 them to close," no.

20 Q. BY MR. BULLOCK: Why?

21 A. I would say it was in order to appease  
22 Peterbilt.

23 Q. Do you know what the basis was for terminating  
24 the lease?

25 MS. RAINEY: Object to foundation.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 A. Yes.

2 Q. As a result, they could not get a certificate  
3 of occupancy?

4 A. Yes.

5 Q. Were you able to work that out with the city to  
6 allow them --

7 A. I didn't represent Johnson Thermal. I just  
8 passed on the contact information of the city person for  
9 them to contact.

10 Q. That person at the city had expressed his  
11 willingness to talk with Johnson Thermal about --

12 A. Assisting them, yes.

13 Q. -- assisting them?

14 A. Yes.

15 (Exhibit 9 was marked.)

16 Q. BY MR. BULLOCK: Do you recognize this  
17 document?

18 A. Yes.

19 Q. Were you involved in the preparation of this  
20 document?

21 A. I did not prepare the document.

22 Q. Were you involved with it? I am not asking if  
23 you wrote it. Were you involved in putting it together?

24 A. I believe we had our attorney help Arlene draft  
25 it.

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 THE WITNESS: Peterbilt wanted to occupy the  
2 building as quickly as possible.

3 Q. BY MR. BULLOCK: At the time, the Gilberts were  
4 still the tenants; correct?

5 MS. RAINEY: Object to form.

6 THE WITNESS: No.

7 Q. BY MR. BULLOCK: Excuse me. The owner?

8 A. Yes.

9 Q. Did Arlene express to you the reason why they  
10 were terminating the lease?

11 A. Because Peterbilt asked them to.

12 Q. Did Arlene express to you any opinion on  
13 whether the lease had been extended beyond October of  
14 2014?

15 A. No. I believe Arlene said she forgot about  
16 it.

17 Q. Forgot about what?

18 A. The term of the lease.

19 Q. If you would, look at the second page there,  
20 paragraph (i).

21 A. Okay.

22 Q. It says:

23 "Lessee did not provide timely written  
24 notice of the exercise of the option at the  
25 conclusion of the lease extension under the

DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 Q. That's okay.  
 2 A. It was before the offer was made. It was a  
 3 week or two before the offer was made.  
 4 Q. When do you recall the offer having been made?  
 5 A. I don't recall.  
 6 Q. Do you recall that the transaction closed  
 7 somewhere around December 31st?  
 8 A. Yes.  
 9 Q. Was the offer made more than a month before  
 10 December 31st or less, if you can recall?  
 11 A. I don't remember.  
 12 Q. When you toured the building, who was with you?  
 13 A. The agent representing Peterbilt and Blake  
 14 Jackson, the president of Peterbilt, and there were two  
 15 or three other individuals that worked for Peterbilt. I  
 16 do not remember their names or titles.  
 17 Q. And yourself?  
 18 A. And myself, yes. Possibly Gus was walking  
 19 through the building with us, as well. I do not  
 20 remember.  
 21 Q. Did Johnson Thermal give you guys any problems  
 22 whatsoever about touring the building?  
 23 A. Just to make sure we had hard hats and safety  
 24 glasses.  
 25 Q. But they were receptive to your presence?  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 A. Yes.  
 2 Q. Answered any questions that Peterbilt had?  
 3 A. I believe so.  
 4 Q. Didn't interfere with Peterbilt's access to the  
 5 building at all?  
 6 A. No.  
 7 Q. Do you recall, during the time Peterbilt was  
 8 looking into buying this building, whether or not  
 9 Peterbilt requested any due diligence period to  
 10 investigate the things that might be at issue with the  
 11 building?  
 12 A. I believe there was a due diligence period.  
 13 Q. Do you recall how long it was?  
 14 A. I do not remember.  
 15 Q. It is a curious manner of speech that you have.  
 16 You say, "I believe..."?  
 17 A. Uh-huh.  
 18 Q. When you say, "I believe," do you mean that's  
 19 your recollection?  
 20 A. Yes.  
 21 Q. You mentioned that the first time you recall it  
 22 having been discussed or having been an issue -- the  
 23 fact that Johnson Thermal was currently the tenant in  
 24 that building that Peterbilt was going to buy -- was on  
 25 the first tour?  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 A. Yes.  
 2 Q. What do you recall about the discussions  
 3 regarding that first tour that Peterbilt took through  
 4 the building?  
 5 A. The conversation was related to all of the  
 6 equipment that Johnson Thermal Systems had in the  
 7 building. It was very heavy, large pieces of equipment.  
 8 Q. Okay.  
 9 A. The person -- and I do not remember who -- from  
 10 Peterbilt asked -- said something to the effect of,  
 11 "That's really heavy equipment to move."  
 12 And I said, "Yes, it is."  
 13 And I explained that they are building a new  
 14 building across the freeway and they have got plans for  
 15 how they are going to take care of that.  
 16 Q. You don't recall which of the Peterbilt  
 17 employees this was?  
 18 A. I don't.  
 19 Q. Can you recall whether or not it was Blake  
 20 Jackson?  
 21 A. I cannot recall.  
 22 Q. So it might have been Blake Jackson?  
 23 A. There is always a possibility.  
 24 Q. So you represented to whomever this individual  
 25 was at Peterbilt that, yes, there was quite a bit of  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

1 equipment that Johnson Thermal Systems had to move but  
 2 that they were working on a project across the freeway;  
 3 right?  
 4 A. Yes.  
 5 Q. And what response did you get?  
 6 A. I do not recall.  
 7 Q. Do you recall anything else about that  
 8 particular conversation that you had with Peterbilt's  
 9 agents at the time of the first tour of the building?  
 10 A. I believe we said something about the plan to  
 11 leave was after the first of the year, but we didn't  
 12 have a set time frame yet.  
 13 Q. That Johnson Thermal didn't have a set time  
 14 frame; correct?  
 15 A. Correct. Construction was still being done on  
 16 their building.  
 17 Q. Do you recall anything else about that first  
 18 conversation during the tour regarding Johnson Thermal's  
 19 occupancy of the building and/or its plans to leave?  
 20 A. Not about that specifically, no.  
 21 Q. What is the next conversation that you recall  
 22 having with any persons at Peterbilt regarding Johnson  
 23 Thermal being in the building?  
 24 A. Probably when it was raised as an issue through  
 25 their agent to me sometime in December, prior to  
 DEPOSITION OF LINCOLN HAGOOD (11.17.2015)



DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
)  
Plaintiff/Counter-Defendant, )Case No. CV 15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
)  
Defendant/Counterclaimant )  
Third-Party Plaintiff, )

vs. )

)  
COLLIERS PARAGON, LLC, an Idaho )  
limited liability company, )  
)  
Third-Party Defendant. )

DEPOSITION OF GARY D. SOMMERCORN  
RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
Fisher Rainey Hudson  
950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
Beginning at 9:34 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

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1 **Q. What is your familiarity with that facility?**  
 2 A. We have operated a dealership there for a  
 3 couple of years now. I have been in it a number of  
 4 times.  
 5 **Q. When you say, "We have operated a dealership**  
 6 **there..." to whom are you referring?**  
 7 A. My employer, Jackson Group Peterbilt.  
 8 **Q. You have been in the facility?**  
 9 A. Uh-huh.  
 10 **Q. Is that a yes?**  
 11 A. Yes.  
 12 **Q. Had you had an opportunity to visit the**  
 13 **facility prior to when Jackson Group Peterbilt started**  
 14 **operating out of that facility?**  
 15 A. Yes.  
 16 **Q. Tell me what you can about your visits to those**  
 17 **buildings. This is getting into Topic 6. We are just**  
 18 **going to deal with both of these at the same time.**  
 19 A. Okay. Well, as we were getting ready to move  
 20 into that facility, I came to Idaho on one of my regular  
 21 visits. I spent some time at the Boise location first  
 22 thing in the morning.  
 23 **Q. Where is the Boise location?**  
 24 A. That is on Federal Way.  
 25 **Q. Continue, please.**

1 **Q. Prior to that February 12th site visit, had you**  
 2 **had occasion to go to the property located at 1505**  
 3 **Industrial Way?**  
 4 A. No.  
 5 **Q. That was your first time there?**  
 6 A. That was my first time.  
 7 **Q. What prompted or precipitated that particular**  
 8 **trip on February 12th? Why then?**  
 9 A. It was one of the regularly scheduled trips  
 10 that I had to Idaho, to Boise. As I am here, you know,  
 11 in the area, I stop at any of the locations and review  
 12 performance with the manager.  
 13 Also, I knew that we were moving into a new  
 14 facility. I wanted to see it. I wanted to get the  
 15 layout first-hand and go through with the manager how he  
 16 thought we should set up the shop and make sure, based  
 17 on my experience, how it would work and flow, that the  
 18 equipment would fit in the spots that we wanted it to go  
 19 in, make sure the power was there, and just look at  
 20 general things like where the fire sprinkler riser was  
 21 so that we left adequate room around it and so forth.  
 22 **Q. Who is the manager that you were working with?**  
 23 A. It was Rod Haylett.  
 24 **Q. Spell that last name for me.**  
 25 A. H-a-y-l-e-t-t.

1 A. Then I went to Caldwell to, first, the old  
 2 location that we were in. I had some work to do with  
 3 the manager there. I needed to do a tool inventory on  
 4 some of the stuff that had been purchased for the new  
 5 shop.  
 6 **Q. Okay.**  
 7 A. Then we drove over to the new shop to look  
 8 around so that I could see and review with the manager  
 9 his ideas on how to set up the shop so that I could do  
 10 some measurements, make sure the equipment would fit in  
 11 certain areas, and look at the power, where it came into  
 12 the building, so that we could determine, again, where  
 13 some of the equipment would fit to make it work for the  
 14 shop and what we were doing.  
 15 **Q. Do you recall the timing of that trip?**  
 16 A. That was February 12th. I actually came up on  
 17 the 11th, that afternoon. I was in the two stores the  
 18 morning of the 12th and then left late that afternoon.  
 19 **Q. That is a pretty precise memory you have there.**  
 20 **What causes you to recall so specifically that it was**  
 21 **February 12th?**  
 22 A. I keep a detailed day planner.  
 23 **Q. Did you review that day planner before today's**  
 24 **deposition?**  
 25 A. I did.

1 **Q. Is he still the manager at the 1505 Industrial**  
 2 **Way facility?**  
 3 A. He is not.  
 4 **Q. Who is the current manager at that location?**  
 5 A. Jason Thompson.  
 6 **Q. You just described quite a bit of activity that**  
 7 **you do with respect to looking at this new facility and**  
 8 **making sure the equipment fit and that it was suitable**  
 9 **for the company's needs and how it would flow. Is that**  
 10 **something that you typically do in your role with**  
 11 **Jackson Group Peterbilt?**  
 12 A. Yes.  
 13 **Q. This is not the first property that you did**  
 14 **that on?**  
 15 A. No.  
 16 **Q. You mentioned that that visit was the first**  
 17 **time you had been to the facility. I understand that**  
 18 **that was after the property was purchased. Did you have**  
 19 **any involvement with the purchase of the property?**  
 20 A. No.  
 21 **Q. The next phrase here on Topic 6 is -- let's**  
 22 **back up. It talks about Caldwell Land & Cattle**  
 23 **Company's electrical power needs at that location. What**  
 24 **were Caldwell Land & Cattle Company's electrical power**  
 25 **needs at that location?**

1 A. Most specifically, for the equipment that I was  
2 looking at, it was the 480-volt, three-phase power.

3 Q. Explain to me what that is. What is the  
4 significance of the 480-volt, three-phase power?

5 A. It's high-voltage, high-amperage power that is  
6 the most efficient that we can use to run the equipment  
7 that we have in the shop, like the air compressor, the  
8 enclosed parts washer, the particular filter cleaning  
9 machine.

10 Q. Is that type of power used at any of the other  
11 Jackson Group Peterbilt facilities that you are aware  
12 of?

13 A. Yes.

14 Q. Do you know whether that particular type of  
15 power was used at the Laurel Street facility? Do you  
16 know what I mean when I say "the Laurel Street  
17 facility"?

18 A. Uh-huh.

19 Q. I believe that is what moved into 1505?

20 A. Yes.

21 Q. Was there 480-volt, three-phase power at that  
22 facility?

23 A. I don't know for sure.

24 Q. Were you involved in setting up the operations  
25 at that Laurel Street facility?

1 that off. That was about it.

2 Q. At that time, there was 480-volt, three-phase  
3 power located at that facility; is that correct?

4 A. It looked like it to me, yes.

5 Q. The next phrase on Topic 6 states:

6 "...communication with Idaho Power Company  
7 regarding the temporary 277/480 electrical  
8 transformer located at 1505 Industrial Way..."

9 Do you see that?

10 A. Uh-huh.

11 Q. Is that a yes?

12 A. Yes.

13 Q. Did you personally have communications with  
14 Idaho Power regarding that 480-volt, three-phase  
15 power?

16 A. No.

17 Q. Did you do anything to learn what  
18 communications Caldwell Land & Cattle Company had with  
19 Idaho Power regarding that power source?

20 A. No.

21 Q. Is there anything that you can tell me, as you  
22 sit here today, about Caldwell Land & Cattle Company's  
23 communications with Idaho Power Company regarding the  
24 temporary 480-electrical transformer?

25 MR. JACKSON: Objection. Mischaracterizes

1 A. No.

2 Q. You were not?

3 A. No.

4 Q. Is it possible to run the type of operations  
5 that Jackson Group Peterbilt runs without the 480-volt,  
6 three-phase power?

7 A. I guess it's possible.

8 Q. You say that with some hesitation. Please  
9 explain.

10 A. The equipment operates best at 480,  
11 three-phase. Some of it can be converted. It doesn't  
12 run as efficiently or as well.

13 Q. When you visited the property on February 12th,  
14 what did you note about the power that existed at the  
15 property at that time?

16 A. The gentleman I was with showed me where the  
17 power came into the building.

18 Q. Who were you with?

19 A. With Rod Haylett.

20 Q. Okay.

21 A. He said, "This is where the 480 comes in." I  
22 opened the panel and looked at it. I looked at the wall  
23 where it was mounted and how much space we had between  
24 the door. I stepped it off. I looked at where we might  
25 place another piece of equipment. I kind of stepped

1 facts.

2 THE WITNESS: I wasn't involved in any of it.

3 Q. BY MS. RAINEY: Do you know whether or not  
4 Caldwell Land & Cattle Company had any communication  
5 with Idaho Power regarding the 480-volt, three-phase  
6 power located at 1505 Industrial Way?

7 A. I don't.

8 Q. Do you know whether or not anyone within  
9 Jackson Group Peterbilt had any communications with  
10 Idaho Power regarding the temporary, 480-volt,  
11 three-phase power that was located at 1505 Industrial  
12 Way?

13 A. I don't know for a fact. I mean, I assume we  
14 did; but I wasn't involved in it.

15 Q. You did not do anything to discuss with anybody  
16 within Jackson Group Peterbilt what communications they  
17 may have had; is that correct?

18 A. No, I didn't. I just verified the power was  
19 there.

20 Q. You went there on the 12th and verified that  
21 the power was there; is that correct?

22 A. Uh-huh.

23 Q. Is that a yes?

24 A. Yes.

25 Q. The next phrase in this category discusses

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
)  
Plaintiff/Counter-Defendant, )Case No. CV 15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
)  
Defendant/Counterclaimant )  
Third-Party Plaintiff, )

vs. )

)  
COLLIERS PARAGON, LLC, an Idaho )  
limited liability company, )  
)  
Third-Party Defendant. )  
\_\_\_\_\_)

DEPOSITION OF BRUCE ADAMS  
RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
Fisher Rainey Hudson  
950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
Beginning at 10:03 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

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Page 20

1 cleared out. The second page depicts how we  
2 anticipated -- before my visit, how we anticipated the  
3 front looking.

4 **Q. Just so that I am clear, the front page is kind**  
5 **of if everything is cleared out; and the second page,**  
6 **PLATINUM REMODEL 096, is what the build-out was going to**  
7 **look?**

8 A. Yes, initially. It was changed after my visit.

9 **Q. I want you to turn to the page that reads**  
10 **PLATINUM REMODEL 099.**

11 A. Okay.

12 **Q. There are four items there written on PLATINUM**  
13 **REMODEL 099. Do those items have any significance to**  
14 **you?**

15 A. Yes.

16 **Q. What is that significance?**

17 A. There are items that I personally saw, not  
18 necessarily at the time this was done. I personally saw  
19 it when we considered damage to the building.

20 **Q. Is that damage to the building caused by the**  
21 **former tenant?**

22 A. Repairs to the siding -- I believe it would  
23 have had to have been. Since there was a hole there, I  
24 assume it had to do with their equipment that was in  
25 place. Having not been in there before the building was

Page 22

1 A. Yes.

2 **Q. How did you come to find out that the asphalt**  
3 **area that you thought needed to be repaired was the**  
4 **result of that three-phase power transformer having been**  
5 **taken out?**

6 A. I didn't realize -- when they take the  
7 transformer, they bring in a concrete slab that they set  
8 on top of the ground; and they set the transformer on  
9 top of it.

10 **Q. Okay.**

11 A. It appeared as though the concrete slab had  
12 been taken, but it is a temporary slab that becomes  
13 permanent when they put the transformer back on top of  
14 it.

15 **Q. How did you learn about this?**

16 A. How did I learn about what?

17 **Q. How did you learn about the temporary slab that**  
18 **becomes permanent when the transformer is --**

19 A. Just by investigation of what had gone on.

20 **Q. So what I am trying to gain an understanding of**  
21 **is this: In mid March, when you are looking at the**  
22 **asphalt patch that needed to be repaired, what can you**  
23 **tell me about the sequence of events of learning that**  
24 **the reason that asphalt patch was in disrepair was**  
25 **because that concrete slab had been removed? Does that**

Page 21

1 empty, I couldn't say for sure.

2 There was conduit on the side of the building,  
3 and that was there from the previous tenant. There was  
4 a section of the floor in the shop that had been cut  
5 out. I assume, again, that was for a piece of their  
6 equipment. That was left empty, and there was a hole in  
7 the floor.

8 **Q. Okay.**

9 A. The repair of the asphalt slab is -- at first,  
10 we thought something had gone wrong there; but that's  
11 where the transformer actually sat, where the asphalt  
12 slab was.

13 **Q. When you say you thought something had gone**  
14 **wrong there, what do you mean?**

15 A. Well, we thought that -- there was just a hole  
16 there, and we were trying to figure out why. That's  
17 where the transformer was at.

18 **Q. When you say "we," who was trying to figure out**  
19 **why the asphalt slab was needing repair? Who is the**  
20 **"we"?**

21 A. It would have been Rod Haylett and myself.

22 **Q. When was the first time that you were out there**  
23 **at the property?**

24 A. It would have been March.

25 **Q. Mid March?**

Page 23

1 **make sense?**

2 A. No.

3 **Q. That is another ground rule that I didn't go**  
4 **over. Sometimes my questions make no sense. You can**  
5 **just look at me like, "That doesn't make any sense," and**  
6 **I will fix it.**

7 A. Okay.

8 **Q. When you looked at that slab in mid March, did**  
9 **you know that the 480, three-phase power had been**  
10 **removed?**

11 A. Yes.

12 **Q. How did you learn that the power had been**  
13 **removed?**

14 A. By a call from our people saying that the power  
15 had been removed.

16 **Q. From whom did you get that call? Do you**  
17 **remember?**

18 A. I believe it was either Rod Haylett or Jeff  
19 Brennan.

20 **Q. Do you recall when?**

21 A. I believe -- from what I understand, looking  
22 back at the notes and things -- I couldn't remember just  
23 off of my stretch of memory. I think we were notified  
24 on March 2nd.

25 **Q. So when you were out there in mid March and you**

1 noticed that that asphalt patch was in disrepair, what  
2 caused you to connect the dots of, "Oh, this is where  
3 the transformer was"?

4 A. We knew that's where the transformer was.

5 Q. Oh, okay.

6 A. We thought somebody had gone in and removed the  
7 concrete that was there also.

8 Q. That is what you thought originally. Did you  
9 learn something different subsequent to that?

10 A. Yes. We learned it had come out with the  
11 transformer.

12 Q. The concrete slab had come out with --

13 A. With the transformer.

14 Q. And how did you learn that?

15 A. I can't say exactly. It was just from looking  
16 at other transformers and conversations as we tried to  
17 reason out what was going on.

18 Q. You just pieced it together?

19 A. We pieced it together, yes.

20 (Exhibit 16 was marked.)

21 Q. BY MS. RAINEY: Exhibit 16, which I have just  
22 handed you, is two pages with Bates Nos. PLATINUM  
23 REMODEL 106 and '107. Is that what you have been  
24 handed?

25 A. Yes.

1 additional doors, overhead doors.

2 Q. Garage doors?

3 A. Garage doors.

4 Q. All right.

5 A. We painted. We put in air lines and oil  
6 delivery lines. We put in equipment. Mr. Sommercorn  
7 talked about that earlier.

8 Q. Did you do that, or did Platinum Remodel do  
9 that?

10 A. As far as equipment that was put in?

11 Q. Yes.

12 A. They did not put in the equipment. I can't  
13 remember if we used our electrician or not. We had the  
14 equipment come in after and did that ourselves.

15 Q. The air lines? Is that something you did  
16 yourselves?

17 A. We contracted that ourselves.

18 Q. As far as work done by Platinum Remodel, was  
19 that just generally putting in the new overhead doors?

20 A. And some painting of the walls.

21 Q. And some painting?

22 A. Yes.

23 Q. Did Platinum Remodel, in fact, do that list of  
24 things that is listed there on page '99 of Exhibit 15?

25 A. Everything except for the slab, the very bottom

1 Q. Do you recognize the document that has been  
2 marked as Exhibit 16?

3 A. Yes.

4 Q. What do you recognize it to be?

5 A. This looks more in line with what our final  
6 plan was on the building.

7 Q. When we were looking at Exhibit 15, you said,  
8 "That's what the plan was before I got out there." Is  
9 this closer to what the plan was after you and Bryan sat  
10 down together to hash it out a little bit further?

11 A. Yes.

12 Q. I am noticing on this that, again, this looks  
13 to me to be kind of that front office retail space; is  
14 that correct?

15 A. That's correct.

16 Q. What was the extent of the work done to either  
17 the warehouse area or the bay area?

18 A. Overall?

19 Q. Yes.

20 A. You would have to go back to --

21 Q. Exhibit 15?

22 A. -- Exhibit 15.

23 Q. Okay.

24 A. I don't know if there is a -- I can tell you,  
25 in general, that the bay area -- we put in some

1 item.

2 Q. My first question is: How do you know that  
3 they did everything except the slab that shows up there  
4 on the bottom item?

5 A. Because they repaired them. We paid them to  
6 repair them.

7 Q. Did you see them repair them?

8 A. No.

9 Q. Who wrote the checks for paying them? Is that  
10 your job?

11 A. I don't know if I actually signed them, but I  
12 approved the invoices.

13 Q. Were you invoiced for these separately, or was  
14 it part of the overall remodel?

15 A. We received a separate bid for these items, but  
16 I can't tell you if they were separated out on the  
17 payment or not.

18 Q. What causes you to recall that they did not do  
19 the asphalt repair on the southeast corner of the  
20 building?

21 A. That goes back to our previous discussion. As  
22 we looked at it, we found out that that concrete pad  
23 would come back with the transformer.

24 Q. So when that concrete pad came back, that is  
25 something that -- Idaho Power put that concrete pad back

1 in?  
 2 A. Yes. That's correct.  
 3 **Q. So the concrete pad that is currently there is**  
 4 **something that was installed by Idaho Power?**  
 5 A. That's correct.  
 6 (Exhibit 17 was marked.)  
 7 **Q. BY MS. RAINEY: I am going to go through some**  
 8 **of these documents to see if it helps us kind of lock**  
 9 **some dates into place a little bit better. I am handing**  
 10 **you a document that the court reporter has marked as**  
 11 **Exhibit 17, Bates Nos. PLATINUM REMODEL 001 and '002.**  
 12 **Do you see that?**  
 13 A. Yes.  
 14 **Q. Have you seen this document before?**  
 15 A. Yes, I have.  
 16 **Q. What do you recognize it to be?**  
 17 A. It is kind of an initial estimate on some  
 18 remodeling up in the -- I assume it's in Caldwell.  
 19 **Q. What makes you assume that that is in Caldwell?**  
 20 A. Let me read it over here real quick.  
 21 **Q. Okay.**  
 22 A. Just because of the things that are being done,  
 23 I would make the assumption that it is for Caldwell. It  
 24 initially could have -- some of the things we did were  
 25 very similar to what we did in Boise.

1 **Q. The date on that is December 10, 2014. Do you**  
 2 **see that?**  
 3 A. I do.  
 4 **Q. Could it have been as early as December 10th**  
 5 **that you began speaking with Bryan about the Caldwell**  
 6 **property?**  
 7 A. It very well could have been, yes.  
 8 (Exhibit 18 was marked.)  
 9 **Q. BY MS. RAINEY: Exhibit 18 is a three-page**  
 10 **document marked PLATINUM REMODEL 16 through '18. Is**  
 11 **that what you have been handed?**  
 12 A. Yes.  
 13 **Q. And what Exhibit 18 contains is an e-mail**  
 14 **string between yourself and Bryan; is that correct?**  
 15 A. Yes.  
 16 **Q. With e-mail strings, we always have to go**  
 17 **backwards with it. You have to turn to the end to get**  
 18 **them in sequence. I want to draw your attention to the**  
 19 **e-mail in the middle of PLATINUM REMODEL 017 that is**  
 20 **dated February 13th at 12:50. Do you see that?**  
 21 A. I do.  
 22 **Q. It reads:**  
 23 **"Bryan: Would you please send me a copy of**  
 24 **the proposal you did earlier for Blake. I**  
 25 **would like to take a quick look at it before I**

1 **head up."**  
 2 **Do you see that?**  
 3 A. I do.  
 4 **Q. Do you recall anything about drafting this**  
 5 **e-mail?**  
 6 A. I do know that Blake looked at the building  
 7 first and had an idea of what he wanted the front part  
 8 to look like. I was going to look at it and make sure  
 9 the flows worked, from what my experience was with the  
 10 shops and the parts departments.  
 11 **Q. That exhibit we just looked at is Exhibit 17.**  
 12 **Is that the proposal that you were referring to in this**  
 13 **e-mail?**  
 14 A. No. I think it would have been more -- not so  
 15 much the proposal. It would have been more the  
 16 information on Exhibit 15.  
 17 **Q. So you wanted to kind of look at those drawings**  
 18 **on Exhibit 15 so that you could work with him to get**  
 19 **kind of the more final plans that we saw there on**  
 20 **Exhibit 16; right?**  
 21 A. Yes.  
 22 **Q. Is there any reason why you waited until**  
 23 **February 13th to start working with Bryan on getting**  
 24 **these drawings finalized?**  
 25 A. What do you mean by, "Is there any reason...?"

1 **Q. Well, if Bryan was out looking at the property**  
 2 **as early as December 10th and kind of coming up with**  
 3 **preliminary bids and preliminary proposals that he had**  
 4 **done for Blake, I am wondering why you waited until**  
 5 **February 13th to continue moving forward on these**  
 6 **planning phases?**  
 7 A. You know, like I said, Bryan was working on our  
 8 Salt Lake -- not our Salt Lake building but our Boise  
 9 building. My travel schedule didn't allow me to be up  
 10 here any sooner.  
 11 **Q. So it was just, really, a matter of**  
 12 **availability between yourself and Bryan that caused you**  
 13 **to get back into this project on February 13th?**  
 14 A. Yes. Again, we didn't have ourselves in a  
 15 position where we needed them because we weren't going  
 16 to have access to the building until November -- not  
 17 November -- until April 30th.  
 18 **Q. Any other reasons that caused you to wait until**  
 19 **February 13th?**  
 20 A. No. Just availability of time.  
 21 **Q. When did you first learn that Johnson Thermal**  
 22 **had vacated the property?**  
 23 A. We got a call from one of our managers. I  
 24 would have to look at a calendar here. I believe it was  
 25 about the 17th, I believe. It could have been the 15th,

Page 32

1 but I believe it was the 17th. We got a call saying  
2 that they swung by the building, and it looked like it  
3 was empty.

4 **Q. Do you recall who you got that call from?**

5 A. Jeff Brennan.

6 **Q. These e-mails are going back and forth on**  
7 **Exhibit 18, as we talked about, kind of in the mid to**  
8 **late February time frame. We discussed earlier that the**  
9 **first time you had actually been in the building was mid**  
10 **March; correct?**

11 A. I think I misspoke. I think it was mid  
12 February.

13 **Q. Fair enough. That is kind of why I am going**  
14 **through these to clarify.**

15 **So to be clear, at the time you were exchanging**  
16 **the e-mails that we see in Exhibit 18, it is likely that**  
17 **you were on site in the Caldwell area or they were in**  
18 **anticipation of you being on site in the Caldwell area?**

19 A. I would anticipate that I -- I think it says I  
20 would be there that next Wednesday, whatever the  
21 Wednesday was from that 13th.

22 **Q. We talked earlier about anticipating a**  
23 **sixty-day build-out. Was that your anticipation for the**  
24 **time from finalizing plans to completion? When we talk**  
25 **about sixty days, what were the activities that**

Page 33

1 **comprised those sixty days?**

2 A. Just having done construction work at our  
3 stores in the past, and from the input from Bryan, we  
4 anticipated sixty days.

5 **Q. Did that time include developing the plans,**  
6 **pulling permits, and the build-out phase; or was it just**  
7 **the build-out phase?**

8 A. I think the only thing that probably took a  
9 little longer than anticipated was pulling the plans and  
10 getting approval from the City.

11 **Q. Why did that take longer than you**  
12 **anticipated?**

13 A. You know, I'm not sure. Bryan said that -- I  
14 think in that e-mail it says it was ten to thirteen  
15 days. Didn't he say that?

16 **Q. I think there is a reference to ten to twelve**  
17 **days.**

18 A. Ten to twelve days. Okay.

19 **Q. It took longer than that ten to twelve days?**

20 A. No. It took that time. We were anxious and  
21 pushing them to get it done. The biggest holdup was the  
22 approval of the plans.

23 **Q. Do you believe the plans were approved within**  
24 **the ten- to twelve-day time frame?**

25 A. I can't say for sure, but they were pretty

Page 34

1 close to that. I know Bryan applied a lot of pressure  
2 to get them -- to get them approved.

3 **Q. You said you were pushing. Why the push?**

4 A. Well, by the time we started on this, we wanted  
5 to finish things up as fast as possible. In fact,  
6 demolition work had started even before then because  
7 that's not included in the construction permit.

8 **Q. What kind of demo was being done?**

9 A. Removing walls in the front part of the  
10 office.

11 **Q. Anything else that you can recall?**

12 A. That would have been the majority of it. That  
13 is all we could do without plan approval.

14 **Q. As you talked earlier, one of the reasons that**  
15 **you did not start working on the plans and the approvals**  
16 **prior to February 13th is because of vacancy issues,**  
17 **that you were concerned the prior tenant wouldn't be**  
18 **out?**

19 A. That's correct.

20 **Q. Did you do anything yourself to work with the**  
21 **prior tenant? Did you say, "Hey, can we get in there**  
22 **and start developing our plans? Can we start doing some**  
23 **of this work while you are in place?"**

24 A. I had no conversations with them at all.

25 **Q. Why did you not have those conversations?**

Page 35

1 A. Because those conversations were being handled  
2 by Blake.

3 **Q. Were you aware of any of those types of**  
4 **conversations going on?**

5 A. I was aware that Blake was talking to them and  
6 their counsel quite often.

7 **Q. Do you know the substance of what he was**  
8 **discussing?**

9 A. It would be just kind of second-hand hearsay.  
10 I mean, I wasn't involved in those plans.

11 **Q. Because you are here on behalf of the company,**  
12 **if there is something that you know because of your**  
13 **activities in running the company --**

14 A. I understand that.

15 **Q. -- it is okay that you let me know that.**

16 A. I understand.

17 **Q. You just know generally that conversations were**  
18 **going on?**

19 A. Yes.

20 **Q. Did the project take longer than you expected**  
21 **it to, to do the build-out?**

22 A. It may have taken about a week longer than we  
23 expected.

24 **Q. What makes you recall that it was about a week**  
25 **longer?**



1 A. Because I think, in earnest, we started on this  
2 about the first part of March, when we finally knew that  
3 we were to the point where we could get going on things.  
4 When we moved into the building, I believe it was the  
5 second week of May.

6 Q. I kind of want to have this timeline because it  
7 is a bit of an important timeline. If we need to pull  
8 out more documentation to support it, that would be all  
9 right.

10 You mentioned that you felt like it was  
11 sometime around February 17th that you learned from one  
12 of the managers that the building appeared to be vacant;  
13 is that correct?

14 A. That's correct.

15 Q. Did you review anything in preparation for  
16 today's deposition that makes you recall that, or is  
17 that just independent recollection that you have from a  
18 few years ago?

19 A. That's a little bit of reviewing things.  
20 Conversations -- we looked at the documents. A lot of  
21 it is just previous recollection.

22 Q. You don't recall which manager it was that --

23 A. Yes, I do. It was Jeff Brennan. I said that  
24 earlier.

25 Q. I think you said Rod or Jeff earlier?

1 started moving as quickly as possible then to get the  
2 construction movement underway?

3 A. No. There were more delays. As you saw in  
4 that one document, there was some damage done to the  
5 building; and we wanted to give the tenant, Johnson  
6 Thermal, sufficient time to bring those back to  
7 standard.

8 Q. What was your involvement in allowing the  
9 tenant to make certain repairs to the building?

10 A. My own involvement was talking to the  
11 contractor and asking him to give us a bid for those  
12 four specific items and passing that on to Mr. Jackson.  
13 He had the conversation with Johnson Thermal.

14 Q. Do you recall when you had that conversation  
15 with the contractor?

16 A. I don't know exactly when that was. I know it  
17 had to be sometime within that week.

18 Q. Did you delay in developing plans with Bryan  
19 until those repairs were finished?

20 A. No. As you can see from the previous documents  
21 here, Exhibit 17, we were working on those previous to  
22 that.

23 Q. To kind of get back to my prior question, once  
24 you found out Johnson Thermal was out of the building,  
25 did you move forward as quickly as possible to get the

1 A. Yes.

2 Q. Is it the case, then, as soon as you found out  
3 that you were able to get into the building -- let me  
4 phrase that differently.

5 Is it the case, then, as soon as you found out  
6 Johnson Thermal was out of the building, you started  
7 moving on this project as quickly as you could?

8 A. In some respects. You know, we found out that  
9 it looked like it was empty. We took a little time to  
10 try to verify that Johnson Thermal was actually out of  
11 the building. We were never notified by Johnson Thermal  
12 that they were out of the building.

13 Q. When you say, "We were never notified..." to  
14 whom are you referring?

15 A. My on-site managers or Mr. Jackson was never  
16 notified that they had vacated the building.

17 Q. Okay.

18 A. So we made the decision to have the manager at  
19 the time walk around the building. He found an open  
20 door and went in and found out how the building was. As  
21 we anticipated, it was empty.

22 Q. That was around the February 17th time frame;  
23 correct?

24 A. Yes. That's correct.

25 Q. So after February 17th, is it the case that you

1 plans finalized, pull the building permit, and get moved  
2 in?

3 A. I think we moved forward in a reasonable amount  
4 of time. I can't tell you the exact dates.

5 Q. As quickly as possible?

6 A. Yes. Once we knew what Johnson Thermal's  
7 intentions were, as far as fixing the building, I  
8 believe that we moved forward as fast as possible.

9 Q. Those repairs that we were talking about -- go  
10 back to Exhibit 15. Let's talk about that a little bit.  
11 That's on page '099.

12 A. Okay.

13 Q. I am referring to the metal siding on the  
14 northeast corner that is referred to there. Did that  
15 prevent you from, in any way, working with Mr. Bixler to  
16 continue developing the drawings and finalizing plans?

17 A. No.

18 Q. Did the conduit that was on the east side of  
19 the building prevent you from moving forward with  
20 developing the drawings and finalizing plans?

21 A. I would say no.

22 Q. Did the concrete hole in the northwest corner  
23 of the shop prevent you from moving forward with  
24 drawings and finalizing plans?

25 A. I would say no.

1 A. You have to be more specific on which damages  
2 you are talking about.

3 Q. What actions were taken to mitigate damages  
4 that resulted from the February 11th move-out -- or the  
5 mid February move-out date?

6 A. Are you talking about business losses? That's  
7 what I am asking you. You have to be more specific  
8 about the specific damages you are talking about so that  
9 I can address it.

10 MS. RAINEY: Let's go through the damages. We  
11 will go through each one.

12 (Exhibit 19 was marked.)

13 Q. BY MS. RAINEY: Exhibit 19 is a document  
14 labeled CALD 0066. Is that what you have been handed?

15 A. Yes. That's correct.

16 Q. Have you seen Exhibit 19 before?

17 A. I don't know if I have seen it in its final  
18 form. I have seen different versions of this, yes.

19 Q. Did you review a version of this in preparation  
20 for today's deposition?

21 A. No.

22 Q. In what context have you seen different  
23 versions of what we are looking at here on Exhibit 19?

24 A. Just as we talked about, the different things  
25 on the building and the damages that we incurred, as we

1 Q. Let's look at the first item of damages,  
2 "Monthly Rent of 812 West Laurel Street location." Do  
3 you see that?

4 A. I do.

5 Q. Explain to me what efforts Caldwell Land &  
6 Cattle Company took to mitigate the damages regarding  
7 monthly rent at 812 West Laurel?

8 A. Initially, when we found out that the 480 power  
9 had been removed, we immediately contacted the lessor  
10 and gave him sixty days' notice, that we would still be  
11 in the building for an additional sixty days.

12 Q. Did you make those communications?

13 A. I instructed our CFO to make those  
14 communications.

15 Q. Explain to me why that was done.

16 A. Why we notified him or why --

17 Q. You said, when you found out the 480 power had  
18 been removed, you gave sixty days' notice that you would  
19 still be in the building -- or you would still be at the  
20 Laurel Street location for another sixty days; correct?

21 A. Sixty days, that's correct.

22 Q. When was it that you found out --

23 A. March 2nd.

24 Q. As of March 2nd, did you have a building  
25 permit?

1 discussed them.

2 Q. If you did not prepare Exhibit 19, did you  
3 prepare documents that are similar to what we see in  
4 Exhibit 19?

5 A. I was involved in discussions. We wanted to  
6 make sure we had everything correct. I was not involved  
7 in preparing the document.

8 Q. Basically, brainstorming what damages were  
9 suffered by --

10 A. Yes, to make sure we were being fair.

11 Q. You said, "Yes, to make sure we were being  
12 fair." Fair to whom?

13 A. Fair to us and fair to Johnson Thermal.

14 Q. Is it the case that you wanted to come up with  
15 a number that would accurately reflect the damages that  
16 Caldwell Land & Cattle Company suffered?

17 A. Yes.

18 Q. In trying to come up with the damages suffered  
19 by Caldwell Land & Cattle Company, you did, in fact,  
20 believe that it was also necessary to be fair to Johnson  
21 Thermal; is that correct?

22 A. That's correct.

23 Q. You did not want to overstate the damages that  
24 you were claiming; is that correct?

25 A. That's correct.

1 A. No.

2 Q. You expected the build-out to take sixty days;  
3 correct?

4 A. That's correct. One of the things you are  
5 forgetting in this whole process is we didn't need the  
6 building permit to be done -- or the build-out to be  
7 done to move into the building.

8 Q. When did you move into the building?

9 A. We moved into the building after the build-out  
10 was done.

11 Q. You didn't need to have the build-out done to  
12 move into the building?

13 A. We could have moved into the building within a  
14 week if that power would have been available.

15 Q. So was it the lack of the 480 power that caused  
16 you to not move into the building?

17 A. That's correct.

18 Q. Did you have that type of power at the Laurel  
19 Street location?

20 A. We did not.

21 Q. Why was it necessary to have it at the 1505  
22 location but not at the Laurel Street location?

23 A. Because the Laurel Street location was a  
24 one-and-a-half-bay shop that could only run limited  
25 equipment. It had 220, single-phase, and a very small

1 compressor that would only allow one or two mechanics to  
2 work at a time.

3 The Caldwell building was much larger and was  
4 in need of a much larger compressor that needed to run  
5 on the 480, three-phase.

6 **Q. Was it Jackson Group Peterbilt's intention to**  
7 **be operating out of the building while construction was**  
8 **occurring?**

9 A. That is true; we were.

10 **Q. How long did it take for Idaho Power to get out**  
11 **there and get the new transformer put into place?**

12 A. I can't remember the exact date that we  
13 requested the power to be installed; but it was that  
14 first week in March, I believe. Initially, they told us  
15 that they thought it would maybe be the end of March;  
16 but it was the end of April before the power was  
17 installed.

18 **Q. Were you able to move into the new facility as**  
19 **soon as the power was installed?**

20 A. Within ten days. Within ten to twelve days.

21 **Q. Was there anything other than the installation**  
22 **of the power that was preventing you from moving into**  
23 **and operating out of the new building?**

24 A. Yes. There was the issue of an occupancy  
25 permit, because of the work that was going on, that

1 A. Because it wasn't a large enough compressor.

2 **Q. But it is the same size that you were operating**  
3 **with at Laurel Street; correct?**

4 A. As I said, we were operating with one or two  
5 mechanics there. It was sufficient for them, but it  
6 wasn't sufficient to run it at the larger --

7 **Q. You couldn't run a larger operation there, but**  
8 **you could have run an operation the size of the Laurel**  
9 **Street operation there?**

10 A. We may have been able to, but it would not have  
11 been practical.

12 **Q. Explain to me why it wouldn't have been**  
13 **practical.**

14 A. Because we were not gaining anything by moving  
15 into the building because we were running the same  
16 operation we would have been running at the old place.

17 **Q. You would have been saving yourself the rent**  
18 **and utilities expenses that you were paying at the other**  
19 **facility?**

20 A. I guess you could look at it that way, but I  
21 don't think that -- still, it wouldn't have been  
22 practical to run it that way.

23 **Q. I need a little bit more specificity from you**  
24 **as to why -- did you conduct an analysis as to which one**  
25 **would have been more cost efficient?**

1 could have delayed us a little bit. We still had the  
2 option, when we originally were going to move into the  
3 building, of getting the occupancy permit and then  
4 moving forward with the removal.

5 **Q. Explain to me how you had that option.**

6 A. Well, whenever you move into a building, you  
7 have to contact the City and get an occupancy permit.  
8 It was our intention to contact the City, get an  
9 occupancy permit, move in, move forward with our plans,  
10 and begin construction.

11 **Q. Why didn't you attempt to get an occupancy**  
12 **permit while construction was ongoing in this instance?**

13 A. Because we were not in a position to occupy the  
14 building. We didn't have sufficient power to run the  
15 equipment.

16 **Q. Could you not have run the same type of**  
17 **operations at 1505 that were run at Laurel Street? I**  
18 **appreciate that there are more bays and stuff at 1505.**

19 **If you are moving a smaller operation into a**  
20 **bigger operation, wouldn't it have been more cost**  
21 **effective to move a portion of the operation so that**  
22 **rent was not required at two places?**

23 A. No. As I said, the compressor wouldn't support  
24 what we needed.

25 **Q. Why wouldn't it support what you needed?**

1 A. No. I just think, from a logistical  
2 standpoint, it wouldn't have worked to have this kind --  
3 by the time we took the expense of moving that  
4 compressor over to the new building and have it  
5 installed -- look into those things -- it just wouldn't  
6 have worked out.

7 **Q. So Jackson Group Peterbilt made the decision to**  
8 **keep running its operations out of the Laurel Street**  
9 **facility until construction was completed at the --**

10 A. No. Until we had sufficient power to run our  
11 equipment.

12 **Q. I kind of want to piece these out. Isn't it**  
13 **the case that you also did not have a certificate of**  
14 **occupancy at that property, which you could not get**  
15 **until construction was completed?**

16 A. If we got the certificate of occupancy first,  
17 because the power was available, we could have gotten it  
18 then.

19 **Q. Was it the lack of power that prevented you**  
20 **from getting the certificate of occupancy?**

21 A. In the long run, I would say it was, yes.

22 **Q. Why do you say "in the long run"?**

23 A. Because it put us in a position where we had to  
24 change our plan and not occupy the building while we  
25 were doing the remodel.

## APPENDIX B

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
Ryan C. Bullock (*Pro Hac Vice*)  
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*Attorneys for Plaintiffs*

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**IN DISTRICT COURT OF THE THIRD JUDICIAL OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**DECLARATION OF BLAKE JACKSON  
IN SUPPORT OF MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S  
MOTION IN LIMINE**

Civil No.: CV15-587

Judge Nye

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In accordance with Idaho Code Section 9-1406, I, Blake Jackson, state and declare as follows:

1. I am over the age of 21 and am competent in every respect to make this declaration.
2. The information set forth in this affidavit is based upon my personal knowledge and personal review of records kept by Plaintiff Caldwell Land & Cattle, LLC ("CLC") as well as those of Caldwell Peterbilt, Inc. and Boise Peterbilt, Inc. (together "Peterbilt").

3. CLC is the owner of property located at 1505 Industrial Way, Caldwell, Idaho 83607 (the "Property"). In or around December 2014, before CLC closed on the Property, the lease agreement was signed between CLC and Caldwell Peterbilt, Inc.

4. On December 31, 2014, CLC closed on its purchase of the Property.

5. CLC's affiliated entity, Peterbilt, owns a semi-truck dealership and service center, which operates on the Property pursuant to a lease agreement (the "Peterbilt Lease"). A copy of the Peterbilt Lease is attached hereto as **Exhibit 1**.

6. CLC leased the Property to Peterbilt pursuant to the Peterbilt Lease, which included a "Commencement Date" of February 1, 2015 (subsection 2.1(g)).

7. This Commencement Date was based on the Notice of Termination which was sent by the prior owner of the Property, which required Defendant to vacate the Property by January 31, 2015.

8. In the Peterbilt Lease, the Commencement Date includes an obvious typographical error for 2008.

9. This typographical error is substantiated by other typographical errors in the Peterbilt Lease, including the description on the footer of "Vernal Lease." (The Property is obviously not located in Vernal, Utah).

10. Peterbilt's affiliates have regularly used this draft lease to memorialize agreements between the local dealership and holding company for the property.

11. Because of JTS's refusal to vacate and give notice, and the resulting delay caused by its actions, CLC was obliged to make mortgage payments for several months without an occupying tenant.

12. As a result, from February through May 2015, Peterbilt paid the mortgage payments on behalf of CLC, which would have otherwise been paid through rent payments had Peterbilt been able to occupy the Property earlier.

13. These mortgage payments were paid by Peterbilt on behalf CLC because, without rent under the Peterbilt Lease, CLC had no income.

14. A statement of these mortgage payments paid on behalf of CLC is attached hereto as **Exhibit 7**.

15. CLC is liable to Peterbilt for these mortgage payments, in addition to the other costs and lost profits that were incurred when the Property was made unavailable by JTS.


16. By committing to close the purchase of the Property on December 31, 2014, which required outside financing, there was no way for CLC to purportedly "avoid" the Peterbilt Lease.

17. Again, had CLC not provided proof of a lease with Peterbilt before closing at the time of financing, then CLC could not have obtained financing to close on the Property.

18. Even if CLC had theoretically not leased the Property to Peterbilt, the repairs occasioned by JTS's damage would still have been necessary to make use of the building.

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 14 day of July, 2017

  
Blake Jackson

**F I L E D**  
A.M. *6:30* P.M.

JUL 27 2017

CANYON COUNTY CLERK  
J COTTLE, DEPUTY CLERK

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**MEMORANDUM IN OPPOSITION TO  
DEFENDANT’S MOTION IN LIMINE**

Case No. CV15-587

Judge Nye

Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this memorandum in opposition to the *Motion in Limine Regarding Evidence of Damages Alleged By Entities Other Than Plaintiff (7/18/17)* (“Motion in Limine”) filed by Defendant Johnson Thermal Systems, Inc. (“JTS”). For the reasons below, CLC respectfully requests the Court deny the *Motion in Limine*.

**BACKGROUND AND RELEVANT FACTS**

This is an action to recover damages for JTS’s unlawful detainer, breach of contract, and malicious injury to real property located at 1505 Industrial Way, Caldwell, Idaho 83607 (the



“Property”). CLC is the owner of the Property. CLC’s affiliated entity, Caldwell Peterbilt, Inc. (“Peterbilt”), owns a semi-truck dealership and service center, which operates on the Property pursuant to a lease agreement (the “Peterbilt Lease”). See *Verified Amended Complaint (3/20/15)* (“Complaint”) at ¶ 11. A copy of the Peterbilt Lease is attached hereto as **Exhibit 1**.

CLC entered an agreement to purchase the Property in November 2014. *Deposition of Blake Jackson (7/6/17)* (“Jackson Depo.”)<sup>1</sup> at 93:9-10, 108:11-13. A copy of the “Purchase and Sale Agreement” is attached hereto as **Exhibit 2** (the “Purchase Agreement”). At the time of purchase, the Property was occupied by JTS pursuant to a “Commercial Lease Agreement” and “Third Lease Amendment” with the prior owner. *Deposition of Sheri Johnson (11/17/15)* (“S. Johnson Depo.”) at 12:17-15:23, 22:17-23:14. Copies of the Commercial Lease Agreement and the Third Lease Amendment are attached hereto as **Exhibits 3 and 4**, respectively. CLC purchased the Property with the intent of taking possession on January 1, 2015. *Jackson Depo.* at 93:15-18, 108:11-13; *Exhibit 2* at ¶ 11.

On or about December 11, 2014, without consulting CLC, the prior owner delivered a “Notice of Termination,” which required JTS to vacate the Property by January 31, 2015. *Jackson Depo.* at 108:11-109:17; see also *Deposition of Gus Gustaveson (11/18/15)* (“Gustaveson Depo.”) at 33:9-17; *Deposition of Jeff Johnson (11/17/15)* (“J. Johnson Depo.”) at 26:16-25. A copy of the Notice of Termination is attached hereto as **Exhibit 5**. Before and after receiving this notice, JTS refused to provide a date certain when it would vacate the Property, and instead gave conflicting dates. *Deposition of Lincoln Hagood (11/17/15)* at 40:9-41:8,<sup>2</sup> 60:7-16; *Gustaveson Depo.* at 26:1-

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<sup>1</sup> Cited portions of all deposition transcripts referenced herein are submitted with **Appendix A**.

<sup>2</sup> “I [the prior owner’s real estate agent] never received a firm date. It was always, ‘The end of January,’ kind of thing, as the plan.”

6,<sup>3</sup> 29:10-18.<sup>4</sup> To add to the confusion, JTS also claimed to have silently exercised an option to remain on the Property through April 2015. *Jackson Depo.* at 95:19-99:8; *Gustaveson Depo.* at 20:16-23, 44:11-45:2.

On December 31, 2014, CLC closed on its purchase of the Property. *Declaration of Blake Jackson* (“Jackson Decl.”) at ¶ 4.<sup>5</sup> Before closing, in order to obtain financing, CLC entered into the Peterbilt Lease. *Id.* at ¶¶ 3, 16-17. CLC leased the Property to Peterbilt pursuant to the Peterbilt Lease, which included a “Commencement Date” of February 1, 2015 (subsection 2.1(g)), based on the Notice of Termination. *Id.* at ¶¶ 5-10. Significantly, JTS knew that Peterbilt intended to occupy the Property and that Peterbilt, and therefore CLC, would incur costs the longer that JTS remained. *Jackson Depo.* at 99:9-100:14; *J. Johnson Depo.* at 17:16-21.

Ultimately, JTS vacated the Property sometime after February 12, 2015. *Gustaveson Depo.* at 42:20-43:4; *Deposition of Gary Sommercorn (7/5/17)* (“Sommercorn Depo.”) at 13:15-25, 17:13-18:1.<sup>6</sup>; *J. Johnson Depo.* at 23:21-24:5. However, JTS did not communicate its exit date to CLC or otherwise provide notice that it intended to leave before April 2015 (the date of the purported extension, *supra*); rather, CLC only discovered that JTS had abruptly abandoned the Property on or about February 17, 2017. *Deposition of Bruce Adams (7/6/17)* (“Adams Depo.”) at 31:21-32:5, 36:10-37:24. Soon after, when the Property was being prepared for Peterbilt, CLC discovered that power had been removed at the instruction of JTS, further delaying occupancy.

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<sup>3</sup> “Q. Had you ever communicated a date [to vacate]? Are you aware of any date that was communicated to Peterbilt about the time when Johnson Thermal would leave the building? A. Not specifically. There were a range of dates that we offered.”

<sup>4</sup> “Q. What was the reason . . . that Johnson Thermal couldn’t give a specific date as to when they would be able to move out of the building? A. There were still many unknowns . . .”

<sup>5</sup> Mr. Jackson’s declaration is submitted as **Appendix B**.

<sup>6</sup> Testifying that JTS still occupied the property as of February 12, 2015.

*Adams Depo.* at 23:12-24:19, 47:15-17. Consequently, Peterbilt was not able to occupy the Property until the end of April 2015 beginning of May 2015. *Adams Depo.* at 48:10-20.

When JTS finally vacated, it had only paid rent through February 2015. *Gustaveson Depo.* at 40:1-8. Because of JTS's refusal to vacate and give notice, and the resulting delay caused by its actions, CLC was obliged to make mortgage payments for several months (February through May 2015) without an occupying tenant. *Jackson Decl.* at ¶¶ 11-12. These mortgage payments were paid by Peterbilt on behalf CLC because, without rent under the Peterbilt Lease, CLC had no income. *Id.* at ¶¶ 12-13. During this same time, Peterbilt was forced to twice extend the lease in its old building in order to continue operating: once because of JTS's refusal to vacate by January 31, 2015, and a second time because of the removed power. *Jackson Depo.* at 17:17-18:19. Because Peterbilt did not know when power to the Property would be restored, it was obliged to extend its old lease through the end of April 2015. *Id.* at 22:1-18. When Peterbilt was finally able to occupy the Property, it had (1) paid additional rent and utilities to extend its old lease three months (February through April 2015); (2) paid wages and benefits for an employee forced to remain idle; (3) paid for repairs caused by JTS's damage to the Property; and (4) incurred lost profits. A calculation of these damages is set forth in **Exhibit 6**. *Id.* at 75:6-8. Pursuant to the Peterbilt Lease, because Peterbilt was not able to occupy the Property by February 1, 2015, CLC is liable to Peterbilt for these amounts. *See Exhibit 1* at §§ 2.1(g) ("Commencement Date"), 5.1 (Peterbilt's right to occupy the Property), 6.8 (interruption of business), 11.2 and 11.3 (default).

For the reasons below, JTS is liable to CLC for these damages and the Court should not exclude evidence of the same.

## ARGUMENT

- I. The liability incurred by CLC pursuant to the Peterbilt Lease is a proximate result of JTS's unlawful detention, breach of contract, and damage to the Property, which CLC could not have avoided and, therefore, should not be excluded.**

A tenant who, without permission, holds over after the expiration of a lease is statutorily liable for unlawful detainer. Idaho Code § 6-303; *Johnston v. Schmidt*, 76 Idaho 470, 472, 285 P.2d 476 (1955). In addition to rent that is determined due, a landlord may recover from a holdover tenant any damages that are the proximate or direct result of the unlawful detainer. Idaho Code § 6-316; *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940, 539 P.2d 288 (1975); *see also Brooks v. Coppedge*, 71 Idaho 166, 170, 228 P.2d 248 (1951) (stating that a landlord is entitled to “three things: [1] restitution of the premises, [2] rent then due and unpaid, and [3] any damages alleged and proven in addition to the rent found due . . .”). These special damages may include the losses “sustained for a period subsequent to the unlawful detainer because the premises has remained unoccupied” because of the holdover tenant’s actions. C.S. Patrinelis, *Measure of damages for tenant’s failure to surrender possession of rented premises*, 32 A.L.R.2d 582 (1953) (cited with favor by *Texaco, supra*). Such damages may also be trebled. Idaho Code § 6-317.

Similarly, a holdover tenant can also be contractually liable for both general and consequential damages, which result from the breach of a lease agreement. *Lamb v. Robinson*, 101 Idaho 703, 705, 620 P.2d 276 (1980); *see also Galindo v. Hibbard*, 106 Idaho 302, 306-07, 678 P.2d 94 (App. 1984). Consequential damages may include lost profits, which are recoverable if proven with reasonable certainty and shown to be within the contemplation of the parties at the time of contracting. *Lamb*, 101 Idaho at 705. Consequential damages are reasonably certain if they are not speculative. *Id.* Whether damages were contemplated by parties at the time of

contracting is a question of fact. *See id.* (remanding the case for a “determination as to what damages were contemplated by the parties in the event of a breach”).

Finally, a plaintiff may also recover the reasonable cost to repair any property that is maliciously or intentionally damaged by a defendant. Idaho Code § 18-7001; *State v. Hughes*, 130 Idaho 698, 703, 946 P.2d 1338 (1997); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 101, 730 P.2d 1014 (1986) (recognizing that courts may provide a private cause of action when it is necessary to ensure the effectiveness of the statute thus providing an injured party right of action). Damages are calculated either by diminution of the property’s fair market value or the reasonable cost of repairs if the property is harmed but not destroyed. *Id.*

In this lawsuit, the parties dispute whether JTS could silently exercise an option to extend its lease of the Property through April 2015, and whether JTS damaged the Property when it vacated. If JTS did legitimately exercise the option in good faith (as it claims), then JTS is liable for two months’ rent (March and April 2015) and triple-net expenses (i.e. property taxes, insurance, and maintenance), plus the costs of repairing JTS’s damage to the Property. *Exhibit 4* at ¶¶ 2-3; *Exhibit 3* at 3 (“Maintenance and Repair”); *see also Exhibit 6* (“Rent Shortfall”). These amounts have never been paid and JTS has no excuse for their non-payment. *Gustaveson Depo.* at 40:6-8.

At trial, CLC will show that JTS, in fact, did not exercise the option and (a) refused to vacate by January 31, 2015, and thus was a holdover tenant in unlawful detainer and breach of its lease, (b) failed to give notice of its abrupt abandonment in February 2015, (c) caused damage to the Property when it finally vacated, and (d) delayed Peterbilt’s occupation. These actions proximately caused CLC to incur damages, including liabilities that were accrued to Peterbilt

under the Peterbilt Lease. *Exhibit 6*. Thus, whether the option was legitimately exercised or not, JTS cannot have it both ways.

The injuries caused by JTS's actions (a) through (d), *supra*, are recoverable by CLC as special and consequential damages under the above-cited authorities. JTS's *Motion in Limine* asks the Court to exclude evidence of some of these damages, specifically CLC's liability to Peterbilt, because JTS argues that (1) under the terms of the Peterbilt Lease, CLC supposedly had no obligation before JTS vacated the Property, (2) CLC could have purportedly "avoided" the Peterbilt Lease altogether, and (3) Peterbilt allegedly "volunteered" to repair damage caused by JTS. *Memorandum in Support of Motion in Limine (7/18/17)* ("Supp. Memo") at 4-7. For the reasons below, each of these arguments can be readily dismissed.

First, the Peterbilt Lease obligated CLC to deliver the Property to Peterbilt on a "Commencement Date" of February 1, 2015.<sup>7</sup> *Exhibit 1* at § 2.1(g). This date coincided with the prior owner's Notice of Termination and the demand to vacate by January 31, 2015, which JTS refused to obey. *Exhibit 5*. When JTS continued to occupy and unlawfully detain the Property after February 1, 2015, CLC became liable to Peterbilt for having to extend its old lease, pay the wages of an idle employee, and incur lost profits. *See Exhibit 1* at §§ 2.1(g), 5.1, 6.8, 11.2 and 11.3; *compare with Exhibit 6*. JTS knew that Peterbilt intended to move its business onto the Property and that time was of the essence. *Jackson Depo.* at 99:9-100:14; *J. Johnson Depo.* at 17:16-21; *see also Exhibit 3* at 5 ("Time of Essence"). As a commercial tenant operating a

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<sup>7</sup> As stated in Mr. Jackson's declaration, the Commencement Date includes an obvious typographical error for "2008." This is substantiated by other typographical errors in the Peterbilt Lease, including the description in the footer of "Vernal Lease." (The Property is obviously not located in Vernal, Utah.) Peterbilt's affiliates have regularly used this draft lease to memorialize agreements between the local dealership and holding company for the property. *Jackson Decl.* at ¶¶ 6-10.

business, JTS further understood at the time of entering its lease that its delay in vacating the Property would cause loss to the next occupying tenant, as well as to the landlord. *See id.* at 2 (“Use of Premises”).<sup>8</sup> Significantly, under the terms of the assumed Commercial Lease Agreement, JTS expressly agreed to indemnify CLC for all damages and injuries resulting from its breach. *Exhibit 3* at 5 (“Indemnification of Lessor”).

Second, by committing to close the purchase of the Property on December 31, 2014, which required outside financing, there was no way for CLC to purportedly “avoid” the Peterbilt Lease. *Exhibit 2* at ¶ 11 (Closing Date); *Jackson Decl.* at ¶¶ 3-4, 16. Because CLC is a single-asset holding company that operates in affiliation with its sole tenant, Peterbilt, and otherwise has no revenue stream, CLC was required to provide proof of a lease to its lender. *Id.* at ¶ 17. Had CLC not provided proof of a lease and an anticipated revenue stream—as Peterbilt’s other affiliated entities and manager have similarly done several times with other dealerships—then CLC could not have obtained financing to close on the Property. *Id.* Thus, the Peterbilt Lease could not have been “avoided” by CLC. JTS’s unsupported averment to the contrary does not satisfy its affirmative burden of proof. *See Whitehouse v. Lange*, 128 Idaho 129, 136, 910 P.2d 801 (1996) (stating that the “[d]efendant who invoke[s] this doctrine [of avoidable consequences] bear[s] the burden to prove that the plaintiff’s damage could have been lessened”).

JTS argues that the lease payments under the Peterbilt Lease did not commence until June 1, 2015, and thus avers that CLC’s liability to Peterbilt did not commence until that date. *Supp. Memo* at 4. This is not true. From February through May 2015, Peterbilt paid the mortgage payments on behalf of CLC, which would have otherwise been paid through rent payments had

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<sup>8</sup> Indeed, the only purpose for JTS entering the Lease and to “use” the Property was to operate a business.

Peterbilt been able to occupy the Property earlier. *Jackson Decl.* at ¶¶ 11-14. CLC is responsible to Peterbilt for these mortgage payments, in addition to the other costs and lost profits that were incurred when the Property was made unavailable by JTS. *Id.* at ¶ 15.

Third, with respect to repairs to the Property for damages caused by JTS, namely to restore power and repairs to the building and heating (*see Exhibit 6*), it makes no difference that these costs were paid by Peterbilt and Peterbilt's affiliated company Boise Peterbilt, Inc.<sup>9</sup> *French v. Nabob Silver-Lead Co.*, 82 Idaho 120, 128, 350 P.2d 206 (1960) (holding that expenses incurred by a party in anticipation of or preparation for performance of a contract may be recovered as damages). Had CLC theoretically not leased the Property to Peterbilt (an impossibility for the reasons, *supra*), the repairs would still have been necessary to make use of the building. *Jackson Decl.* at ¶ 18. Moreover, CLC is obligated to reimburse Peterbilt for these costs in making the Property available for use. Again, JTS cannot avoid its express contractual liability to CLC under the assumed Commercial Lease Agreement. *See Exhibit 3* at 3 ("Maintenance and Repair") and 5 ("Surrender of the Premises"); *see also J. Johnson Depo.* at 35:17-36:14.<sup>10</sup>

In sum, CLC's liability to Peterbilt under the Peterbilt Lease was proximately caused by JTS's unlawful detainer, breach of contract, and damage to the Property and could not have been avoided. Therefore, for the foregoing reasons, JTS's *Motion in Limine* should be denied.

**II. Even if the Court were to exclude evidence of CLC's liability under the Peterbilt Lease, CLC can still show direct damages for lost rent while the Property was unoccupied.**

Regardless of CLC's liability to Peterbilt under the Peterbilt Lease, the fact remains that

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<sup>9</sup> Specifically, the building and heating repairs.

<sup>10</sup> Conceding that JTS had intended to make the repairs.



the Property could not be occupied until May 2015 because of JTS's actions, *supra*. The Property was purchased for the sole purpose of leasing it to Peterbilt, which JTS knew before it vacated. JTS has absolutely no argument or evidence to satisfy its burden of proof that CLC could have leased the Property to another temporary tenant before May 2015, let alone for the amount paid by Peterbilt. *See Whitehouse*, 128 Idaho at 136. Accordingly, even if the Court were to grant JTS's *Motion in Limine* and exclude evidence of CLC's liability to Peterbilt, then at a minimum CLC would still be entitled to the amount of rent that Peterbilt would have paid had it been able to timely move in on February 1, 2015 (i.e. \$8,000 per month for 3 months, triple net). *Exhibit 1* at §§ 2.1(b) and 4.1. Indeed, because CLC was required to make monthly mortgage payments regardless of an occupying tenant, there can be no question that it was injured by JTS's unlawful detainer and breach of contract.

Thus, no matter the Court's ruling, CLC has incurred damages for lost rent, in addition to repairs to the Property, which it can prove at trial.

### CONCLUSION

For the foregoing reasons, CLC respectfully requests that JTS's *Motion in Limine* be denied and that the Court not exclude from evidence CLC's calculation of damages (Exhibit 6) and related exhibits identified in JTS's Appendices A and B.

DATED this 26th day of July, 2017.

STRONG & HANNI

*/s/ Graden P. Jackson*

---

Robert L. Janicki  
Graden P. Jackson  
Ryan C. Bullock  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of July, 2017, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION IN LIMINE** was served by the method indicated below, to the following:

Kristin Bjorkman Dunn	( )	U.S. Mail, Postage Prepaid
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Rebecca A. Rainey	( )	U.S. Mail, Postage Prepaid
Angie Perkins	( )	Hand Delivered
Fisher Rainey Hudson	( )	Overnight Mail
950 W. Bannock St., Ste. 630	( )	Facsimile (208) 514-1900
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<a href="mailto:angie@frtriallawyers.com">angie@frtriallawyers.com</a>		

*/s/ Graden P. Jackson*

\_\_\_\_\_  
Graden P. Jackson

FILED  
A.M. 4:50 P.M.  
JUL 31 2017

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*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff

v.

JOHNSON THERMAL SYSTEMS, INC.  
an Idaho corporation,

Defendant

**Case No. CV 15-587**

**DEFENDANT'S REPLY IN SUPPORT  
OF MOTION IN LIMINE**

COMES NOW Defendant, Johnson Thermal Systems, Inc. ("JTS"), by and through its counsel of record FISHER RAINEY HUDSON, and submits this reply in support of its motion in limine, and asks this Court to exclude from trial evidence offered by Plaintiff regarding alleged damages incurred by entities other than Plaintiff, Caldwell Land &

**DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE - 1**

Cattle, LLC, or Caldwell Land & Cattle Company, LLC (“CLC”).

### I. ARGUMENT

- a. **There is no evidence that the lease between CLC and Caldwell Peterbilt was entered into or became effective on any date other than June 1, 2015.**

The final paragraph of the lease agreement reads: “Lessor and Tenant have executed this lease to be effective as of the date stated in the first paragraph of this lease.” Affidavit of Ryan C. Bullock in Opposition of Defendant’s Motion in Limine (“Bullock Aff.”), Ex. 1 (Peterbilt Lease), p. 14 (CALD 0417). The first paragraph of the lease agreement between CLC and Caldwell Peterbilt states a commencement date of June 1, 2015. Bullcok Aff., Ex. 1, p. 2 (CALD 0405). That is the same date that Caldwell Peterbilt began paying rent on the Property. Affidavit of Rebecca A. Rainey (“Rainey Aff.”), Ex. 4 at 73:17-74:1, CALD 0220, and CALD 0218.

CLC claims it entered the lease with Caldwell Peterbilt prior to closing on the property and in order to obtain financing. Memorandum in Opposition to Motion in Limine (“Opposition Memo.”), p. 3. However, the lease clearly and unambiguously states a commencement date of June 1, 2015. It strains credulity to think that sometime in December of 2014, before all of the events that formed the basis of this lawsuit occurred, CLC and Caldwell Peterbilt entered into a lease agreement that—coincidentally—had a commencement date of June 1, 2015: the exact date in which Caldwell Peterbilt would begin operating out of and paying rents on the Property.

Because there is no evidence that CLC and Caldwell Peterbilt had a lease agreement that was effective any time prior to June 1, 2015, and because CLC did not plead as much in its Verified Amended Complaint, this Court should exclude by order in limine any and all evidence of damages allegedly suffered by Caldwell Peterbilt—and allegedly flowing

through to CLC—resulting from an anticipated February 1, 2015 move in date.

- b. JTS did not move to exclude lost rent damages. However, based on the information and evidence presented in CLC's response, exclusion of lost rents damages may be appropriate.**

Plaintiff CLC claims that it could not find a tenant to occupy the property at the rate being paid by Caldwell Peterbilt. Opposition Memo., p. 10. On December 22, 2014, JTS sent an e-mail to their landlord, Plaintiff's predecessor in interest, and advised them of their belief that they had extended their lease and had the right to remain on the premises until April 15, 2015. Affidavit of Rebecca A. Rainey in Support of Reply ("Rainey Reply Aff."), Ex. A. It was JTS's position, therefore, that it was contractually obligated to pay rent at the contractual rate of \$6,000.00/month plus triple net in the amount of \$1730.00/month for a total of \$7,730.00/month. JTS did, indeed, pre-pay rent in that amount for January 2015, and for February 2015. Then, JTS learned that CLC had filed a lawsuit to evict.

The loan payment ledger submitted by CLC as Exhibit 7 in support of its opposition to the motion in limine shows that mortgage payments on the Property were \$5,726.86. Bullock Aff., Ex. 7 (CALD 0418). The \$7,730.00/month due under the terms of its lease and that JTS was paying was sufficient to cover CLC's mortgage payments. Had CLC not filed a notice of eviction against JTS in January, it would not have suffered its alleged mortgage damages. Moreover, by its own admissions, those mortgage damages were voluntarily paid by Caldwell Peterbilt, despite no contractual obligation for Caldwell Peterbilt to do so. Opposition Memo., p. 4. Under the doctrine of voluntary payment, Caldwell Peterbilt has no legal right to recover from CLC payments voluntarily made and, correspondently, CLC has not legal right to attempt to pass that obligation through to JTS in this lawsuit. *See Action Collection Serv., Inc. v. Jackson*, No. 35226, 2009 WL 9150844,

at \*4 (Idaho Ct. App. July 8, 2009) (citing *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940)). “Where no obligation exists, the demand voluntarily met can be considered unjust or illegal.” *Action Collection Serv., Inc.*, 2009 WL 9150844, at \*4 (citing *Kimpton v. Studebaker Bros. Co.*, 14 Idaho 552, 560, 94 P. 1039, 1041 (1908)). Moreover, this legal theory was not pled in Plaintiff’s Verified Amended Complaint.

Rather than mitigate its damages, CLC threatened JTS and attempted to extort additional money from it. By letter dated December 30, 2014, counsel for CLC confirmed that it had received the letter and refused to accept JTS’s position that it had effectively exercised its option to remain on the property until April 15, 2015. Rainey Reply Aff., Ex. B. Instead, counsel for CLC demanded that JTS agree to an earlier move-out date and pay an increased amount of rents. Rainey Reply Aff., Ex. B. Counsel for CLC then threatened JTS with an eviction and unlawful detainer lawsuit. Rainey Reply Aff. Ex. B.

Under its lease with Caldwell Peterbilt, CLC receives \$8,000.00 per month in rent. Bullock Aff., Ex. 1, p. 2 (CALD 0405). The difference between the rent that JTS was contractually obligated to pay under its 6-month extension was \$7,730.00—only \$70.00 less than what CLC began receiving from Caldwell Peterbilt when the June 1, 2015 lease became effective. Incurring damages in excess of \$125,000.00 to recover less than \$70.00/month of damages is simply not an attempt to mitigate. Accordingly, this Court can and should exclude evidence of lost profits and other damages allegedly suffered by Caldwell Peterbilt—which CLC attempts to claim as its own—because CLC failed to mitigate its damages and because CLC did not actually pay its own mortgage: rather, CLC’s mortgage payments were paid, voluntarily, by Caldwell Peterbilt.

Because evidence submitted by CLC in opposition to Plaintiff’s motion in limine


conclusively proves that CLC failed to mitigate its damages and—even further—that it suffered no damages because its mortgage payments were made, voluntarily, by another entity who is not a party to this lawsuit, this Court's order in limine should also exclude evidence of mortgage payments voluntarily made by Caldwell Peterbilt.

## II. CONCLUSION

For these reasons, Defendant JTS asks this Court for an order in limine excluding from trial any evidence offered by Plaintiff regarding alleged damages incurred by entities other than Plaintiff, Caldwell Land & Cattle, LLC, or Caldwell Land & Cattle Company, LLC.

DATED this 31<sup>st</sup> day of July 2017.

FISHER RAINEY HUDSON

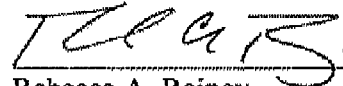
  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31<sup>st</sup> day of July 2017, I caused a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
Ryan Bullock  
Bill Ingram  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorney for Defendant*



JUL 31 2017

CANYON COUNTY CLERK  
T. PETERSON, DEPUTY

Kristin Bjorkman Dunn, ISB No 4613  
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Boise, ID 83702  
Email: kbd@bjorkmandunn.com  
Telephone: (208) 639-1458  
Facsimile: (208) 330-3700

Rebecca A. Rainey, ISB No. 7525  
Angie Perkins, ISB No. 10113  
FISHER RAINEY HUDSON  
950 W. Bannock St., Ste. 630  
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Email: rar@frhtriallawyers.com  
Email: angie@frhtriallawyers.com  
Telephone: (208) 345-7000  
Facsimile: (208) 514-1900

*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation

Defendant.

Case No. CV 15-587

**AFFIDAVIT OF REBECCA A. RAINEY  
IN SUPPORT OF REPLY TO  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION IN LIMINE**

STATE OF IDAHO            )  
  ) ss.  
County of Ada             )

Rebecca A. Rainey, being first duly sworn, deposes and states as follows:

AFFIDAVIT OF REBECCA A. RAINEY IN SUPPORT OF REPLY TO PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION IN LIMINE - 1

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

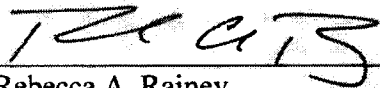
2. I am an attorney of record for the Defendant and I have personal knowledge of the matters contained herein.

3. Attached hereto as **Exhibit A** is a true and correct copy of a letter from Kristin-Bjorkman Dunn, dated December 22, 2014 (highlighted for the Court's convenience).

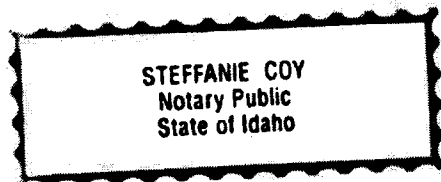
4. Attached hereto as **Exhibit B** is a true and correct copy of a letter from Graden Jackson, dated December 30, 2014 (highlighted for the Court's convenience).

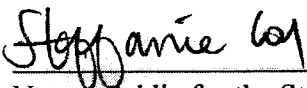
5. Further your affiant sayeth naught.

DATED this 31<sup>st</sup> day of July 2017.

  
Rebecca A. Rainey

SUBSCRIBED AND SWORN BEFORE ME this 31 day of July 2017.



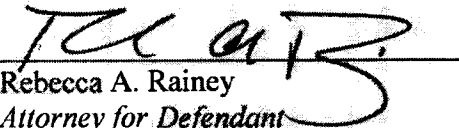
  
Notary Public for the State of Idaho  
Residing at: BOISE  
Commission Expires: MARCH 26, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31st day of July 2017, I caused a true and correct copy of the foregoing **AFFIDAVIT OF REBECCA A. RAINEY IN SUPPORT OF REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
Ryan Bullock  
Bill Ingram  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax:(801)596-1508

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

  
\_\_\_\_\_  
Rebecca A. Rainey  
*Attorney for Defendant*

December 22, 2014

Via US Mail and US Certified Mail, Return Receipt Requested

Gilbert Family Limited Partnership  
PO Box 1064  
Caldwell, Idaho 83606

Re: Commercial Lease Agreement by and between Johnson Thermal Systems, Inc., and Gilbert Family Limited Partnership dated February 10, 2012 as amended ("**Lease**")

Ladies and Gentlemen:

This office represents Johnson Thermal Systems, Inc. You recently sent a letter captioned "NOTICE OF TERMINATION" demanding that Johnson Thermal Systems vacate the premises which are the subject of the Lease on or prior to January 31, 2015. Your letter mistakenly indicates that my client did not timely or properly exercise an extension and characterizes the term of the Lease as month to month, when the lease actually extends until April of 2015. My client has a legal right to the premises and you may not terminate possession as of January 31, 2015. To do so would breach the contract.

My client prefers to resolve this matter without litigation but is prepared to protect its rights and business. Johnson Thermal Systems is actively conducting its business on the premises and paying rent in accordance with the terms of the Lease. Your decision to treat the Lease as a month to month tenancy contradicts both the terms of the Lease and the manner in which you have conducted yourself. Rent has been paid and accepted at the rate specified for a six month extension. Asserting a month to month tenancy part way through the extension term is inconsistent with the position you've taken and damaging to my client. Any plans you have for the property that are



KBD 347

Gilbert Family Limited Partnership  
December 22, 2014  
Page 2 of 2

contrary to my client's legal right to possession of the premises until April of 2015 are at your own risk and the consequences thereof are the result of your own actions.

This letter is sent without prejudice to my client's rights, claims and remedies, all of which are expressly reserved. In the event of litigation, you may be ordered to pay court costs, attorneys' fees and expenses as provided for in the Lease and at law including, without limitation, Idaho Code Sections §§12-120, 12-121 and 6-324. Please direct any communication regarding this matter to my attention. It is my client's expectation that you will retract your notice of termination and honor the six month extension of the term of the Lease.

In addition to this certified mail, return receipt requested version of this letter I am also sending you a copy of this letter by regular first class mail in case you refuse to accept the certified mail version of this letter.

Very Truly Yours,

  
Kristin Bjorkman Dunn

cc: Darrell Gustaveson

KBD 348

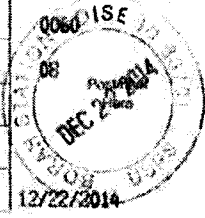
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**U.S. Postal Service**  
**CERTIFIED MAIL™ RECEIPT**  
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CALDWELL ID 83606

Postage	\$	\$0.49
Certified Fee		\$3.30
Return Receipt Fee (Endorsement Required)		\$2.70
Restricted Delivery Fee (Endorsement Required)		\$0.00
<b>Total Postage &amp; Fees</b>	<b>\$</b>	<b>\$6.49</b>



Mail to: Gilbert Family Limited Partnership  
 Street, Apt. No. / or PO Box No.: PO Box 1664  
 City, State, ZIP+4: Caldwell, ID 83606

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <input checked="" type="checkbox"/> <i>Mark Green</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to:  Gilbert Family Limited Partnership PO Box 1064 Caldwell, Idaho 83606	B. Received by (Printed Name) <i>Mark Green</i>	C. Date of Delivery <i>1/2/11</i>
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No  <i>Mark Green</i>	
2. Article Number (Transfer from service label)	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.  4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
	7013 3020 0000 2556 9177	

PS Form 3811, February 2004

Domestic Return Receipt

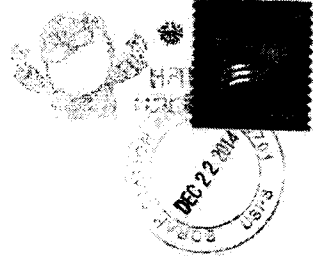
102595-02-M-1540

KBD 350

Bjorkman Dunn PLLC  
Plaza One Twenty One  
121 N. 9th Street, Suite 300  
Boise, Idaho 83702

BOISE ID 837

22 DEC 2014 PM 2 -



KBD 351

Gilbert Family Limited Partnership  
PO Box 1064

*Callwell,* Idaho 83606

NOV 22 2014 10:09 AM

POSTAL SERVICE  
MAIL DELIVERY POINT ADDRESS  
PO BOX 1064

83606-1064  
980020622

NOV 22 2014 10:09 AM



# STRONG & HANNI LAW FIRM

A PROFESSIONAL CORPORATION

SANDY OFFICE  
9350 SOUTH 150 EAST, SUITE 820  
SANDY, UT 84070

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ROGER H. BULLOCK  
R. SCOTT WILLIAMS  
PAUL M. BELNAP  
STUART H. SCHULTZ  
BRIAN C. JOHNSON  
PAUL W. HESS  
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ANDREW D. WRIGHT  
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SUZETTE H. GOUCHER  
LANCE H. LOCKE  
A. JOSEPH SANO  
JAMES C. THOMPSON  
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JENNIFER R. CARRIZAL  
JEREMY G. KNIGHT  
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SADÉ A. TURNER  
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GREGORY N. GUNN  
ALAN R. HOUSTON  
JASON L. DEFOREST  
JESSICA J. JOHNSTON

1 ALSO MEMBER CALIFORNIA BAR  
2 ALSO MEMBER COLORADO BAR  
3 ALSO MEMBER DISTRICT OF COLUMBIA BAR  
4 ALSO MEMBER IDAHO BAR  
5 ALSO MEMBER NEW YORK BAR  
6 ALSO MEMBER OREGON BAR  
7 ALSO MEMBER VERMONT BAR  
8 ALSO MEMBER WASHINGTON BAR  
9 ALSO MEMBER WYOMING BAR

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Member  
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December 30, 2014

## Via First Class Mail and Electronic Transmission

Ms. Kristin Bjorkmann Dunn  
Bjorkmann Dunn PLLC  
Plaza One Twenty One  
121 N. 9<sup>th</sup> St., Suite 300  
Boise, ID 83702  
kbd@bjorkmandunn.com

Re: *Property at 1505 Industrial Way; Commercial Lease Agreement by and between Johnson Thermal Systems, Inc., and Gilbert Family Limited Partnership, as amended ("Lease")*

Dear Ms. Dunn:

We hope this missive finds you doing well. Please be advised that we represent Jackson Group Peterbilt, which does business in Idaho, among others, as Caldwell Land and Cattle Company, LLC ("Peterbilt"). We write in connection with the above reference matter, and, more specifically, in response to that certain letter you, on behalf of you client, Johnson Thermal Systems, Inc. ("Tenant"), recently provided to the Gilbert Family Limited Partnership ("GFLP") in connection with the real property and improvements located at 1505 Industrial Way in Caldwell Idaho ("Property").

As you are aware, Peterbilt is in the process of purchasing the Property from the GFLP. More accurately stated, perhaps, is that by the time you receive this missive, Peterbilt will be the owner of the Property. As a consequence of that purchase, Peterbilt is immediately entitled to possession of the Property. However, we have been advised by GFLP and you, via your letter, that the Tenant is refusing to vacate the property, and is further asserting that it has entered into an extension of the Lease, providing for an additional six (6) months of occupancy of the Property. Please be advised that we have reviewed your letter, have evaluated correspondence between Tenant and GFLP's leasing agent, Lincoln Hagood, and have spoken indirectly with GFLP concerning their understanding of the status of the Lease and the alleged extension. Based on this review and evaluation, it is clear to us that your client has not been granted a six (6) month extension to the Lease, that your client currently possesses the Property under the terms of

SALT LAKE CITY OFFICE — 102 SOUTH 200 EAST, SUITE 800  
SANDY OFFICE — 9350 SOUTH 150 EAST, SUITE 820

Exhibit

B

KBD 352

Ms. Dunn  
December 30, 2014  
Page 2

a month-to-month tenancy, and that the Notice of Termination served on your client and referenced in your letter is justified.

In particular, our review and evaluation of these items evidences the following: First, over the course of nine (9) months beginning in April of this year, there were many written communications between Tenant and Mr. Hagood discussing future leasing options concerning the Property. Taken together, these communications plainly show that while there was discussion concerning a potential six (6) month extension to the Lease, there was never any actual agreement between your client and GFLP on that item.<sup>1</sup> Second, we have seen nothing from Tenant showing a written instrument memorializing the alleged six (6) month extension to the Lease. Of course, this is curious to us in light of the fact that the Lease and each of its previous three amendments were agreed to and embodied in separate written instruments, each signed by Tenant and GFLP. Third, during the months leading up to the expiration of the express Lease term, i.e., October 15, 2014, and at the current time, Tenant is admittedly in the process of transitioning to a new building. As noted in the excerpts from Tenant's e-mails below, this transition was expected to take place as early as "December," and then, as later indicated by Tenant, in "January or February." In either event, any one of these timeframes would take place well prior to the expiration of the alleged six (6) month extension term in April of 2015<sup>2</sup>. Again, these near-term dates further point to the fact that Tenant had not and has not entered into the six (6) month extension it claims was agreed to by the parties. Fourth, a Notice of Termination has been properly served on Tenant in accordance with Idaho Code Section 55-208, providing that Tenant shall vacate the property no later than January 31, 2015. Fifth, based on the above four items, and based on representations made to Peterbilt by GFLP, no (6) month extension to the Lease was ever effectuated; instead, a month-to-month tenancy was created by default upon Tenant's continued possession of the Property following the expiration of the original Lease term. That Tenant made payment to GFLP for two months "at the rate specified for a six month extension," alone, does not evidence that the alleged extension was in fact in place.

---

<sup>1</sup> Exemplars of the back and forth discussions between Tenant and Mr. Hagood include the following: e-mail from Tenant on 4/10/14 stating "it would "like to do a 6 month lease with the option to go month to month for an additional 3-6months. *If that's amenable to [GFLP], get it drawn up and we'll sign.*"; e-mails from Tenant on 4/18/14 and 4/19/14 discussing Tenant's anticipated vacation date and stating "*we are still hoping on the December move in on the new building, but it could be January,*" and "*...we are tentatively planning to move in January or February, however, if the final permit approval continues to lag, this could stretch.*"; e-mail from Mr. Hagood to Tenant on 9/26/14 stating "I have convinced [GFLP] that you staying on the property is fine and would benefit her...*Please also keep me informed on you planned vacancy of the building. I told Arlene you were shooting for December 15<sup>th</sup>.*"; and an e-mail exchange between Mr. Hagood and Tenant on 12/8/14 in which the former states "[i]f you were able to locate correspondence between you and [GFLP] in October extending your lease please provide such documentation as [GFLP] doesn't have any documentation other than the 3<sup>rd</sup> lease amendment that I provided....Per our previous correspondence and latest discussions on Friday [12/5/14] you stated that you thought you could be out of 1505 Industrial by the end of January," and Tenant responds as follows "*...I did not find any correspondence with Arlene beyond the 3<sup>rd</sup> amendment.* However, we did exercise our Tenant's six month extension option by continuing to pay the six month extension rate, and not paying the clearly different month by month rate..." (Emphasis added to each as identified).

<sup>2</sup> We also note that during this transition time, Tenant asked for, and GFLP accommodated, flexibility related to its continued use and possession of the Property during the months leading up to and following the expiration of the original Lease term, to the end that Tenant would be able to relocate and transition to its new building on relatively short notice.

KBD 353

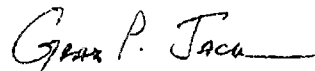
Ms. Dunn  
December 30, 2014  
Page 3

Given the above, we see two options going forward. One is that Peterbilt, as the new owner of the Property, and Tenant, as the hold-over tenant of the Property, come to an amicable arrangement as to a date (well short of April 2015) on which your client will peacefully vacate the Property. Our client's initial inclination here is to keep the January 31, 2015, date identified in the Notice of Termination, provided it we will consider some marginal deviation from that date. This option is our client's preference, and, quite frankly, is the most appropriate course of action. However, if the first option cannot be attained, then the other option is for Peterbilt to enforce the Notice of Termination, and, absent the Tenant vacating the Property as provided in that Notice, proceed with an unlawful detainer action against your client and have it removed from the Property. We see this as the less desirable option, but one, nonetheless, that Peterbilt is prepared to employ if a reasonable resolution consistent with the first option cannot be reached. As you have noted in your letter, and as is noted in the Notice of Termination, in that instance Peterbilt would similarly seek recoupment of its attorneys' fees and costs, together with its other damages, trebled, each as provided by Idaho Code Sections 6-324, 12-120 and 12-121, respectively. In either event, we do note that as of the effective date of Peterbilt's purchase of the Property, the current rental rate being paid by your client as a month to month tenant will need to be adjusted to appropriately embody current market conditions. We would be happy to discuss that adjusted rate with you in more specificity when we next speak.

We remain hopeful that your client will awaken to the fact that its positions, as espoused in your letter, are tenuous at best, and that, consequently, it will seriously consider Peterbilt's offer to resolve this issue short of judicial eviction. Please contact us directly once you have had an opportunity to discuss with your client its desired next steps.

Best Regards,

STRONG & HANNI



Graden P. Jackson  
R. Roman Groesbeck

RRG  
cc: Client

KBD 354

Kristin Bjorkman Dunn, ISB No 4613  
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*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant

**Case No. CV 15-587**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Comes now Defendant, Johnson Thermal Systems, (“JTS”), and hereby submits its  
proposed findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1**

## **FINDINGS OF FACT**

1. On February 22, 2012, JTS and Gilbert Family Limited Partnership, (“GFLP”), entered into a lease agreement regarding the 1505 Industrial Way property. Ex. 1. The lease agreement provided for a 13-month lease term, commencing on March 15, 2012 and expiring on April 15, 2013. The agreement provided that the Lessee should give the Lessor 60 days prior written notice of an intent to renew the lease.

2. The parties extended the lease three times. The parties did not follow the requirement of 60 days prior written notice of the intent to renew the lease for any of the extensions. Rather, at or near the extension deadline, the parties worked informally to negotiate an extension. Tr. 45-46.

3. JTS and GFLP negotiated and entered a third lease amendment dated April 15, 2014. Plaintiff Exhibit 3. The third lease agreement provided for a six-month lease at the rate of \$6,000.00 per month to expire on October 15, 2014. At the conclusion of the first six-month term, the tenant had the choice<sup>1</sup> to continue in the premises for either a six-month term at \$6,000.00 or on a month-to-month basis at an increased rate of \$6,250.00. Tr. 44-45.

4. At the time the parties entered into the third lease agreement, it was Ms. Arlene Gilbert’s, the GFLP representative negotiating the lease, intent to charge an increased rate of \$6,250 for the month-to-month term because she wanted to discourage a month-to-month tenancy. Ms. Gilbert was concerned with the building being vacant for any period of time and, as such, was

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<sup>1</sup> The contract used the word “option” to refer to a choice to extend. However, its use of the word “option” was not done in the legal sense and this Court finds that the use of the word ‘option’ was not done in an effort to create an option contract – but merely to provide two alternatives that would govern the contract after October 15, 2014.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2**

more interested in a six-month commitment (albeit at a lower lease rate) than she was interested in a higher monthly rate, with a shorter commitment. Tr. 299, 231, 256, 261-63.

5. JTS's concern was having plenty of buffer to complete the new building, even if it meant paying rent for a longer term than was actually needed. Tr. 120-22; 124.

6. In April 2014, Johnson Thermal Systems contracted with Idaho Power for the installation of a temporary transformer. Tr. 108.

7. The purpose of the temporary transformer was to meet the additional power needs required of equipment used by Johnson Thermal Systems in its extended operations. Tr. 108.

8. Johnson Thermal Systems payed for the removal of the temporary transformer at the same time that it paid for the installation of the transformer. Tr. 300; Ex. 221.

9. Ms. Gilbert was highly concerned with payment of rents at the correct rate and, on prior occasions, when Ms. Gilbert believed she had not received the full amounts. Tr. 41.

10. When the initial six-months of the third lease extension ended, JTS continued paying rent at the lower rate, \$6,000.00. Tr. 81.

11. Ms. Gilbert accepted \$6,000.00 lease payments for November and December without question or objection.

12. Other than paying \$6,000.00 for rent, JTS did not make any other oral or written representations to Ms. Gilbert regarding its intent to extend the lease on either a month-to-month or six-month basis. Tr. 80-81.

13. GFLP listed the property for sale and, in November of 2014, entered into a purchase and sale agreement with a single purpose real estate entity, Plaintiff Caldwell Land and Cattle ("CLC"). Tr. 274, 235, Ex. 8.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3**

14. CLC's intent was to purchase the property and lease it to its sister company, Caldwell Peterbilt. CLC wanted the property to be without a tenant as of the date of closing—December 31, 2014. Tr. 251, 389.

15. In early December, CLC raised questions regarding the length of JTS's tenancy: specifically, whether JTS had effectively selected the six-month extension option. Tr. 250.

16. When Colliers, the real-estate broker representing both the buyer and the seller, asked JTS about their intent to extend the lease by six-months, JTS explained that its payment of rent at \$6,000.00 effected a six-month extension of the lease. Tr. 124; Ex. 9.

17. JTS further explained that, in any event, it would not be able to vacate the premises until its new building was completed. JTS was willing to cooperate to move out early, if possible. Tr. 85-93; 97, 133.

18. Initially, Ms. Gilbert expressed a willingness to back out of the sale if CLC was unwilling to "be fair" to JTS, Ms. Gilbert's long-term, existing tenant. Tr. 123, 257, 258, 260, Ex. 10.

19. CLC threatened to not close on the sale unless and until an eviction notice was sent to JTS and other existing tenants. Tr. 278.

20. Ms. Gilbert complied with CLC's demands and, on or about December 14, 2014, sent an eviction letter to JTS giving them until January 31, 2015 to vacate the building. Tr. 236-37, 256, 261.

21. In early December, prior to the close of the purchase of 1505 Industrial Way, CLC entered a lease with its sister company, Caldwell Peterbilt. Tr. 375; Ex. 21.

22. Caldwell Peterbilt entered into this lease to provide it to a third-party lender for purposes of obtaining financing. Tr. 375.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4**

23. The lease stated that the effective date was June 1, 2015. Ex. 21.
24. The lease stated a commencement date of February 1, 2008. Tr. 379; Ex. 21.
25. Blake Jackson testified that February 1, 2015, was the date intended by CLC and Caldwell Peterbilt to give rise to duties and obligations under the lease, including Caldwell Peterbilt's right to move into the property and CLC's obligation to reimburse Caldwell Peterbilt for any lost profits sustained as a result of not being able to move into the premises on February 1, 2015. Tr. 424, 425.
26. Mr. Jackson testified that reference to 2008 in the lease was a typo. Tr. 379.
27. The lease was a "form" lease that Mr. Jackson's companies used for all properties leased by a land holding company to an operating company. Tr. 379.
28. The form lease contained many errors including a footer at the bottom of the page that indicated it was the Vernal Lease and an incorrect address of 1905 Industrial Way for the property. Ex. 21.
29. Mr. Jackson testified that beginning on the "commencement date" of February 1, 2015, Caldwell Peterbilt satisfied its obligations to pay rent by employing a "distribution model". Tr. 408, 431.
30. Under the "distribution model" Caldwell Peterbilt would distribute to either CLC or Mr. Jackson profits due and owing from the operation of the Caldwell Peterbilt franchise. Tr. 408, 431.
31. From those profits, Mr. Jackson and/or CLC would pay the mortgage payments to the bank. Tr. 408.
32. Mr. Jackson testified that on the "effective date" of June 1, 2015, Caldwell Peterbilt satisfied its obligations to pay rent by employing an "expense model." Tr. 409, 431, 432.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5**



33. Under the “expense model” Caldwell Peterbilt made lease payments to CLC as part of its operating budget. Tr. 435.

34. Mr. Jackson testified that June 1, 2015, was selected as the “effective date” in the lease because at the time of the purchase of the property it was unknown when JTS would vacate. Because there had been talk about an April 15, 2015 move out date, June 1, 2015 seemed like a safe time to pick and the best guess as to when they would have occupancy. Tr. 433-34.

35. JTS consistently and ardently maintained the position that they had a six-month lease.

36. It did so recognizing that if their building was completed early, allowing them the ability to vacate sooner than April 15, 2015, they would still be obligated to pay the full six-month lease term. Tr. 120-121.

37. Bruce Adams, the employee charged with coordinating the remodel of the 1505 Industrial Way property, testified consistently that, as early as January of 2015, Mr. Jackson informed him that JTS would likely not be out of the building until April 15, 2015 and that he should plan his remodel efforts around that date.<sup>2</sup> Tr. 330, 331-32, 333, 339, 346, 351.

38. It is undisputed that JTS paid February rent, though no evidence was presented regarding the date of the payment.

39. On or about January 24<sup>th</sup>, CLC filed a lawsuit to evict Johnson Thermal from the premises.

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<sup>2</sup> In early January, JTS proposed the March 15<sup>th</sup> compromise move-out date, CLC’s attorney responded, “that date is very difficult for my client.” This conflicts with Bruce Adams’ testimony that he was instructed as early as January to plan around JTS moving out around April 15, 2015. While this Court cannot place blame on CLC’s attorney for the substance of such conversations as Black Jackson testified that he was not “consulting with his attorney” but rather, “directing him what to do” the misdirection at Black Jacksons instructions led to the breakdown in any meaningful resolution to this matter. Tr. 482

40. When JTS was served with an eviction lawsuit, it increased efforts to further expedite completing the building and expediting the move.

41. Specifically, JTS was required to pay for employees of Industrial Builders—the company who was building JTS’s new building as well as moving JTS’s equipment—who had to work overtime to finish the building, obtain a certificate of occupancy, and complete the move as quickly as possible. Tr. 680-81.

42. JTS presented evidence of an additional \$21,685.31 in employee costs incurred as the result of expediting the completion of the building and physically moving JTS from one space to another. Ex. 290.

43. Dave Earlbach testified that he personally aided in creating the chart and confirmed that it was limited to overtime hours that were necessary for purposes of expediting the building and the move—though he was unable to delineate which overtime hours were required for completing the building and which overtime hours were required for completing the move. Tr. 678-80.

44. JTS presented evidence of \$7,866.90 incurred in renting extra equipment to expedite the move. Exs. 290, 233.

45. The parties dispute whether JTS vacated the property on Thursday, February 12, 2015 (as maintained by JTS) or Tuesday, February 17, 2015<sup>3</sup> (as maintained by CLC). Tr. 182-83; 318-19, 394.

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<sup>3</sup> CLC claimed at trial that one of its employees conveniently noticed on Tuesday, February 17, 2015 that the building was vacant and unsecured. CLC then presented evidence, by way of an invoice, claiming that it did not change the locks until Sunday, February 22, 2015. However, during that timeframe, CLC employees testified that they were working in the building, planning next phases of construction. One of two things must be true: either CLC changed at least one of the locks so that it could secure and have access to the building, or CLC simply left the building unlocked for approximately 5 days until a locksmith could come out and change all of the locks. Given the testimony of Blake Jackson and his clear concern for the security of his building, this Court finds its more likely than not that

46. The evidence shows that counsel for JTS advised CLC on February 12, 2015 that the building was vacant. Ex. 258.

47. Gary Sommercorn testified that, on that same date, he was on-site and there was no indication that JTS was out of the property. Tr. 183.

48. Mr. Sommercorn testified that prior to that trip, he had never been told that JTS would be out sometime in February. Tr. 192.

49. At the time JTS vacated the building, CLC was holding the JTS security deposit in the amount of \$5,270.84. It is undisputed that CLC has not returned any portion of that money.

50. CLC did not respond to JTS's February 12, 2015 e-mail for several days. Tr. 518, Ex. 258.

51. After JTS advised CLC that it had vacated the building, JTS employees attempted to return to the building to make repairs. Jeff Johnson testified that the lock on the front door had been changed. Tr. 105.

52. When CLC did respond to the February 12, 2015 e-mail, it did not mention the present allegation that JTS had not vacated the building on the 12<sup>th</sup> – rather, the response involved claims that Blake Jackson had been traveling, was unable to respond, and inquiries about how the parties would address repairs that needed to be made to the building. Tr. 518-19.

53. When JTS vacated the building, necessary repairs included repair to siding where vents had been in place, repairs to concrete where equipment had been installed, and removal of conduit. The reasonable value of these repairs was \$1,500.00. It is undisputed that CLC or Caldwell Peterbilt paid for the repairs. Tr. 103, 106, 202; Exs. 10, 27.

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CLC changed at least one of the locks on the building so that it could have access to and secure the building sometime before February 22, 2015. Tr. 394-95.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 8**

54. Caldwell Peterbilt also paid for maintenance and/or repairs to the heaters. Tr. 550.
55. The lease obligated JTS to maintain the heaters, but capped such maintenance costs at \$750/year.
56. CLC claims that it found the building vacant and unsecured on February 17, 2015. Tr. 519.
57. CLC admits that it had persons working in the building on February 18, 2015. Tr. 318.
58. CLC presented an invoice for having changed all of the locks on the facility dated February 22, 2015. Tr. 395.
59. On or about February 24, 2015, counsel for CLC informed counsel for JTS that someone was on the property removing some electrical panel. JTS responded immediately that it was not anyone affiliated with JTS and suggested that it might be someone from Idaho Power for purposes of removing the electrical transformer. CLC did nothing in response to this information. Tr. 525.
60. No person affiliated with CLC advised any person affiliated with Johnson Thermal Systems of the need for 480-power on the property. Tr. 116, 356.
61. No person affiliated with CLC made any inquires or conducted any investigation regarding the permanency of the 480-power at the 1505 Industrial Way location.
62. Idaho Power Removed the temporary transformer on or about March 2, 2015. Tr. 361.
63. CLC did not complete the paperwork necessary to schedule the installation of a temporary transformer until March 20, 2015. Tr. 293, 304.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW - 9**

64. When CLC called to schedule the installation of the temporary transformer, it did not indicate any sense of urgency and it did not seek to expedite the request. Tr. 297-98.

65. Idaho Power installed a new, permanent 480-power transformer on April 30, 2015. Tr. 401.

66. A certificate of occupancy was issued on May 19, 2015. Tr. 553, Ex. 289.

67. Caldwell Peterbilt moved into the property sometime in May of 2015 and was operating out of the property on or before June 1, 2015. Tr. 554.

68. Caldwell Peterbilt began paying rent on the property on June 1, 2015—the same date set forth in the lease as the “effective date.”

69. Caldwell Peterbilt’s profits for the relevant months are as follows: January \$-978; February \$9,881; March \$5,404; April \$10,078; May \$-5,854, June \$8,980; July \$22,065; August \$34,640; September \$19,997. Ex. 29.

70. The lost profit model presented by CLC compared the average profits of the months of January, February, March, and April to the average profits of the months June, July, August and September. Tr. 562.

71. CLC did not include the month of May in the lost profits calculation. Mr. Jackson testified that it would be “unfair” to include May in the calculations for either party.<sup>4</sup> Tr. 563.

72. The difference in lost profits for the two four-month timeframes examined by Mr. Jackson was \$15,324. That number, if multiplied by three is \$45,973. Tr. 424-25.

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<sup>4</sup> Mr. Jackson testified that the decreased profits in the month of May were not the result of the move, but rather, the result of JTS’s conduct in either (i) not vacating the premises until February 12, 2015 and/or having the temporary transformer removed by Idaho Power in early March. Tr. 564. It is unclear to this court how actions of JTS that occurred more than two months prior to the move in the month of May could have negatively impacted the moving process and/or sales during the moving process.

73. The difference in lost profits for the two three-month timeframes considered during cross examination showed an average of \$ -57.00. Tr. 565.

74. CLC is also attempting to recover for the “lost efficiency” of an extra mechanic who was hired by Caldwell Peterbilt in early December in anticipation of the purchase of the new building. Caldwell Peterbilt claims that since it was not able to fully utilize said employee, it suffered “loss efficiency” of approximately -2.77% amongst its mechanics which, for the relevant three-month time frame amounted to \$7,969.22. Ex. 25.

75. Caldwell Peterbilt compared the efficiency of the three months of February, March, and April to the average efficiency of the eight months of May through December.

76. CLC claims that “efficiency” was depressed during the three months of February, March, and April, resulting in an efficiency percent of 75.21% vs the average of 77.99%.

77. During the months of February and March, Caldwell Peterbilt had efficiency percentages of 78% and 84% respectively. Each of these two months was higher than the average efficiency for the 11 months represented.

78. The month of April was the lowest month represented.

79. As of April, the mechanic had been in place since December, April was the 5<sup>th</sup> month in which Caldwell Peterbilt (and the sister companies where the mechanic was used) had to “absorb” the excess labor.

80. Every three-month grouping, beginning in February and continuing through September, shows a lower than average efficiency rating:

- March/April/May average is 73.66%
- April/May/June average is 71.66%
- May/June/July average is 73.66%

- June/July/August average is 75.33%
- July/August/September is 75.66%
- August/September/October is 79%

## **CONCLUSIONS OF LAW**

### **Competing Claims for Breach of Contract**

1. “The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole.” *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005). For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term or it must be nonsensical.” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). “Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.” *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454-455, 259 P.3d 595, 600-01 (2011) (citing *Potlatch Education Ass’n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)).

2. “A written contract may be modified or waived by a subsequent oral agreement.” *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App. 1997) (citing *Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (Ct. App. 1983)). “The modification of an agreement ‘may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.’” *Id.* (quoting *Ore-Ida Potato Products Inc. v. Larsen*, 83 Idaho 290, 296, 362 P.2d 384, 287 (1961)).

3. Contractual provisions requiring that all amendments or modification be made in writing can be modified or waived by the conduct of the parties: “More specifically, an implied waiver occurs where a party’s neglect to insist upon enforcing a right results in prejudice to another party.” *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass’n*, 133 Idaho 669, 675–76, 991 P.2d 857, 863–64 (Ct. App. 1999) (quoting *Idaho Migrant Council, Inc. v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 806, 718 P.2d 1242, 1244 (Ct. App. 1986)).

4. This Court finds that JTS’s payment of \$6,000.00, which was accepted by GFLP without objection, effectively extended the lease for an additional six-month term.

5. The contractual requirement that was “breached”, if any, was the failure to give written notice of an intent to extend the lease. The parties’ course of dealing included zero instances of the giving of written notice of an intent to extend the lease. Moreover, the third lease agreement itself included the terms of an extension, if any: payment of rent at \$6,000 extended the lease for six months; payment of rent at \$6,250 extended the lease on a month-to-month basis, for up to six months.

6. CLC attempts to argue that JTS’s failure to provide additional written evidence of its intent to extend the lease was fatal and, thereafter, JTS was a holdover tenant with no contractual rights. This position ignores the course of dealing by and between JTS and GFLP over several years of the lease. This position is also inconsistent with Idaho law.

7. JTS paid \$6,000.00 which was consistent with express, written terms of the contract. GFLP accepted that amount, without question or objection, for two months. Questions arose only after CLC interjected and threatened to sue Ms. Gilbert. Ms. Gilbert’s actions in December of 2014, specifically, serving JTS with the notice of eviction—and in response to threats of legal action—do not meaningfully reflect Ms. Gilbert’s intent at the time she entered the third



lease extension. Rather, in December of 2014, the evidence shows that Ms. Gilbert was tending to her dying husband (he passed only two days before the sale of the building closed). Ms. Gilbert was interested in completing the transaction as quickly and for the highest price possible and avoiding the legal action that was being threatened by Plaintiff, CLC. Moreover, the evidence further shows that Ms. Gilbert was relying heavily on the advice provided by her broker, Lincoln Hagood, who was also working to avoid legal action threatened by CLC against his employer, Colliers, as a result of alleged misrepresentations regarding tenancy on the building.

8. This Court concludes that when looking at the contract as a whole and the dealings of the parties throughout the term of the contract, and the respective interests and reasons the parties agreed upon the rates specified for a six-month extension vs. a month-to-month extension, payment of rent at the specified—particularly as it was accepted without objection for two months—was sufficient for JTS to exercise its option to select the six-month extension. Surely, if the shoe were on the other foot and Ms. Gilbert had not found a willing buyer as quickly as she did, she would have been well within her rights to enforce the six-month extension against JTS. The contractual obligations are mutual and reciprocal and inure to the benefit of both parties consistent with their mutual intent at the time of contracting. The circumstances surrounding the dispute that arose in December of 2014—after JTS had made two months of payments consistent with the contract—cannot change the intent of the parties or the terms of the contract.

9. Accordingly, this Court concludes that JTS effectively extended the contract for a six-month term. At the time that Plaintiff CLC closed on the property the existing tenant, JTS, had a right to remain on the property until April 15, 2015.

10. From that conclusion, CLC would have been entitled to collect rents from JTS through the end of the contract period: April 15, 2015. March rent and ½ of April rent totals \$11,768.12.

11. Because JTS had a contractual right to remain on the property until April 15, 2015, this Court holds that CLC did not suffer any damages resulting from JTS vacating the property well in advance of its contractual rights.

12. Additionally, the evidence in the case strongly shows that despite CLC's strident attempts to get JTS to vacate the property early, CLC and Caldwell Peterbilt were relying on an April 15, 2015 date to plan for the move, the remodel, and the effective date of the lease that CLC entered into with Caldwell Peterbilt in early December. For these reasons, this Court finds that, even if its conclusion on the breach of contract is incorrect, there is no causal relationship between JTS "holding over" for 12 days and the lost profits and lost efficiency damages claimed by CLC. Because CLC and Caldwell Peterbilt were working under the assumption that they would not have access to the building until April 15, gaining access on February 12<sup>th</sup> or 17<sup>th</sup>, whichever the case may have been, did not impact their contractual dealings at all.

13. Though this Court has concluded that CLC would have been entitled to rents for March and half of April, it will not award such damages as CLC repudiated the contract by filing a lawsuit for eviction on January 24, 2015—prior to the end of the lease term.

14. "An anticipatory breach of contract has been defined as 'a repudiation [by the promisor] of his contractual duty *before the time fixed in the contract for his performance has arrived.*" *Foley v. Munio*, 105 Idaho 309, 311, 669 P.2d 198 (1983) (quoting *STC, Inc. v. City of Billings*, 543 P.2d 374, 377 (1975)) (emphasis original).

15. “An essential element of a true anticipatory breach of a contract is that the repudiation of <sic> renunciation by the promisor occur *before his performance is due* under the contract. Where a party bound by an executory contract repudiates or renounces his obligation before the time for performance, the promisee has, according to the treat weight of authority, an option to treat the contract as ended, as far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach, repudiation, or renunciation, even in the absence from the contract of a specific provision authorizing the maintenance of an action or the declaring of a forfeiture.” *Foley*, 105 Idaho at 311 (quoting 17A C.J.S. s 472(1) (1963)) (emphasis original).

16. By filing the January 24, 2015 lawsuit to evict Johnson Thermal, CLC repudiated and, therefore, anticipatorily breached the contract with JTS. Accordingly, CLC is not entitled to damages for JTS vacating the premises early. Rather, JTS is entitled to damages for expenses incurred in expediting the move as a result of the anticipatory breach.

17. For purposes of a damages award to JTS, it is necessary that the overtime hours presented by JTS be causally related to the notice of eviction that was filed on or about January 24, 2015, the event of breach that triggered JTS’s right to recover damages.

18. The total number of overtime hours shown on Exhibit 290 is 516.

19. The overtime hours shown range from more than 100 (Russell Hinkley at 108) to as few as 10 (Wesley Davis).

20. The average number of overtime hours worked by the 10 non-salaried individuals is 51.6.

21. The notice of eviction was filed on January 24, 2015.

22. JTS had fully vacated the premises on or about February 12<sup>th</sup>, a total of 19 days, though it is reasonable to believe that additional overtime hours were required for a period thereafter to get JTS operational at its facility.

23. Over the course of one normal work week, 10 non-salaried individuals are able to work approximately 400 (40-hour work week x 10 people). The overtime hours submitted by JTS represent slightly more than one average work week. Given that JTS vacated the building more than 2 months ahead of schedule, but less than three weeks after receiving the notice of eviction, this Court finds that the overtime hours submitted by JTS are reasonable and necessarily incurred.

24. Accordingly, this Court finds that JTS was damaged in the amount of \$21,685.31 in additional employee costs associated with the overtime expense for expediting the building and the move.

25. JTS's contractor was also required to rent additional scissor lifts to accomplish the expedited move. Upon close review, one invoice for \$1,003.10 is for a rental that occurred prior to the notice of eviction. That rental could not be causally related to CLC's anticipatory breach of the contract. The remaining rentals, however, all occur after the January 24, 2015 notice of eviction and, therefore, are more likely than not causally related to CLC's anticipatory breach of the contract. Accordingly, this Court finds that JTS was damaged in the amount of \$6,863.80 incurred to rent additional equipment needed to expedite the move.

26. Despite CLC's anticipatory breach of contract, JTS is still legally obligated to make repairs to the premises that fall outside the scope of ordinary wear and tear.

27. The undisputed reasonable cost of repairs made by CLC is \$1,500 for building repairs.

28. Heaters were serviced after CLC took over possession of the building.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW - 17**

29. The lease obligated JTS to maintain the heaters, up to \$750.00 per year. Tr. 550.

30. JTS is entitled to a refund of its security deposit in the amount of \$3,020.84.

31. As a result of the lawsuit for eviction, JTS further increased efforts to vacate the premises. While there is conflicting evidence in the record, it is undisputed that JTS completely vacated the 1505 Industrial Way property sometime between February 12, 2015 and February 17, 2015. CLC is entitled to a refund of rent for the half of February that it did not occupy the property. This amount is \$3,922.71.

32. **Total Damages:** This Court finds that CLC is liable to JTS for damages proximately caused by CLC's anticipatory breach of the lease as follows and will enter judgment in favor of JTS and against CLC as follows:

- **Employee Overtime Costs:** \$21,685.31
- **Scissor Lift Rentals:** \$6,863.80
- **Refund of Security Deposit:** \$3,020.84
- **Refund of ½ February Rent:** \$3,922.71

**TOTAL: \$35,492.66**

33. JTS is entitled to attorney's fees pursuant to the terms of the contract and Idaho Code Section 12-120.

### **Malicious Injury to Property**

34. This Court concludes that CLC failed to present any evidence supporting its claim for malicious injury to property. JTS was under a contractual obligation with Idaho Power to contact Idaho Power to have the temporary transformer removed when JTS was no longer in need

of the transformer. JTS was not under a duty to inform CLC of its contractual relationship with Idaho Power. JTS was not under a duty to inquire about CLC's power needs.

35. Because CLC failed to present evidence arising in tort whereby JTS had a legal duty to protect CLC from adverse consequences resulting from removal of the temporary transformer, CLC is not entitled to any of the damages allegedly arising from removal of the temporary transformer.

36. Additionally, as discussed above, the temporary transformer was removed on March 2, 2015. It was reinstalled on April 30, 2015—only 15 days after JTS's contractual right to remain in the building. CLC was able to conduct its remodel, in a vacant space, prior to that period. CLC's tenant was able to move into the property in early May and was fully operational and paying rent by June 1, 2015, the effective date set forth in its lease agreement. Accordingly, this Court holds that even if there was a duty to protect CLC from the adverse consequences of JTS complying with its contract with Idaho Power, there is no causal relationship between removing the temporary transformer and CLC being able to remodel the premise and lease it to its tenant as planned.

37. This Court holds that CLC take nothing by its claim for malicious injury to property.

To the extent these proposed findings of fact or conclusions of law do not specifically address separate claims advanced by either party, such claims are determined to be duplicative of the evidence presented and/or rendered moot by the findings of fact and conclusions of law presented herein. The judgment to be entered by this Court shall be a final judgment, disposing of all the claims and all the issues in the case.

DATED this 20<sup>th</sup> day of November, 2017.

FISHER RAINEY HUDSON




Rebecca A. Rainey  
*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of November, 2017, I caused a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served upon the following individuals in the manner indicated below:

Graden Jackson  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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



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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**CLOSING TRIAL BRIEF**

Case No. CV15-587

Judge Nye

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Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, respectfully submits the following closing arguments for the completed trial against Defendant Johnson Thermal Systems, Inc. (“JTS”). By stipulation, the parties have agreed to submit their briefs two weeks from the date that the last day of trial was transcribed<sup>1</sup> and limit their written argument to 20 pages (exclusive of this cover page).

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<sup>1</sup> All references to trial testimony are cited in brackets.



**I. FIRST CLAIM FOR RELIEF (*Am. Complaint* at ¶¶ 57-64): JTS is liable for unlawful detainer because JTS was an at-will or month-to-month tenant and because it failed to vacate the Property when given notice.**

When a lessor accepts rent from a holdover lessee after the term of a lease has expired, a new lease arises by operation of law. *Lewiston Pre-Mix Concrete, Inc.*, 110 Idaho 640, 644-45, 718 P.2d 551 (1985). The new tenancy is implied from the conduct of the parties and “can be one of several types: tenancy at sufferance, tenancy at will, periodic tenancy (month-to-month or year-to-year) or fixed term tenancy.” *Id.* at 645. An at-will or month-to-month tenant who holds over after receiving a written notice of eviction is liable for unlawful detainer. Idaho Code §§ 6-303(1) and 55-208(1); *see also Johnson v. Schmidt*, 76 Idaho 470, 472, 285 P.2d 476 (1955).

In this case, CLC has shown that the lease agreement (the “Lease”) between the Gilbert Family Limited Partnership (the “Gilbert Family”) and JTS expired and that, thereafter, JTS was an at-will or month-to-month tenant. Because JTS failed to vacate Property within the 45-day notice period required by the Notice of Termination (*Ex. 13*), JTS is liable for unlawful detainer.

The Lease expired on October 14, 2014, when JTS failed to exercise the 6-month option in subparagraph 3(a) of the Third Lease Amendment (*Ex. 3*). That option was subject to a 60-day written notice requirement contained in the original Commercial Lease Agreement (*Ex. 1* at 1, “Term of Lease,” and 2, “Option to Review”), which was incorporated by paragraph 4 of the Third Lease Amendment. *Ex. 3* at ¶ 4.<sup>2</sup> After the Lease expired, JTS continued to occupy the Property, but as an at-will or month-to-month tenant subject to eviction by the Gilbert Family upon notice.

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<sup>2</sup> JTS has suggested that the 60-day written notice requirement was waived by prior extensions of the Lease. However, this requirement was reaffirmed by the parties’ execution of the Third Lease Amendment on April 18, 2014, and the express inclusion of paragraph 4. *After* April 18, 2014, when the 60-day notice requirement was incorporated and reaffirmed, there is no evidence that the Gilbert Family ever waived that provision.

See Idaho Code § 55-208(1). This new tenancy is evidenced by the following:

- The Third Lease Amendment was entered with the understanding that JTS was constructing a new building and would vacate the Property as soon as that building was completed. *Ex. 4* [17:13-17, 68:22-69:1, 228:20-229:4]. JTS understood that upon vacating the Gilbert Family expected to find a new tenant or purchaser [22:8-13, 29:5-16, 229:5-10].

- JTS had an option to extend the Lease for another full year through April 15, 2015 (*Ex. 1* at 2, “Option to Renew”), but instead requested a lesser term of six months with the option to go month to month afterwards. *Ex. 4* (“We [JTS] would like to do a 6 month lease *with the option to go month to month* for an additional 3-6 months” (emphasis added)) [25:9-12, 57:25-58:3].

- On August 15, 2014, 60 days before the end of the Third Lease Amendment, and within the notice period, *supra*, the Gilbert Family’s agent, Lincoln Hagood, communicated with JTS to inquire about the status of completing the new building and to request an exit date. *Exs. 5 and 6*. In response, JTS did not exercise the six-month option. *Id.* [26:24-27:14, 31:19-32:9, 73:4-25].

- Later, in early October 2014, *at the end of* the Third Lease Amendment, the Gilbert Family listed the Property for sale because of JTS’s stated intent to leave. *Ex. 7* [75:2-11, 275:16-22].

- When the Property was listed for sale, Mr. Hagood specifically asked JTS to “keep [him] informed on [JTS’s] planned vacancy of the building.” *Ex. 7*. JTS never informed Mr. Hagood that it might occupy the Property for another six months through April 15, 2015. *Id.* [34:20-35:6, 75:21-76:13, 237:17-241:8].

- Throughout its communications, JTS *never* expressed any written or oral intent to exercise the 6-month option [39:11-19, 40:7-10, 55:13-56:7, 78:21-79:4, 80:13-81:1, 82:21-83:5, 138:4-13, 147:12-20, 232:16-233:7, 241:9-19]. Instead, JTS only communicated potential exit dates that

were less than six months and before April 15, 2015. *Ex. 5* (stating a potential December or January exit date) [237:6-16]; *Ex. 6* (stating a potential January or February exit date); *Ex. 7* (failing to correct Mr. Hagood's representation that JTS was "shooting for December 15<sup>th</sup>" to vacate) [239:24-240:4, 242:1-13].

- JTS did not pay six months of rent through April 15, 2015 [81:16-82:12].
- The first time that JTS ever asserted it had purportedly exercised the six-month option, was in December 2014, after the Property was sold when JTS was informed that it would be required to vacate with 30-day notice. *Ex. 9* [131:15-132:7, 233:12-21, 276:14-24].

- The *sole* basis for JTS's argument that the six-month option was exercised, was the payment of rent in the base amount of \$6,000, plus triple-net expenses, for the months of November and December 2014. *Ex. 9* (arguing that JTS's "lease payments for Nov and Dec have been at the base rent for [the] six month period, not the higher month to month period") [80:13-81:1, 633:20-24]. However, these payments were sent to Arlene Gilbert (an elderly widow living in St. George, Utah [218:5-12]), and not to the Gilbert Family's agent, Mr. Hagood,<sup>3</sup> and were not accompanied with a written exercise of the option [81:7-11, 132:3-11].

- While JTS belatedly asserted the six-month option had been exercised, internally, its principals stated that this argument was for gaining leverage to delay an eviction. *Ex. 9* (Dave Erlebach: "Good luck with that! It appears we have the option to extend the lease so we will exercise the option. If they evict us we will fight it which should take at lease 6 months."). JTS

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<sup>3</sup> Mrs. Gilbert's deposition testimony shows that she relied on Mr. Hagood to make all decisions regarding the Property and that she had no communications with JTS or its principals about extending the Lease. *Depo. of Arlene Gilbert* at 49:18-50:6, 54:8-55:10, 61:14-19. JTS's principals confirmed that they exclusively communicated with Mr. Hagood about the Third Lease Amendment [12:12-14, 30:18-21, 39:6-10, 54:22-55:7, 65:2-66:8]. Mrs. Gilbert was not aware of any modifications or amendments to the Lease. *Depo. of Arlene Gilbert* at 33:13-19.

could not show its purported intent to exercise the six-month option before the Third Lease Amendment expired [80:9-12, 133:8-15, 146:5-9, 147:21-148:11, 150:10-18, 686:7-687:11].

- Before the threat of eviction, JTS never insisted upon staying on the Property for the duration of the six-month option though April 15, 2015 [131:15-132:11]. Afterwards, JTS continued to tie its exit to completing the new building and asserted an earlier exit date of March 1, 2015. *Exs. 10-12, and 14-16* [144:16-145:17, 385:18-386:10, 567:4-9].

Based on the foregoing, the Court should find that the Lease expired on October 15, 2014, at the end of the Third Lease Amendment. The conduct of both JTS (as lessee) and the Gilbert Family's agent, Mr. Hagood (as lessor), shows that the six-month option was *not* exercised and that JTS's payment of rent for the months of November and December 2014 created an at-will or month-to-month tenancy, consistent with JTS's stated intent to leave the Property as soon as possible. *See Lewiston Pre-Mix*, 110 Idaho at 645. Significantly, the Gilbert Family's Notice of Termination is consistent with the above evidence that after October 15, 2014, JTS occupied the Property as an at-will or month-to month tenant. *Ex. 13* (asserting the at-will notice provision of Idaho Code § 55-208 and explaining why "the option to extend the Lease was not timely or properly exercised") [281:19-282:1]. The Notice of Termination, delivered on or about December 11, 2014 [89:15-20, 138:19-20], complied with Idaho statute to give JTS more than one-month notice to vacate. Idaho Code §§ 6-303(1) and 55-208(1).

Therefore, because JTS failed to vacate the Property by January 31, 2015 [90:16-18, 139:17-19], the Court should find that JTS is liable for unlawful detainer and order that CLC, as successor landlord,<sup>4</sup> be compensated for damages as discussed in *Section VI, infra*.

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<sup>4</sup> Notably, subsection 303(1) applies with equal force to "the successor in estate of [the lessee's] landlord," which in

**II. SECOND CLAIM FOR RELIEF (Am. Complaint at ¶¶ 65-72): JTS is liable for breach of contract because it failed to vacate the Property by January 31, 2015.**

Even assuming that the Lease was extended by JTS's payment of rent for the months of November and December 2014, at best, only the month-to-month option in subparagraph 3(b) of the Third Lease Amendment was exercised. For the same reasons identified and discussed above, the conduct of the parties demonstrates that the six-month option was *not* exercised and that following the 45-day Notice of Termination (which provided JTS more than one-month notice as would be required in a month-to-month tenancy under the Lease), JTS failed to timely vacate the Property by January 31, 2015 [90:16-18, 139:17-19]. Therefore, the Court should find that JTS is liable for breach of contract and order that CLC, as successor landlord under the Lease (*Ex. 1* at 6, "Binding Effect"), be compensated for damages as discussed in *Section VI, infra*.

The Court should also find that JTS is liable for breach of other provisions of the Lease, namely the "Maintenance and Repair" and "Surrender of Premises" provisions (*Ex. 1* at 3 and 5, respectively), which are discussed in *Section VI, infra*.

**III. THIRD CLAIM FOR RELIEF (Am. Complaint at ¶¶ 73-77): JTS is liable for breach of the implied covenant of good faith and fair dealing because it deprived the Gilbert Family and CLC the benefit of (a) actual notice and (b) rent and termination rights commensurate with JTS's occupation.**

Even assuming that the Lease was extended by JTS's payment of rent and that such payment can be construed as an exercise of the six-month option, JTS is still liable for breach of the implied covenant of good faith and fair dealing because it failed to give the Gilbert Family and CLC the benefit of (a) actual notice when it would vacate the Property and (b) rent and termination rights commensurate with JTS's indefinite representations about the length of its occupation.

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this case is CLC. Idaho Code § 6-303(1).

“In every contract there is an implied covenant of good faith and fair dealing, which ‘requires the parties to perform, in good faith, the obligations required by their agreement.’” *Drug Testing Compliance Group, LLC v. DOT Compliance Serv.*, 161 Idaho 93, 102-03, 383 P.3d 1263 (2016) (quoting *Silicon Intl. Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 552, 314 P.3d 593 (2013)). “A violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.” *Id.* (quoting *Idaho First Natl. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 824 P.2d 841 (1991)).

The Third Lease Amendment was the product of *JTS's* insistence—not the Gilbert Family—to remain on the Property only so long as necessary to complete its new building. *See Ex. 4* [24:2-5, 25:9-12, 57:25-58:3, 70:14-21]. Indeed, JTS had the option to extend for another full year through April 15, 2015 (*Ex. 1* at 2, “Option to Renew”), but asked for a lesser six-month term with a month-to-month option afterwards. *Ex. 4*. In exchange for this option, the Gilbert Family had a reasonable expectation of notice from JTS regarding a firm exit date, as evidenced by provisions in the Lease (*see Ex. 1* at 1, “Term of Lease,” 2, “Option to Renew,” and 5, “Time of Essence”), as well as Mr. Hagood’s communications with JTS in the months and weeks before the end of Third Lease Amendment. *Exs. 5, 6, and 7*. In reliance on JTS’s representations that it would vacate the Property sometime in December or January, the Gilbert Family listed the Property for sale in early October 2014, at the end of the Third Lease Amendment. *Ex. 7*. Knowing that the Property was listed for sale, JTS had a good faith obligation to notify the Gilbert Family and their designated agent, Mr. Hagood, whether JTS would be extending the Lease option and for how long [29:5-20]. This good faith obligation to give notice extended to CLC as the successor landlord under the Lease (*Ex. 1* at 6, “Binding Effect”).

By claiming a silent exercise of the six-month option in paying Mrs. Gilbert (an elderly widow in St. George, Utah) while simultaneously—and consistently—representing an exit date *before* the end of that six months, JTS first violated the implied covenant of good faith and fair dealing by nullifying, or at least significantly impairing, the Gilbert Family’s right (and CLC’s right as their successor) to actual notice when JTS would leave. Had JTS given notice that it would exercise the six-month option, then the Property likely would not have been listed for sale until a later date. Instead, when the Property was sold in November 2014, it was *not* represented to CLC that JTS would occupy through April 15, 2015 [275:16-22, 380:7-10, 461:12-17].

Second, by belatedly claiming a right to possess through April 15, 2015, while at the same time asserting termination sometime before that date, JTS also violated the implied covenant by depriving the Gilbert Family and CLC of the higher rent that JTS agreed to pay in exchange for the month-to-month option. *Ex. 3* at ¶ 3(b). In remaining silent, JTS hoped to both (i) continue paying a lesser amount of monthly rent and (ii) avoid committing to pay full rent for the next six months. This impaired the Gilbert Family and CLC’s right to the full amount of rent through April 15, 2015, which otherwise would have been due had JTS given notice for the six-month option.

Finally, JTS’s bad faith is further evidenced by its belated assertion of the six-month option, not for the purpose of actually occupying the Property until April 15, 2015, but to leverage against a notice of termination while simultaneously paying less rent. *Ex. 9* (Dave Erlebach: “Good luck with that! It appears we have the option to extend the lease so we will exercise the option. If they evict us we will fight it which should take at lease 6 months.”) [133:8-15]. Because of JTS’s failure to give notice, the Property was sold in November 2014 with the understanding that JTS was occupying as a month-to-month tenant [275:16-22, 380:7-10, 461:12-17]. JTS’s subsequent

actions in asserting the six-month option impaired the rights of the Gilbert Family and CLC to terminate the Lease with proper notice, which otherwise would have been completed by January 31, 2015, if JTS were up front about its month-to-month tenancy.

Therefore, because JTS's actions deprived the Gilbert Family and CLC of (a) actual notice and (b) rent and termination rights commensurate with JTS's occupation, the Court should find that JTS is liable for breach of the implied covenant of good faith and fair dealing and award CLC damages consistent with Section VI, infra.

**IV. FOURTH CLAIM FOR RELIEF (Am. Complaint at ¶¶ 78-83): JTS is liable for intentional injury to the Property because it purposefully instructed Idaho Power to remove the 480V Transformer without CLC's consent.**

When JTS gave the instruction to Idaho Power to cancel electrical services on or about February 23, 2015 (*Ex. 20* [288:2-24]), it knew that Idaho Power would enter the Property to remove the 480V Transformer [127:25-128:3, 308:5-8, 691:10-13]. Indeed, this was JTS's understanding from the beginning when the "temporary" transformer was installed. *See Ex. 220* (2/25/14: "Temp 6 months then remove @ later date . . . customer [JTS] will provide pavement replacement at time of removal") [116:4-13]. As discussed in subsection VI(B), infra, JTS's instruction to Idaho Power, without notice and the consent of CLC, was, *at a minimum*, a breach of the Lease. *Ex. 1* at 3, "Improvements" (stating that JTS "shall not reconstruct, remodel or change any part of the premises without the consent of the Lessor") [109:11-17, 128:4-17, 130:1-8, 156:15-21]. There was evidence that this breach was specifically intended to cause injury to the Property. JTS observed Peterbilt's inspection of the 480V power. Sometime later, JTS removed the 480V breaker panel, not because it needed the panel, but because it "sure as s\*\*\* [didn't] want to leave it behind!" *See Ex. 18*. In the end, JTS was "tempt[ed] to leave the [Property] a mess" for



CLC and, because of its instruction to Idaho Power, that is exactly what happened.

Consequently, the Court should find that JTS is liable for intentional injury to the Property and further award damages consistent with Section VI, *infra*.

V. **FIRST THROUGH THIRD COUNTERCLAIMS (Counterclaim at ¶¶ 24-43): The Court should dismiss JTS's counterclaims because JTS unlawfully detained the Property and breached the Lease, *supra*, and because the Notice of Termination and filing of this lawsuit does not constitute a constructive eviction.**

For the same reasons above, the Court should dismiss JTS's counterclaims. The Gilbert Family did not breach the Lease by issuing the Notice of Termination. And CLC did not breach the Lease by filing this action. Furthermore, even if JTS exercised the six-month option to extend the Lease through April 15, 2015—which it did not, *supra*—CLC did not constructively evict JTS.

“To constitute an eviction, either actual or constructive, there must be a disturbance of possession.” *Metzker v. Lowther*, 69 Idaho 155, 167, 204 P.2d 1025 (1949). Words alone and a notice of termination do not constitute a constructive eviction. *Id.* (upholding dismissal of the appellant's claim that a notice of forfeiture of contract was a “constructive eviction”); *Galindo v. Hibbard*, 106 Idaho 302, 305-06, 678 P.2d 94 (App. 1984) (distinguishing the landlord's actions to constructively evict<sup>5</sup> from a dismissed case where the landlord “simply . . . told [the tenant] he didn't want [him] to stay there any longer”). Similarly, merely filing a lawsuit without a physical interference, especially where there is no claim that the lawsuit is malicious or non-meritorious, does not constitute a constructive eviction. *JS Props., L.L.C. v. Brown and Filson, Inc.*, 389 N.J. Super. 542, 548-50, 914 A.2d 297 (2006) (surveying cases which conclude “that a landlord's filing of an eviction suit is not alone sufficient to support a tenant's constructive eviction claim”); *see*

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<sup>5</sup> In *Galindo*, the landlord the entered the premises, padlocked the tenant's stockyards, and announced “I'm taking over.” *Galindo*, 106 Idaho at 306.

also 49 Am. Jur. 2d *Landlord and Tenant* § 598 n. 8 (stating constructive eviction requires “a material act” by the landlord and that “[t]here is no ‘constrictive eviction’ if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment”).

Like the dismissed appellant in *Metzker*, in this case, JTS’s “possession was at all times undisturbed except by the [Gilbert Family and CLC] in enforcement of the contract.” *Metzker*, 69 Idaho at 158; *see also id.* at 160 (further explaining that the appellee’s “enforcement of the contract,” like this case, merely included (i) serving notices of forfeiture and (ii) commencing a lawsuit). Neither the Gilbert Family nor CLC undertook any action to enter the Property, to shut off utilities, to block access, or to otherwise interfere with JTS’s possession [112:8-113:25, 159:10-160:1, 395:6-23]. By the time that JTS abruptly vacated in the middle of February 2015 [318:8-15, 393:19-21], it had already asserted a wherewithal to “fight the edict” (*Ex. 9* [88:15-89:2]) and threatened to “su[e] to seek an injunction” [278:25-279:2], and had engaged legal counsel to accomplish the same [596:18-25, 631:5-10, 636:24-637:4, 638:5-16, 672:6-14, 687:12-689:7]. *See also e.g. Ex. 17* (1/29/15: “You can tell your client there is an unexpired term left in the lease and [JTS] has until April 15, 2015, to vacate the property.”) [98:17-21, 100:2-7]. Thus, JTS’s purported “assertion of a fear that the sheriff would arrive” and say, “Get out” [671:12-672:5], is “an unreasonable basis for a constructive eviction because such an occurrence could not lawfully occur in the absence of a valid direction from the court.” *JS Props.*, 389 N.J. Super. at 550 n. 3.<sup>6</sup>

JTS claims nothing more than CLC’s mere assertion of legal rights as grounds for

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<sup>6</sup> The reasoning of the court in *JS Props.* is particularly analogous to the facts of this case: “Since our laws and procedures do not permit the judicial removal of a tenant without notice and an opportunity to be heard, [which is also required under Idaho law,] we question the reasonableness of a tenant’s [JTS’s] decision to abandon a leasehold when merely faced with a lawsuit, particularly when there has been no showing that the landlord possesses far greater economic power than possessed by the tenant.” *Id.*

constructive eviction [641:20-643:19, 690:9-16]. Significantly, the alleged “special damages” incurred by JTS to “expedite its move” (*Counterclaim* at ¶¶ 30-31), were incurred *before* CLC discovered that the Property was abandoned and then changed the locks [395:6-12]. *Exs. 233 and 290* (summarizing JTS’s “January & February Expedited Costs” [680:15-21]). Thus, even assuming that changing the locks to the already abandoned building somehow “constructively evicted” JTS (*see Counterclaim* at ¶ 28 [639:4-12]), JTS still has no claim.

Finally, JTS’s claim for refund of a security deposit is considered in *Section VI, infra*. Because repairs to the Property, rent due by JTS, and the damages incurred by CLC exceed the amount of the deposit, CLC is entitled to a setoff and is not liable for a full refund to JTS.

**VI. DAMAGES: CLC should be awarded damages for JTS’s unlawful detainer, breach of contract,<sup>7</sup> and injury to the Property.**

When a holdover tenant is found liable for unlawful detainer, in addition to rent that is determined due, a landlord may recover any damages that are the proximate or direct result of the unlawful detainer. Idaho Code § 6-316; *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940, 539 P.2d 288 (1975); *see also Brooks v. Coppedge*, 71 Idaho 166, 170, 228 P.2d 248 (1951) (stating that a landlord is entitled to “three things: [1] restitution of the premises, [2] rent then due and unpaid, and [3] any damages alleged and proven in addition to the rent found due . . .”). These special damages may include the losses “sustained for a period subsequent to the unlawful detainer because the premises has remained unoccupied” because of the holdover tenant’s actions. C.S. Patrinelis, *Measure of Damages for Tenant’s Failure to Surrender Possession of Rented Premises*, 32 A.L.R.2d (1953) (cited with favor by *Texaco, supra*). Such damages may also be trebled. Idaho

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<sup>7</sup> “A violation of the implied covenant [of good faith and fair dealing] is a breach of the contract” and results in contract damages. *Idaho First Nat. Bank*, 121 Idaho at 289.

Code § 6-317. Importantly, as distinguished from consequential damages for breach of contract, *infra*, a reasonable understanding of the parties at the time of contracting is not required to show special damages for unlawful detainer. See *Brooks*, 71 Idaho at 170.

In addition to damages for unlawful detainer, a holdover tenant can also be contractually liable for both general and consequential damages, which result from the breach of a lease agreement. *Lamb v. Robinson*, 101 Idaho 703, 705, 620 P.2d 276 (1980); see also *Galindo*, 106 Idaho at 306-07. Consequential damages may include lost profits, which are recoverable if proven with reasonable certainty and shown to be within the contemplation of the parties at the time of contracting. *Lamb*, 101 Idaho at 705; *Galindo*, 106 Idaho at 307; see also *Idaho First Nat. Bank*, 121 Idaho at 289 (“As in other contract cases, a claimant may be entitled to consequential damages for breach of the implied covenant of good faith if ‘there is something in that contract that suggests that they were within the contemplation of the parties and are proved with reasonable certainty.’”). Consequential damages are reasonably certain if they are not speculative. *Galindo*, 106 Idaho at 307.

Finally, a plaintiff may also recover the reasonable cost to repair any property that is maliciously or intentionally destroyed by a defendant. Idaho Code § 18-7001; *State v. Hughes*, 130 Idaho 698, 703, 946 P.2d 1338 (1997); see also *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 101, 730 P.2d 1014 (1986) (recognizing that courts may provide a private cause of action when it is necessary to ensure the effectiveness of the statute thus providing an injured party right of action). Damages are calculated either by diminution of the property’s fair market value or the reasonable cost of repairs if the property is harmed but not destroyed. *Id.*

As discussed above, CLC has shown that after January 31, 2015, JTS was a holdover tenant

and, therefore, is liable for unlawful detainer and breach of the Lease. Because JTS failed to give notice of its abrupt abandonment in February 2015, caused damage to the Property when it finally vacated, delayed Peterbilt's occupation, and failed to make required repairs, as discussed below, the Court should award damages to CLC in addition to rent due through April 2015.

**A. CLC should be awarded rent due under the Lease through April 15, 2015.**

CLC purchased the Property anticipating that its tenant, Peterbilt, could take possession on February 1, 2015, the day after JTS was required to vacate according to the Notice of Termination [313:19-314:3, 380:2-6, 384:8-13]. Instead, JTS did not leave until the middle of February [318:8-15, 393:19-21] and, because of its instruction to remove the 480V Transformer, Peterbilt could not start occupying the Property until May [320:14-321:18, 397:1-3]. By preventing CLC from leasing the Property until that time, the Court should award CLC rent through *at least* April 15, 2015. (Coincidentally, if JTS had silently exercised the six-month option through April 15, 2015—as alleged, but not proven, *supra*—then it would have been obligated to pay this same amount of rent, plus the cost of repairs, *infra*.)

Testimony showed that JTS paid rent for one additional month, February, after being ordered to vacate [82:1-12]. For the remaining period through April 15, 2015, plus the amount that JTS was deficient for January and February, JTS should be ordered to pay the amount due under the Third Lease Amendment in accordance with the Notice of Termination. *Ex. 13* at 1 (stating “that pursuant to the Lease and despite Landlord’s termination of the Lease, monthly rent will continue to be due and payable”). Because JTS paid a security deposit in the amount of \$5,270.84 at the beginning of the Lease, to be applied toward rent due, the total amount of rent that JTS should be ordered to pay is **\$7,603.12** calculated as follows (*see Ex. 22*, “Rent Shortfall”):

Base Rent and NNN x 3.5 months <sup>8</sup>	\$28,333.96
less Jan. and Feb. rent paid by JTS	(\$15,460.00)
less Security Deposit	(\$5,270.84)
<b>TOTAL</b>	<b>\$7,603.12</b>

Should the Court find that JTS is responsible for the amount of time through May 1, 2015, when Peterbilt occupied the Property, then this amount should be increased to \$11,650.18. *Ex. 22.*

**B. CLC should be awarded special and consequential damages for its resulting liability under the Peterbilt Lease and the delay and expenses caused by JTS.**

Under the Lease, JTS agreed to timely surrender the Property in a condition that would allow a new commercial tenant to occupy and make use of the building. *See Ex. 1* at 5, “Surrender of Premises” and “Time of Essence.” Importantly, JTS also agreed that it would “not reconstruct, remodel or change any part of the premises without [the] consent of” CLC. *Id.* at 3, “Improvements” (emphasis added). JTS further agreed “to indemnify and hold [CLC] harmless from any damages, . . . liabilities, or expenses arising from the use and occupancy of the premises by” JTS, its agents, or “guests.” *Id.* at 2, “Liability Insurance,” and 5, “Indemnification of Lessor.”

As stated above, when JTS gave the instruction to Idaho Power to cancel electrical services on or about February 23, 2015 (*Ex. 20*), it knew that Idaho Power would enter the Property to remove the 480V Transformer [127:25-128:3, 308:5-8, 691:10-13]. Although JTS understood that it required the permission of CLC to reenter the premises [128:23-129:22], it failed to inform CLC that Idaho Power would be entering, tearing out the 480V Transformer, removing power, and leaving a hole in the parking lot. *See Exs. 220 and 286* [109:11-17, 128:4-17, 130:1-8, 156:15-21, 186:7-12, 396:9-12, 691:14-17]. Idaho Power would not have entered the Property to remove the 480V Transformer, but for JTS’s cancellation [308:13-24, 309:24-310:2]. Had Idaho Power known

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<sup>8</sup> As testified by Blake Jackson, this amount is adjusted for half the amount of April [414:24-415:5].

that JTS did not have the consent of the landlord, it would not have entered the Property, but would have contacted CLC [298:12-15]. Had CLC been contacted, it would have arranged for the 480V Transformer to remain so that power to the Property could be preserved [295:16-21, 298:4-11, 365:6-12]. Instead, because of JTS's instruction, power was removed and not restored for approximately two months until April 2015 [295:2-9, 321:13-18, 401:15-17]. Consequently, Peterbilt's occupation was delayed: first, by JTS's refusal to vacate by January 31, 2015 [316:18-317:14, 364:7-10]; and second, by JTS's instruction and removal of power in late February/early March. *Ex. 23* [323:8-324:10, 364:15-19, 532:16-25, 535:23-536:9].

JTS's instruction to Idaho Power without notice and the consent of CLC was, at best, a violation of the Lease (*Ex. 1* at 3, "Improvements") and, at worst, an intentional act of damage to the Property. *See Section IV, supra*. Either way, JTS is liable for the "damages, liabilities, and expenses" caused by its actions (*Ex. 1* at 2, "Liability Insurance"), which includes compensating for CLC's resulting liability under the lease between CLC and Peterbilt (the "Peterbilt Lease").

The un rebutted testimony of Blake Jackson confirmed that the Peterbilt Lease (*Ex. 21*) was entered before CLC closed its purchase of the Property in December 2014 [375:20-376:3, 377:17-21]. (Otherwise, CLC could not have obtained outside financing [375:9-376:10].) When the Peterbilt Lease was entered, it was understood that Peterbilt would take possession of the Property on February 1, 2015 [313:19-314:3, 380:2-6], and that rent would start on that "Commencement Date" [384:8-13]. *Ex. 21* at §§ 2.1(g) and 4.1. However, when JTS refused to vacate and unlawfully detained the Property after February 1, 2015, Peterbilt could not take possession and was obliged to extend its old lease one month [316:18-317:14, 364:7-10]. Later, when JTS subsequently instructed Idaho Power to cancel services, Peterbilt was forced again to extend its old lease another

two months through April 30, 2015. *Ex. 23* [323:8-324:10, 364:15-19]. During this time, Peterbilt continued to pay rent and utilities under the old lease. *Ex. 24* [324:4-19]. Because the old lease was in a smaller building, Peterbilt's planned expansion was delayed and Peterbilt lost profits. *Ex. 29* [316:6-14, 363:3-9]. Peterbilt also incurred the cost of an idle employee, who had been hired to work in the expanded location. *Ex. 25*. Peterbilt also paid for Idaho Power to restore power to the Property. *Ex. 26*. Under the Peterbilt Lease, CLC is liable for these costs incurred because of Peterbilt's delayed occupation of the Property.<sup>9</sup> *Ex. 21* at § 11.2, "Lessor Defaults" (stating that "any amount or amounts which Tenant advances on Lessor's behalf will be repaid by Lessor to Tenant"); *see also id.* at § 6.8, "Interruption of Business" (reserving additional remedies).

As a tenant operating a business under a "Commercial Lease Agreement" (*Ex. 1*), JTS reasonably understood at the time of entering the Lease that time was of the essence (*Ex. 1* at 5, "Time of Essence") and that the landlord expected the Property to be occupied by a new tenant upon termination. *See Ex. 1* at 2, "Use of Premises," and 5, "Surrender of Premises." Significantly, at the time the parties contracted for the final Third Lease Amendment, in April 2014, JTS expressly understood from Mr. Hagood that the landlord desired to have a new tenant or buyer "tak[e] the space over from [JTS]" as soon as it vacated. *Ex. 4* [21:6-22:13]. For this reason, Mr. Hagood continued to inquire from JTS about an exit date. *Exs. 5, 6, and 7* [237:23-238:5]. JTS, as suggested by its own protest, understood that a delay in vacating and causing a new tenant to operate without a building would cause "economic damage." *See Ex. 9* [85:13-86:4]. Because JTS agreed to indemnify the landlord against damages and liabilities caused by its actions (*Ex. 1* at 2,

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<sup>9</sup> Even if CLC's resulting liability to Peterbilt is somehow not established under the Peterbilt Lease, the parties' un rebutted course of dealing shows that CLC will reimburse Peterbilt for all costs incurred because of Peterbilt's delayed occupation [326:19-22, 409:11-411:1]. Curiously, JTS also argues for reimbursement [681:6-9].



“Liability Insurance,” and 5, “Indemnification of Lessor”), JTS reasonably contemplated CLC’s resulting liability to Peterbilt (as the new lessee) under a new lease agreement. (Again, however, such contemplation is *not* required to recover special damages for unlawful detainer, *supra*.)

Therefore, CLC has demonstrated that it is entitled to special and consequential damages from JTS for its unlawful detainer and breach of contract, respectively. *Brooks*, 71 Idaho at 170; *Galindo*, 106 Idaho at 307. CLC has proven its resulting liability to Peterbilt and calculation of damages (*Ex. 22*) with reasonable certainty [412:5-425:20]. *Galindo*, 106 Idaho at 307 (stating that “reasonable certainty does not demand proof with mathematical exactitude,” but requires “only that damages be taken out of the realm of speculation” (citations omitted)).

Rent/NNN for Old Lease ( <i>Exs. 22-24</i> )	\$14,587.92 <sup>10</sup>
Lots Profits ( <i>Exs. 22 and 29</i> )	\$45,973.00
Idle Employee ( <i>Exs. 22 and 25</i> )	\$7,696.22
Cost to Restore 480V ( <i>Exs. 22 and 26</i> )	\$7,929.00
TOTAL	<b>\$76,186.14</b>

Notably, the evidence is sufficient for the Court to conclude that the lost profits resulting from Peterbilt’s constricted operations is compensable. *Cf. Galindo*, 106 Idaho at 307 (concluding there was enough evidence to show future profits of a new business in the face of a first-year loss).

**1. JTS did not show that CLC’s damages were unmitigated or avoidable.**

A defendant who asserts an affirmative defense of avoidable consequences (also known as the mitigation-of-damages doctrine) bears the burden of proving that (1) a proposed means of mitigation was available and reasonable under the circumstances, (2) could be accomplished at a reasonable cost, and (3) was within the plaintiff’s ability. *McCormick Intl. USA, Inc. v. Shore*, 152 Idaho 920, 924, 277 P.3d 397 (2012). “Proof of the latter of these three [factors] requires more

<sup>10</sup> \$11,941.02 plus \$2,646.90. *Ex. 22*.

than a mere suggestion that a means of mitigation exists.” *Id.* Here, JTS has not demonstrated that CLC’s damages resulting from the Peterbilt Lease were avoidable or could have been lessened.

As discussed above, the listing of the sale of the Property in October 2014 and the timing of CLC’s purchase soon thereafter were occasioned by JTS’s intent to terminate the Lease. By committing to close on December 31, 2014 (*Ex. 8* at § 11), which required outside financing [374:17-20], there was no way for CLC to purportedly “avoid” the Peterbilt Lease. Because CLC is a single-purpose LLC operating in affiliation with Peterbilt and otherwise has no income stream [367:20-369:1], CLC was required to provide proof of a lease before closing [375:9-376:10]. If CLC had not entered the Peterbilt Lease and committed to Peterbilt’s tenancy, then it could not have closed on the Property. Thus, CLC’s liability to Peterbilt could not have been “avoided.”

JTS suggests that CLC could have rented a 480V generator [652:19-653:24] to temporarily satisfy Peterbilt’s power needs and accommodate an earlier move-in date. Because none of the three factors (availability, cost, and ability by CLC, *supra*) were addressed, this should be rejected.

JTS further suggests that CLC could have simply avoided closing on the Property altogether by invoking a due diligence clause. *See Ex. 8* at § 8. This also should be rejected. CLC purchased a unique real property for the sole purpose of leasing it to Peterbilt to operate a dealership [368:8-369:1, 372:16-373:2]. JTS provided no evidence that an alternative property was available or that CLC and Peterbilt could have gone elsewhere. (They could not [373:3-374:3, 380:20-381:1, 566:16-24].) Further, because JTS refused to leave in December 2014, during the period when the due diligence clause could have been exercised (*Ex. 8* at § 8), CLC had *no* duty to mitigate. *Consol. AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 230, 912 P.2d 115 (1996) (holding there is no obligation to mitigate damages if the lessee has not abandoned the property).

Accordingly, the Court should deny JTS's affirmative defense and award CLC all damages. CLC and Peterbilt did not "passively suffer[] economic loss," but expended every reasonable effort to avoid the damages caused by JTS. *McCormick*, 152 Idaho at 924.

2. **Alternatively, and at a minimum, CLC should be awarded consequential damages for the additional rent that it lost from Peterbilt.**

Even if CLC somehow does not meet its burden to show special and consequential damages, and regardless of CLC's resulting liability to Peterbilt under the Peterbilt Lease, *supra*, CLC has shown that the Property could not be occupied until the end of April 2015 because of JTS's actions. The Property was purchased by CLC for the sole purpose of leasing it to Peterbilt [367:20-369:1]. Because JTS was itself a commercial tenant paying rent, JTS *at least* understood that the Property would be rented to a new tenant and that the new tenant would pay rent. *See e.g. Ex. 4*. During the months of February, March, and April 2015, when Peterbilt could not move into the building, it did not pay any rent to CLC, and, consequently, CLC was obliged to take capital contributions (ultimately paid by Peterbilt) to make the mortgage payments [408:8-409:5]. JTS has absolutely no argument or evidence to satisfy its affirmative burden of proof that CLC could have leased the Property to another temporary tenant before May 2015 or for an equal amount of rent that Peterbilt would have paid under the Peterbilt Lease. Furthermore, JTS has no argument or evidence to show that the amount of rent paid by Peterbilt is unreasonably high. The rent determined by CLC was based upon the actual purchase price [378:3-13]. Therefore, alternatively, *and at a minimum*, the Court should award damages for the additional rent that CLC would have realized from Peterbilt in the amount of **\$8,375.00, plus any other amounts not paid by JTS.**<sup>11</sup>

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<sup>11</sup> This amount is calculated by \$8,000 base rent due under the Peterbilt Lease (*Ex. 21* at § 2.1(b) [379:5-10]) for three months from February through April 2015, subtracted by the base rent for this same period (\$6,250 x 2.5 months

**C. In addition to rent due and consequential damages, CLC should be awarded the costs of repairs to the Property.**

Under the Lease, JTS was undisputedly responsible for the maintenance and repair of the Property during its occupation, including maintaining the HVAC system, and was obligated to surrender the Property in the same condition as it existed at the beginning of the Lease. *Ex. 1* at 3, “Maintenance and Repair,” and 5, “Surrender of Premises” [107:2-25, 131:1-6, 151:16-152:1, 153:5-13, 157:4-6]. Thus, in addition to rent due and the damages above, JTS should be ordered to pay **2,600.00**<sup>12</sup> for the costs of repairs to the Property. *Exs. 22, 27, and 28* [204:13-15, 327:18-328:2, 329:1-4, 396:17-19]. It makes no difference that these costs were paid by Peterbilt. The repairs would have been necessary regardless of who purchased and occupied the Property. JTS did not provide any evidence that these repairs were unnecessary or unreasonable [213:20-214:10].

**D. The Court should treble the amount of CLC’s damages because JTS acted in bad faith to delay vacating the Property and caused special damages.**

Idaho Code § 6-317 allows for trebling of damages for a tenant found liable of unlawful detainer. Because, as discussed above, JTS acted in bad faith to delay vacating and caused special damages, the Court should exercise its discretion to enter judgment for three times the amount of all damages awarded: **\$236,358.42** [\$76,186.14 + \$2,600] x 3).

**VII. ATTORNEY FEES**

CLC reserves the right to request an award of attorney fees and costs upon entry of final judgment consistent with Idaho R. Civ. P. 54(d)(5), Idaho Code § 6-324, and the Lease (*Ex. 1* at 5, “Enforcement Expenses”).

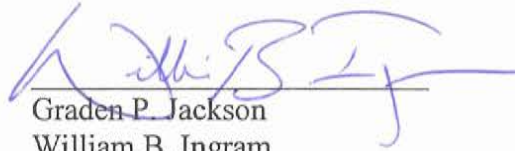
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through April 30, 2015), which JTS should be ordered to pay according to *subsection VI(A), supra*. Importantly, if JTS is ordered to pay less base rent or not required to pay triple-net expenses, then this calculation should increase by that amount. *See Ex 21* at §§ 4.4, 4.5, and 6.6 (Peterbilt responsible for payment of triple-net expenses and utilities).

<sup>12</sup> This includes repairs for the holes in the building, hole in the floor, and repairs to the HVAC. *Exs. 22, 27, and 28*.

DATED this 20<sup>th</sup> day of November, 2017.

STRONG & HANNI

A handwritten signature in blue ink, appearing to read "William B. Ingram", written over a horizontal line.

Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

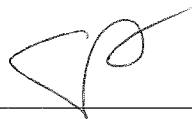
I hereby certify I caused a true and accurate copy of foregoing *Closing Trial Brief* to be delivered via email, to the following counsel of record this 20<sup>th</sup> day of November, 2017.

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and Defendant executed three separate written amendments to the Lease Agreement. The First Amendment extended the lease term to April 15, 2014. (Ex. 2).

In 2014, Defendant had a new facility under construction at different location. Defendant planned on moving into its new facility once it was finished. Defendant was not certain when it would be completed, but believed it would be done by late 2014 to early 2015.

In April 2014, Defendant, through Sheri Johnson, and Gilbert, through Lincoln Hagood, discussed plans for renewing the lease beyond April 15, 2014. In an April 1<sup>st</sup> email to Ms. Johnson, Mr. Hagood noted that Gilbert knew about Defendant's plan to move into a new facility and advised Ms. Johnson that Gilbert may have buyers interested in the real property. (Ex. 4). He presented Ms. Johnson with various renewal terms at different rates, which included a month-to-month, a six-month, and a one-year term.

On April 10<sup>th</sup>, Ms. Johnson told Mr. Hagood that Defendant "would like to do a 6 month lease with the option to go month to month for an additional 3-6 months." (*Id.*). The parties agreed to a six-month extension. Defendant and Gilbert executed the Third Amendment to the Lease Agreement in mid-April 2014. (Ex. 3). The Third Amendment extended the lease term to October 15, 2014. The Third Amendment included a renewal option that provided:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

(Ex. 3, ¶3). The parties agreed that "All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect." (*Id.*, ¶4).

In summer-fall 2014, Gilbert and Defendant discussed possibly extending the lease beyond October 15, 2014. In its communications with Gilbert, Defendant reaffirmed its intent to



vacate the property as soon as it could occupy its new facility. Due to the uncertainty about when it would be able to move into its new facility, Defendant could not give Gilbert a definite answer on when it would move out, whether it intended to renew, and if so, for how long. Defendant's officers told Mr. Hagood that they hoped to move out by December, but that it could be as late as February or March. (Exs. 5-7). Mr. Hagood asked Defendant to keep him informed of its plans regarding the Property.

Defendant paid rent to Gilbert in the amount of \$6,000/month, plus triple net, for November and December, 2014. Gilbert accepted those rent payments. Unlike Gilbert and Defendant's previous lease renewals, which they put in writing before the lease term expired, they did not execute a written agreement or amendment extending the lease beyond October 15, 2014. They did not have an oral agreement to extend the lease beyond October 15<sup>th</sup>.

In early December 2014, Mr. Hagood notified Defendant that Gilbert would sell the Property and that the new tenant wanted to occupy it ASAP. (Ex. 9). Gilbert and Plaintiff wanted to close before December 31, 2014.

On December 11, 2014, Gilbert sent a written notice to Defendant terminating the lease and requesting that Defendant vacate and surrender possession of the property, including removing its trade fixtures, fencing, and personal property, by January 31, 2015. (Ex. 13).

Gilbert and Plaintiff closed on the Property on or about December 31, 2014. On January 29, 2015, Defendant's counsel informed Plaintiff's counsel that Defendant would not vacate the Property until April 15, 2015, arguing that it exercised the Third Amendment's 6-month renewal option by paying the \$6,000/month base rent, plus triple-net expenses. (Ex. 17).

Defendant vacated the Property on or about February 15, 2015. Prior to vacating, Defendant's officers discussed making repairs and removing items from the Property. (Ex. 18).

Defendant made no repairs to the Premises after it vacated the Property. After Defendant vacated the Property, it instructed Idaho Power to remove a 480V electrical transformer that Defendant installed in February 2014.

Plaintiff is a holding company for Peterbilt. Plaintiff bought the Property intending to lease it to Peterbilt. Plaintiff needed to have proof of a lease in order to close on the Property. Plaintiff and Peterbilt entered into a lease agreement sometime before Plaintiff closed on the Property. (Ex. 21, "Peterbilt Lease"). Peterbilt wanted to occupy the Property on February 1, 2015; however, it was unable to occupy the Property until May 2015. Plaintiff presented evidence of damages it and Peterbilt incurred as a result of being unable to occupy the Property until May 2015.

Plaintiff filed this lawsuit on January 22, 2015. In its Verified Amended Complaint, Plaintiff alleges four claims for relief: unlawful detainer; breach of contract; breach of the implied covenant of good faith and fair dealing; and intentional and malicious injury to property. Defendant filed counterclaims for breach of contract – constructive eviction; refund of security deposit; and refund of pro rata share of February 2015 rent. Third party defendant Colliers Paragon, LLC was dismissed out of the case by stipulation.

## **II. Standard of review**

The trial court is the fact-finder in a bench trial. "[I]t is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses." *Big Wood Ranch, LLC v. Water Users' Ass'n of Bradford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 230 (2015). "Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Id.* An appellate court "will liberally construe

the trial court's findings of fact in favor of the judgment entered.” *Id.* The trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Id.*; I.R.C.P. 52(a). Preponderance of the evidence is the civil case standard. *Ebert v. Newton*, 97 Idaho 418 (1976).

### **III. Discussion**

#### **A. Defendant was a month-to-month or at-will tenant after October 15, 2014**

The main issue in this lawsuit is whether Defendant properly exercised the Third Amendment’s 6-month renewal option. Based on a review of the record and applicable law, the Court finds that Defendant did not properly exercise the 6-month option, but carried on as a month-to-month or at-will tenant after October 15, 2014.

The plain language of the Lease Agreement required all amendments, modifications, or changes to be in writing and signed by the parties. Defendant and Gilbert put all of their previous renewals in writing before the lease term expired. The Third Amendment did not alter or eliminate the writing requirement. The Lease Agreement required any renewal, including a renewal under the Third Amendment, to be put in writing.

A provision in a contract that requires modifications to be in writing can be avoided by the parties to the contract where their words, acts, or conduct amount to a waiver, modification, rescission, or abandonment of that provision, or where a party by his acts or conduct is estopped to rely on it. *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass'n.*, 133 Idaho 669, 675 (Ct. App. 1999). Such a waiver or modification “may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.” *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717 (2014); *Idaho Migrant Council, Inc. v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 806 (Ct.App.1986) (“[A]n implied waiver occurs where a party's neglect to insist upon enforcing a right results in prejudice to another party.”) “Waiver is foremost a question of

intent,” and whether a waiver or modification has been proven is for the trier of fact. *Pocatello Hosp., LLC*, 156 Idaho at 718-719; *Dennett v. Kuenzli*, 130 Idaho 21, 26 (Ct. App. 1997). There must be “substantial evidence” of a waiver; “in order to establish waiver the intention to waive must clearly appear...” *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 520 (1982). Leniency on the part of the lessor in demanding or ensuring strict compliance with contract provisions does not necessarily equal waiver. *Id.* at 522. Waiver of one contract provision does not equal waiver of all contract provisions. *Id.*; 13 Williston on Contracts § 39:18 (4th ed.); 5 Causes of Action 2d 357 (1994). A party who waived one provision may still insist on strict compliance with other contract provisions. *Ritchie*, 103 Idaho at 522. Waiver should be decided on a case by case basis. *Id.* at 521.

Per the terms of the Lease Agreement and the Third Amendment, and consistent with the parties’ prior conduct, Defendant and Gilbert needed to execute a written agreement to renew the lease. That was not done. Nothing the record demonstrates a waiver of the writing requirement.

The parties’ intent is important in determining if a lease was renewed and the term of the renewal. *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho 640 (Ct. App. 1985). Generally, a fixed-term tenancy becomes a tenancy at will when, after the lease term expires, the landlord expressly or implicitly permits the tenant to stay on the property, the landlord accepts rent from the tenant, and the parties have not reached an agreement to extend the lease. *Id.*; *Texaco, Inc. v. Johnson*, 96 Idaho 935 (1975); *Johnston v. Schmidt*, 76 Idaho 470 (1955); 45 A.L.R.2d 827 (1956). A tenancy at will may be terminated by giving written notice to the tenant at least one (1) month before the termination date/date to vacate. *Id.*; I.C. § 55-208.

Until the present dispute arose, neither Defendant nor Gilbert intended to renew the lease for a six-month term after October 15, 2014. They did not have an agreement to renew the lease.

In discussions leading up to October 2014, Defendant made clear that it intended to move out as soon as its new facility was finished. Defendant's proposed exit dates were less than six months after October 15, 2014. Ms. Johnson told Mr. Hagood that after the lease expired in October 2014, Defendant wanted to go "month to month for an additional 3-6 months." (Ex. 4). Defendant's communications did not demonstrate intent to be any more than a month-to-month tenant after October 15, 2014. Gilbert intended to sell the property. Defendant's continued possession of the Property and Gilbert's acceptance of the \$6,000/month rent checks for November and December 2014 did not demonstrate intent to extend the lease for six months. *See* 29 A.L.R.4th 903 (1984). Defendant was a month-to-month tenant after October 15, 2014. This is consistent with Defendant's stated intent to vacate as soon as it could move to its new facility.

B. Defendant is liable for unlawful detainer and breach of contract

Defendant is liable for unlawful detainer because it failed to vacate the property within the timeframe set forth in the notice to vacate. I.C. §§ 6-303(1); 55-208(1); *Schmidt, supra*. Plaintiff, as the successor landlord, is entitled to compensation for damages caused by the unlawful detainer. I.C. § 6-303(1). "I.C. s 6-316 allows a landlord in an unlawful detainer action to recover, in addition to possession of his property, damages and rent found due. The landlord who seeks to recover damages from the holdover tenant, has the burden of proving that the claimed damages are the proximate or direct result of the unlawful detention." *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940 (1975); *Brooks v. Coppedge*, 71 Idaho 166, 170 (1951). Damages may include losses "sustained for a period subsequent to the unlawful detainer because the premises has remained unoccupied[.]" 32 A.L.R.2d 582 (1953).

The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages. *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991) (plaintiff has the burden of proving the existence of a contract and

the fact of its breach); *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985) (the damages recoverable must be caused by the breach); *Watkins Co., LLC v. Storms*, 152 Idaho 531, 539, 272 P.3d 503, 511 (2012) (the amount of damages must be proved).

*Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278 (2013). There is no dispute that the parties had a contract. Defendant is liable for breach of contract because it failed to vacate the Property after its term expired; removed the transformer after the term expired and without Plaintiff's permission<sup>1</sup>; and failed to make repairs. (*See*, Ex. 1, "Surrender of Premises;" "Time of Essence;" "Maintenance and Repair;" and "Improvements"). Defendant breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option. *See Drug Testing Compliance Grp., LLC v. DOT Compliance Serv.*, 161 Idaho 93 (2016).

Plaintiff may recover damages caused by the breach of contract. *Mosell Equities, LLC, supra*. "Consequential damages for a breach of contract are recoverable if they were within the reasonable contemplation of the parties at the time of contracting and have been established with reasonable certainty." *Galindo v. Hibbard*, 106 Idaho 302, 306-07 (Ct. App. 1984); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 97 (1986) (The damages must be reasonably foreseeable at the time of the contract). "The test for 'reasonable certainty' has been held by this court to require only that the damages be taken out of the realm of speculation." *Circle C Ranch Co. v. Jayo*, 104 Idaho 353, 356 (1983). "These requirements apply to damages for lost profits arising from breach of a lease agreement, unless the agreement provides a different measure of damages." *Galindo*, 106 Idaho at 306-307 (citing *Lamb v. Robinson*, 101 Idaho 703 (1980)).

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<sup>1</sup> There is no private cause of action for a violation of I.C. § 18-7001. A private cause of action is not necessary to assure the effectiveness of the provision. *See Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171 (1996); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94 (1986).



In the Lease Agreement, Defendant agreed “to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee’s agents, employees or customers or Lessee’s guests caused by either negligent or intentional acts,” (Ex. 1, “Liability Insurance”); and to “indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of the Lease.” (Ex. 1, “Indemnification of Lessor”).

Based on Defendant’s unlawful detainer and breach of contract<sup>2</sup>, the terms of the Lease Agreement and amendments, and the applicable law, Plaintiff may recover the following damages from Defendant: rent due under the Lease Agreement through April 15, 2015 (\$7,603.12) (Ex. 22); damages and costs caused by Defendant’s removal of the transformer (\$7,929.00) (Exs. 22 and 26); Peterbilt’s rent and triple-net for its old lease (\$14,587.92) (Exs. 22-24); cost of Peterbilt’s idle employee (\$7,696.22) (Exs. 22 and 25); costs to repair the Property (\$2,600.00) (Exs. 22, 27, and 28); and Peterbilt’s lost profits (\$45,973.00) (Exs. 22 and 29). Defendant did not show that Plaintiff failed to mitigate its damages. *See McCormick Int’l USA, Inc. v. Shore*, 152 Idaho 920 (2012); *Consol. AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228 (1996). The record does not support Defendant’s other affirmative defenses.

Plaintiff asks the Court to award treble damages. I.C. § 6-317; *Barth v. Canyon Cty.*, 128 Idaho 707 (1996). “[A]bsent a showing of malice, wantonness or oppression, treble damages cannot properly be awarded in an action for unlawful detainer.” *Mecham v. Nelson*, 92 Idaho 783, 789 (1969). Plaintiff failed to show that Defendant’s conduct was malicious, wanton, or oppressive. The Court cannot award treble damages.

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<sup>2</sup> Breach of the implied covenant of good faith and fair dealing is a breach of contract theory. *DOT Compliance Service*, 161 Idaho at 103.

The total award is **\$86,389.26**.


In light of the Court's decision, Defendant cannot prevail on its counterclaims. Defendant's security deposit is set off against Plaintiff's award.

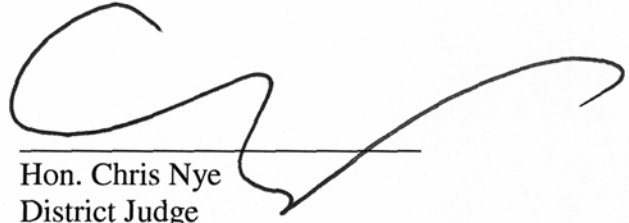
**IV. Conclusion**

For the reasons set forth above, Plaintiff is entitled to an award of \$86,389.26 on its unlawful detainer and breach of contract claims. Defendant cannot recover on its counterclaims.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that Plaintiff is entitled to a total award of \$86,389.26. IT IS FURTHER ORDERED that Plaintiff's counsel is to prepare a final judgment that is consistent with these findings of fact and conclusions of law

DATED: January , 2018

  
\_\_\_\_\_  
Hon. Chris Nye  
District Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

Signed: 1/5/2018 11:47 AM

Robert Janicki  
STRONG & HANNI  
102 South, 200 East, Suite 800  
Salt Lake City, Utah 84111

- U.S. Mail, postage prepaid
- Hand-delivered
- Facsimile (801) 596-1508
- Email:  
[rjanicki@strongandhanni.com](mailto:rjanicki@strongandhanni.com)

Rebecca Rainey  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Suite 630  
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[rar@frhtriallawyers.com](mailto:rar@frhtriallawyers.com)

Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Suite 300  
Boise, Idaho 83702

- U.S. Mail, postage prepaid
- Hand-delivered
- Facsimile
- Email:  
[kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)



\_\_\_\_\_  
Deputy Clerk

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

---

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**MEMORANDUM OF  
ATTORNEY FEES AND COSTS**

Case No. CV15-587

Judge Chris Nye

---

Pursuant to Idaho Rule of Civil Procedure 54(d)(4) and (e)(5), Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this memorandum of attorney fees and costs, and respectfully requests that the amounts stated herein be included with the Court’s final judgment.<sup>1</sup> This memorandum is based on the *Findings of Fact and Conclusions of Law* entered by the Court on January 4, 2018, and supported by the accompanying *Affidavit of William B. Ingram* (“Attorney Aff.”), **Exhibit 1**, and below-cited

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<sup>1</sup> In accordance with the Court’s order, a proposed judgment is submitted concurrently herewith. Idaho R. Civ. P. 2.3

authorities and contract provision.

**ATTORNEY FEES**

Pursuant to Contract or Statute. In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

Idaho R. Civ. P. 54(e)(1).

Attorney fees. In any action brought under the provisions of this chapter [Forcible Entry and Unlawful Detainer], except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees. . . .

Idaho Code § 6-324.

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney’s fee to be fixed by such court, in addition to the costs allowed by law.

*Commercial Lease Agreement* (Ex. 1) at 5.

As the prevailing party, CLC is entitled to the following amounts of attorney fees and legal research costs, which were reasonably incurred in this action in accordance with Idaho R. Civ. P. 54(e)(3), as set forth in the *Affidavit of William B. Ingram*:

<u>Description</u>	<u>Amount</u>
Attorney Fees	\$.....177,137.00
Legal Research Costs	\$.....1,597.72
<b>TOTAL</b>	<b>\$.....178,734.72</b>

*Attorney Aff.* (Ex. 1) at ¶¶ 6-29 and Sch. 1 thereto.

**COSTS**

Parties Entitled to Costs. Except when otherwise limited by these rules, costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Idaho R. Civ. P. 54(d)(1)(A).

As the prevailing party, CLC is entitled to the following costs as a matter of right in accordance with Idaho R. Civ. P. 54(d)(1)(C):

<u>Description</u>	<u>Amount</u>
Court Filing Fees	\$.....816.00
Service Fees	\$.....706.80
Witness Fees	\$.....132.85
Transcripts (deposition and trial)	\$.....3,204.67
Copying Charges	\$.....382.20
<b>TOTAL</b>	<b>\$.....5,242.52</b>

*Ingram Aff.* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto.

CLC submits that it is further entitled to the following discretionary costs in accordance with Idaho R. Civ. P. 54(d)(1)(D):

<u>Description</u>	<u>Amount</u>
Travel Costs	\$.....4,946.72
Long Distance Telephone Charges	\$.....5.70
Misc. Costs (FedEx and admission fees)	\$.....531.46
<b>TOTAL</b>	<b>\$.....5,483.88</b>

*Ingram Aff.* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto.

DATED this 17<sup>th</sup> day of January, 2018.

STRONG & HANNI

*/ s / William B. Ingram*

---

Graden P. Jackson  
 William B. Ingram  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 17<sup>th</sup> day of January, 2018.

Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

( ) U.S. Mail, postage prepaid  
( ) Facsimile  
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[kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)

Rebecca A. Rainey  
Angie Perkins  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Suite 630  
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[angie@frhtriallawyers.com](mailto:angie@frhtriallawyers.com)

*/ s / Sariah Runnells, legal secretary*

---

# EXHIBIT “1”

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

---

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**AFFIDAVIT OF  
WILLIAM B. INGRAM**

Case No. CV15-587

Judge Chris Nye

---

STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE        )

Pursuant to Idaho Rule of Civil Procedure 54(e)(5), William B. Ingram, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for Plaintiff Caldwell Land & Cattle, LLC (“CLC”) in the above-captioned action (the “Action”) against Defendant Johnson Thermal Systems, Inc. (“JTS”).

3. I am a shareholder with the law firm Strong & Hanni, which has represented CLC throughout this Action.

4. In preparing this affidavit, I have reviewed the time, billing, and expense records associated with this Action that have been maintained by Strong & Hanni in the ordinary course of business, as well as the briefings of the parties and orders by the Court that have been filed in the Lawsuit.

5. I am licensed to practice law in the State of Utah (admitted *pro hac vice* in this Action) and have been a member in good standing of the Utah State Bar Association since 2005.

**Time Spent and Work Performed by Attorneys in this Action**

6. I am lead trial counsel and have represented CLC in this Action since approximately June 2017.

7. Since becoming lead trial counsel, I have actively participated in and overseen all aspects of this Action, and am personally familiar with the nature and amount of legal work that has been performed; I am also personally familiar with the other individual lawyers who performed work on this Action before my representation.

8. The legal services that I have rendered for CLC related to this Action have included, among other things, reviewing pleadings and memoranda filed with the Court; preparing for and defending the deposition of Graden P. Jackson (noticed and taken by JTS); reviewing and exchanging correspondence with counsel for JTS; coordinating and preparing for the deposition



of Idaho Power; reviewing deposition transcripts and preparing witness examinations and exhibits for trial; reviewing and drafting supplemental discovery and pretrial disclosures, objections, motions in limine, and the opening trial brief; preparing and appearing for telephonic pretrial hearings; coordinating appearances of witnesses for trial; consulting with the client; preparing for, attending, and presenting evidence in support of CLC's claims at trial and defending against JTS's counterclaims; reviewing trial transcripts and drafting the closing trial brief; and other related services.

9. The hourly rate for my services in this Action has been \$260.00 and \$270.00.

10. I have also been assisted in this Action by Graden P. Jackson and Ryan C. Bullock who are attorneys with Strong & Hanni.

11. Graden P. Jackson (admitted *pro hac vice* in this Action) is a shareholder with Strong & Hanni and has been a member in good standing with the Utah State Bar Association since 1999. The legal services that Mr. Jackson has rendered for CLC related to this Action have included, among other things, consulting with the client; drafting and exchanging numerous correspondence and communications with counsel for JTS; reviewing pleadings, summary judgment motions, and memoranda filed with the Court; reviewing discovery responses; preparing for and participating in mediation with JTS; preparing for and defending the depositions of CLC, Blake Jackson, Bruce Adams, and Gary Sommercorn; preparing for and being deposed (in a deposition noticed and taken by JTS); preparing for and taking the deposition of Idaho Power; reviewing deposition transcripts and preparing witness examinations and exhibits for trial; reviewing pretrial disclosures, objections, motions in limine, and opening trial brief; preparing and appearing for telephonic pretrial hearings; preparing for, attending, and presenting evidence in

support of CLC's claims at trial and defending against JTS's counterclaims; reviewing the closing trial brief; and other related services.

12. Mr. Jackson has represented the Jackson Group, CLC, and other related entities since approximately 2008.

13. The hourly rate for Mr. Jackson's services in this Action has been between \$225.00 and \$290.00.

14. Ryan C. Bullock (admitted *pro hac vice* in this Action) is a shareholder with Strong & Hanni and has been a member in good standing with the Utah State Bar Association since 2008. The legal services that Mr. Bullock has rendered for CLC related to this Action have included, among other things, drafting and preparing pleadings, summary judgment motions, and memoranda filed with the Court; drafting discovery requests, subpoenas, and discovery responses; reviewing and preparing document productions; drafting a mediation brief; preparing for and taking the depositions of JTS, Gus Gustaveson, Jeff Johnson, Dave Erlebach, Sheri Johnson, Lincoln Hagood, and Arlene Gilbert; reviewing deposition transcripts and exhibits, and preparing witness examinations and exhibits for trial; drafting pretrial disclosures, objections, and motions in limine; preparing and appearing for telephonic pretrial hearings; drafting trial subpoenas and coordinating appearances of witness; and other related services.

15. The hourly rate for Mr. Bullock's services in this Action has been between \$200.00 and \$220.00.

16. Mr. Jackson was previously assisted in this Action by Roman R. Groesbeck, who is a former associate of Strong & Hanni and member in good standing with the Utah State Bar Association. Mr. Groesbeck provided assistance and support from the commencement of the

Action until approximately June 2015. His legal services included, among other things, researching, drafting, and preparing pleadings; drafting summary judgment briefs; and other related services.

17. The hourly rate for Mr. Groesbeck's services in this Action was \$195.00 and \$200.00.

18. I am personally familiar with Strong & Hanni's billing practices, including the time, manner, and method of recording and billing for legal services performed.

19. All Strong & Hanni attorneys who provided services in this Action, namely Messrs. Jackson, Bullock, Groesbeck, and myself, have logged their time in the ordinary course of business, consistent with Strong & Hanni's standard billing practices, at the rates identified above.

20. Consistent with Strong & Hanni's standard billing practices, monthly statements have been regularly maintained for this Action, which are compiled from each attorney's contemporaneous time records and memorialize what services were performed, when, by whom, and the amount of time expended.

21. The hours expended, hourly rates, attributable fees, and descriptions of the work performed by each attorney in this Action (reviewed and redacted for privilege<sup>1</sup>) is reflected in the attached **Schedule 1**, which has been generated from the above-described billing records maintained by Strong & Hanni.

22. The total attorney fees for legal services rendered by Strong & Hanni in this Action through January 15, 2018, is \$177,137.00 (\$185,137.00 less courtesy discounts of \$8,000.00).

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<sup>1</sup> By attaching these descriptions, CLC and Strong & Hanni do not waive the attorney-client and work product privileges.

23. The total legal research costs incurred by Strong & Hanni in this Action through January 15, 2018, is \$1,597.72.

**Reasonableness of Attorney Fees**

24. I have reviewed Strong & Hanni's billing statements from each month to ensure that the rates, services performed, amount of time, and fees charged have been fair, reasonable, and appropriate.

25. Strong & Hanni periodically reviews its rates to ensure that they are consistent with the market rates charged by law firms of comparable size and experience in the area.

26. I have also conferred with other shareholders of Strong & Hanni who are licensed to practice in Idaho to confirm that the hourly rates billed in this Action are reasonable for services of a similar nature under the facts and circumstances of this case.

27. Based on my experience, I believe that the hours expended by each attorney and the amounts billed in this Action have been reasonably and necessarily incurred, and are in accordance with the standards in the legal community for similar work of similarly skilled attorneys under similar circumstances. In particular, this Action has involved, among many other things, (a) claims and counterclaims asserted by both parties; (b) third-party claims asserted by JTS (previously dismissed); (c) numerous settlement communications and participation in formal mediation; (d) review and production of written discovery and numerous documents; (e) ten depositions (six taken by CLC and four taken by JTS); (f) engaging with four attorneys retained by JTS; (g) preparation and filing of motions for summary judgment filed by both parties, motions to exclude evidence, and pretrial briefing; (h) calculations of lost costs and lost profits evidence; (i) preparation for and presentation of a three-day trial, including eleven witnesses and many

exhibits; (j) post-trial briefing; and (k) the Court's resolution of several facts and conclusions of law.

28. CLC has prevailed on its claims for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, and has been awarded \$86,389.26 in damages for rent due, damage and repair to property, lost costs, and lost profits; whereas JTS has been unsuccessful in its affirmative defenses and counterclaims for breach of contract and constructive eviction. *Findings of Fact and Conclusions of Law (1/4/18)*.

29. Both parties prayed to recover attorney fees and costs in their respective pleadings according to their written contract and as allowed by statute.

#### Costs

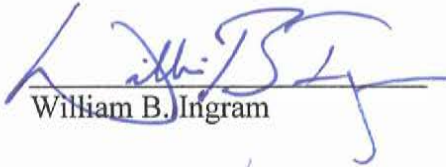
30. Strong & Hanni has also incurred various costs on behalf of CLC related to this Action, including court filing fees, service fees, witness fees, copying charges, and transcripts for deposition and trial, which are identified and summarized in **Schedule 1**.

31. The total costs incurred by Strong & Hanni on behalf of CLC in this Action through January 15, 2018, is \$10,726.40 (\$12,324.12 total expenses, less legal research costs of \$1,597.72, *supra*).

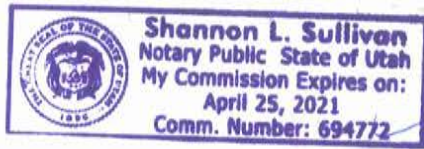
32. For the same reasons above, I believe that these costs have been reasonably and necessarily incurred in this Action.

Further your affiant sayeth naught.

DATED this 17<sup>th</sup> day of January, 2018.

  
William B. Ingram

SUBSCRIBED AND SWORN BEFORE ME this 17<sup>th</sup> day of January, 2018.

  
**Shannon L. Sullivan**  
Notary Public State of Utah  
My Commission Expires on:  
April 25, 2021  
Comm. Number: 694772



**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **AFFIDAVIT OF WILLIAM B. INGRAM** to be delivered via email, to the following counsel of record this 17<sup>th</sup> day of January, 2018.

Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
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[angie@frhtriallywers.com](mailto:angie@frhtriallywers.com)

*/ s / Sariah Runnells, legal secretary*

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# SCHEDULE 1





**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

**Case No. CV15-587 (Idaho 3d Jud. Dist.)**

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
12/29/2014	ZRRG	139151	2.9	195	\$565.50	Interoffice conference with Atty. G. Jackson re: current facts of dispute, preparation of response letter to Tenant's counsel; receive and analyze many e-mails between Tenant and real estate agent re: timing to vacate property, lease negotiations, and related items; outline and draft response letter; e-mail same to Atty. G. Jackson for review and revision.
12/30/2014	ZRRG	139151	0.8	195	\$156.00	Receive and review e-mail from Mr. Jackson re: comments to draft response letter; prepare revised response letter based on same; e-mail revised letter to Atty. G. Jackson for review and signature.
1/5/2015	GPJ	140039	0.6	285	\$171.00	Emails from and to Blake re building details. Emails exchanged with counsel re status.
1/6/2015	GPJ	140039	0.4	285	\$114.00	Telephone call with Attorney Dunn and email Mr. Jackson re negotiating.
1/7/2015	GPJ	140039	0.2	285	\$57.00	Emails from and to Attorney Dunn and Mr. Jackson re settlement.
1/8/2015	GPJ	140039	0.3	285	\$85.50	Emails from and to Attorney Dunn and Mr. Jackson re negotiations.
1/9/2015	GPJ	140039	0.2	285	\$57.00	Emails exchanged with Mr. Jackson and Attorney Dunn re settlement.
1/12/2015	GPJ	140039	0.7	285	\$199.50	Emails from and to counsel re ongoing negotiations. Letter re counterproposal. Telephone call with and email exchange with Mr. Jackson re status.
1/13/2015	GPJ	140039	1.3	285	\$370.50	Many calls and emails from and to Attorney Dunn and Mr. Jackson. Outline complaint.
1/14/2015	GPJ	140039	0.6	285	\$171.00	Telephone call with Mr. Jackson and forward a draft copy of Complaint.
1/14/2015	ZRRG	140039	4.7	200	\$940.00	Voicemail from Atty. G. Jackson re: preparing complaint; review and analyze lease amendments, notice of termination, and property purchase closing documents; conduct additional research re: pleading requirements; outline and draft complaint; copy of complaint
1/15/2015	GPJ	140039	0.5	285	\$142.50	Email from and to and telephone call with Mr. Jackson re next steps and reaction to counter. Emails from and to Attorney Dunn re complaint.
1/16/2015	GPJ	140039	0.4	285	\$114.00	Email from and to Mr. Jackson and Attorney Dunn re negotiations. Letter to Attorney Dunn re signed complaint.
1/16/2015	ZRRG	140039	0.5	200	\$100.00	Finalize complaint for unlawful detainer; prepare correspondence and send same for filing with Court.
1/19/2015	GPJ	140039	0.3	285	\$85.50	Letter to Mr. Jackson enclosing Operating Agreement. Email exchanges re damages.
1/20/2015	GPJ	140039	1	285	\$285.00	██████████ Telephone calls with Attorney Dunn and Mr. Jackson re settlement. Emails re damages exchanged with Blake.
1/21/2015	GPJ	140039	0.5	285	\$142.50	Finalize letter to Mr. Jackson re next steps. Emails from and to Lincoln and Attorney Dunn re negotiations. Telephone call with Attorney Dunn and Telephone call with Mr. Jackson re negotiations.
1/22/2015	GPJ	140039	0.8	285	\$228.00	Telephone calls and emails from and to Attorney Dunn and Mr. Jackson re settlement. ██████████
1/23/2015	GPJ	140039	1	285	\$285.00	Emails from and to Attorney Dunn re settlement. ██████████ Email exchange with Mr. Jackson re settlement. Telephone calls with Attorney Dunn and Mr. Jackson re settlement.
1/26/2015	GPJ	140039	0.1	285	\$28.50	Status email with Mr. Jackson.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
1/28/2015	GPJ	140039	0.3	285	\$85.50	Email exchange with Attorney Dunn re not moving. Text exchange with Mr. Jackson.
1/29/2015	GPJ	140039	0.4	285	\$114.00	Email exchange with Attorney Dunn re demand. Email exchange with and telephone call with Mr. Jackson.
1/29/2015	ZRRG	140039	0.5	200	\$100.00	E-mails with Atty. G. Jackson and assistant re: service of complaint; work on summons and service items.
2/4/2015	GPJ	140806	0.1	285	\$28.50	Text exchange with Mr. Jackson re status.
2/5/2015	GPJ	140806	0.6	285	\$171.00	Text exchange and telephone call with Blake re status. Receive check and forward with cover letter to Mr. Coats.
2/6/2015	GPJ	140806	0.5	285	\$142.50	Email from and to Mr. Jackson re January rent. Telephone call with Mr. Jackson re contact from Attorney Dunn. Email from Attorney Dunn.
2/9/2015	GPJ	140806	0.6	285	\$171.00	Telephone call with Attorney Dunn. [REDACTED] Emails from and to Blake and Attorney Dunn re resolution.
2/11/2015	GPJ	140806	0.4	285	\$114.00	Telephone call and email with Blake re steps with tenant. [REDACTED].
2/12/2015	GPJ	140806	0.1	285	\$28.50	Telephone call with Attorney Dunn re status.
2/16/2015	GPJ	140806	0.3	285	\$85.50	Email exchange with and phone call with Mr. Jackson re approach. Email to Attorney Dunn re settlement.
2/17/2015	GPJ	140806	0.6	285	\$171.00	Telephone calls and emails exchanged with Mr. Jackson and Attorney Dunn.
2/18/2015	GPJ	140806	0.5	285	\$142.50	Telephone call with Mr. Jackson re status. Receive Notice of Appearance. Email to and from Attorney Dunn re settlement discussions.
2/20/2015	GPJ	140806	0.3	285	\$85.50	Email from Attorney Dunn re status and to Mr. Jackson.
2/23/2015	GPJ	140806	0.2	285	\$57.00	Email from Attorney Dunn and forwarded to Mr. Jackson.
2/24/2015	GPJ	140806	0.5	285	\$142.50	Emails from and to Attorney Dunn and Mr. Jackson re settlement. Telephone call with Mr. Jackson re damages.
2/25/2015	GPJ	140806	0.7	285	\$199.50	Emails exchanged with Attorney Dunn and Mr. Jackson. Telephone call with court re trial dates. Draft Notice of Intent to enter default.
2/26/2015	GPJ	140806	0.3	285	\$85.50	Email exchange with Attorney Dunn re Notice and Motion to Strike.
2/26/2015	ZRRG	140806	1.9	200	\$380.00	Telephone call with Atty. G. Jackson re: motion to strike filed by defendants, strategy; review motion to strike and notice of hearing; begin to conduct additional research re: non-possessory causes of action for amended complaint.
2/27/2015	ZRRG	140806	5.4	200	\$1,080.00	Finish researching non-possessory causes of action for amended complaint; interoffice conference with Atty. G. Jackson re: go-forward strategy; research Idaho Rule of Civ. Procedure re: procedure to amend complaint; outline and begin to draft amended
2/27/2015	GPJ	140806	1	285	\$285.00	Emails from and to Attorney Dunn and Mr. Jackson re next steps. Work on research for amended Complaint.
3/2/2015	ZRRG	141477	2.3	200	\$460.00	Finish drafting initial draft of verified amended complaint; prepare exhibits for same; copy to Atty. G. Jackson for review and revision; e-mails with Atty. G. Jackson re: modifications to draft, finalizing same; finalize initial draft verified amended complaint and
3/2/2015	GPJ	141477	0.6	285	\$171.00	Finalize Verified Amended Complaint. Letter to Mr. Jackson for approval. Emails exchanged with Mr. Jackson re status.
3/3/2015	GPJ	141477	1.7	285	\$484.50	Receive Order re setting case deadlines. Email from and to Attorney Dunn re amended complaint. Emails from and to and telephone call with Mr. Jackson re case facts, new evidence about property destruction. Emails to Attorney Dunn re property
3/3/2015	ZRRG	141477	0.4	200	\$80.00	Confer with Atty. G. Jackson re: strategy, communications with opposing counsel.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
3/4/2015	ZRRG	141477	2.8	200	\$560.00	Telephone call with Atty. G. Jackson re: additional events and actions taken by defendants to building, modification of verified amended complaint to incorporate same; interoffice conference with Atty. Bullock re: same, strategy for additional causes of action;
3/4/2015	GPJ	141477	1.2	285	\$342.00	Outline changes to complaint. Email to Attorney Dunn. Email new Amended Complaint. Address new issues.
3/4/2015	RCB	141477	0.8	200	\$160.00	Confer with Atty Groesbeck re potential causes of action (bad faith, malicious destructino of property). Analysis of Idaho law re the same. Review and edit of Verified Amended Complaint.
3/5/2015	GPJ	141477	0.3	285	\$85.50	Emails exchanged with Attorney Dunn and Mr. Jackson re various matters.
3/6/2015	ZRRG	141477	0.5	200	\$100.00	Prepare stipulated motion to file amended complaint and proposed order re: same.
3/9/2015	ZRRG	141477	0.4	200	\$80.00	E-mails with Atty. G. Jackson re: stipulation, next steps; instructions to assistant re: communications with opposing counsel.
3/9/2015	GPJ	141477	0.4	285	\$114.00	Email from Mr. Jackson re furnace repair and cancellation of hearing.
3/10/2015	GPJ	141477	0.5	285	\$142.50	Receive letter vacating hearing. Email re power box. Letter to Attorney Dunn enclosing list.
3/10/2015	ZRRG	141477	0.1	200	\$20.00	Receive and review letter from opposing counsel re: vacating motion to strike hearing.
3/13/2015	GPJ	141477	0.1	285	\$28.50	Status email exchanged with Mr. Jackson.
3/16/2015	GPJ	141477	0.2	285	\$57.00	Letter to Attorney Dunn re moving ahead.
3/17/2015	GPJ	141477	0.6	285	\$171.00	Letter exchange with Attorney Dunn. Email and text exchange with Mr. Jackson re how to proceed.
3/20/2015	GPJ	141477	0.1	285	\$28.50	Email from and to Attorney Dunn re service.
3/20/2015	ZRRG	141477	1.6	200	\$320.00	E-mails with Atty. G. Jackson re: filing issues with amended complaint; review letter from opp. counsel re: same; telephone call with ID court clerk re: filing procedure; research ID R. Civ. Pro. re: same, service; prepare revised amended complaint for filing with court; send for filing.
3/26/2015	ZRRG	141477	0.3	200	\$60.00	Work on service of amended complaint issues; prepare summons and amended complaint and send for service.
4/1/2015	GPJ	142740	0.3	285	\$85.50	Email from and to Mr. Jackson re status. Outline next steps.
4/1/2015	ZRRG	142740	1.6	200	\$320.00	Interoffice meeting with Atty. Bullock re: go-forward strategy, including procedural issues, dispositive motion timing, discovery, and related items; begin to work on same.
4/1/2015	RCB	142740	1.3	200	\$260.00	Confer with Atty Groesbeck re status of case and strategy. Outline motion for summary judgment and proposed discovery. Analysis of Idaho Rules of Procedure for timing of motion and discovery.
4/2/2015	RCB	142740	0.5	200	\$100.00	Confer with Attys Groesbeck and Turner re procedural steps on motion for summary judgment, diclosures and timing. Confer with Atty Groesbeck re strategy and next steps. Outline the same.
4/2/2015	ZRRG	142740	0.3	200	\$60.00	Work on go-forward procedural and litigation strategy issues.
4/8/2015	RCB	142740	1.6	200	\$320.00	Begin draft of motion for summary judgment on all claims. Analysis of Idaho Law re unlawful detainer for use in summary judgment motion. Confer with Atty Groesbeck re status and strategy
4/8/2015	ZRRG	142740	4.9	200	\$980.00	Research Idaho Rules of Civil Procedure Rules 26, 33, 34, and 36 re: discovery practice; work on preparing initial draft of interrogatories, requests for production and requests for admission.
4/8/2015	GPJ	142740	0.3	285	\$85.50	Telephone call with Mr. Jackson re customer issue.
4/9/2015	RCB	142740	2.3	200	\$460.00	Continue work on draft motion for summary judgment (draft standard for summary judgment and argument re contract and unlawful detainer). Analysis of Idaho case law in support of position for unlawful detainer.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
4/10/2015	ZRRG	142740	0.4	200	\$80.00	Finalize initial discovery requests; copy of same to Atty. Bullock for review and revision; confer with Atty. Bullock re: MSJ strategy.
4/13/2015	GPJ	142740	0.8	285	\$228.00	Telephone call with Mr. Jackson re responsive pleading. Receive and analyze Answer and Counterclaim. Email from Mr. Jackson re next steps.
4/13/2015	GPJ	142740	0.3	225	\$67.50	Telephone call with Mr. Jackson re customer issue.
4/14/2015	ZRRG	142740	0.9	200	\$180.00	Review and begin to analyze answer and counterclaim of Johnson Thermal.
4/21/2015	GPJ	142740	0.2	285	\$57.00	Telephone call with Mr. Jackson re status.
4/27/2015	ZRRG	142740	1	200	\$200.00	Begin to outline and draft reply to counterclaim.
4/28/2015	ZRRG	142740	2.7	200	\$540.00	Finish preparing reply to counterclaim; revise draft first set of discovery responses; e-mail same to Atty. G. Jackson for review and comment; confer with Atty. Bullock re: initial arguments for partial summary judgment motion.
4/28/2015	GPJ	142740	0.2	285	\$57.00	Finalize pleadings and forward to Mr. Jackson for review.
4/28/2015	RCB	142740	1.8	200	\$360.00	Confer with Atty Groesbeck re Reply to Counterclaim, Motion for Summary Judgment and discovery requests. Continue work on motion for summary judgment (outlining facts, reviewing answer to complaint, setting up intro)
4/29/2015	RCB	142740	4.6	200	\$920.00	Continue work on motion for summary judgment (draft fact section, introduction, argument (i) liable for unlawful detainer (ii) breached the lease agreement (iii) breached covenant of good faith and fair dealing (iv) liable for attorney fees); Confer with Atty
4/29/2015	GPJ	142740	0.3	285	\$85.50	Look at Motion for Summary Judgment and forward to Mr. Jackson for approval.
4/29/2015	ZRRG	142740	0.7	200	\$140.00	Make additional revisions to reply to counterclaim; work on motion for partial summary judgment items.
4/30/2015	ZRRG	142740	2.5	200	\$500.00	Review and revise draft memorandum for partial summary judgment; finalize reply to counterclaim and first set of discovery requests; e-mails with Atty. G. Jackson re: verification issue; prepare verification and e-mail same to Atty. G. Jackson for provision
4/30/2015	GPJ	142740	0.7	285	\$199.50	Email from and to Mr. Jackson re changes to Motion for Summary Judgment. Email re verification. Work on minor edits to pleadings.
4/30/2015	RCB	142740	2.9	200	\$580.00	Revised and edit Motion and Memo in Support of Motion for Partial Summary Judgment per input from Attys Jackson and Groesbeck; Confer with Atty Jackson and Groesbeck re filing of Reply, and Discovery; Analysis of Idaho Rules of Civil Procedure re
5/4/2015	ZRRG	143512	0.1	200	\$20.00	Receive and briefly review new scheduling order.
5/4/2015	RCB	143512	0.1	200	\$20.00	Receipt of Order from Court re scheduling conference
5/7/2015	RCB	143512	0.3	200	\$60.00	Confer with Atty Groesbeck re status conference. [REDACTED]
5/7/2015	GPJ	143512	0.1	285	\$28.50	Receive Notice of Address Change.
5/11/2015	ZRRG	143512	0.5	200	\$100.00	Confer with Atty. G. Jackson re: scheduling hearing items, strategy; work on pro hac vice applications.
5/12/2015	ZRRG	143512	0.3	200	\$60.00	Participate in telephonic scheduling conference with Atty Bullock, opposing counsel and court.
5/12/2015	RCB	143512	0.3	200	\$60.00	Participate in telephonic scheduling conference with Court. Confer with Atty Jackson re the same.
5/26/2015	ZRRG	143512	0.2	200	\$40.00	Confer with Atty. G. Jackson re: status of matter; confer with Atty. Bullock re: preparing motion to set hearing date for motion for partial summary judgment.
6/3/2015	ZRRG	144390	0.7	200	\$140.00	Begin to review and analyze defendant's responses to discovery requests.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/4/2015	ZRRG	144390	1.5	200	\$300.00	Finish initial review and analysis of defendant's discovery responses and production of documents.
6/5/2015	GPJ	144390	0.2	285	\$57.00	Telephone call re various topics with Mr. Jackson.
7/2/2015	GPJ	145375	0.3	285	\$85.50	Status call with Mr. Jackson. Receive and briefly review pleadings.
7/6/2015	RCB	145375	3.6	200	\$720.00	Review and analyze opposition to motion for summary judgment and affidavit in support filed by Johnson Thermal. Outline response. Begin draft of reply memorandum. Confer with Atty Jackson re the same.
7/7/2015	RCB	145375	4.9	200	\$980.00	Continue work on draft of Reply Memo in support of Motion for Summary Judgment; Analyze responses to discovery requests and review documents produced by Johnson Thermal for incorporation into memo
7/7/2015	GPJ	145375	0.5	285	\$142.50	Receive Opposition and Declaration. Letter to Mr. Jackson enclosing pleadings. Email exchange re appearing telephonically.
7/8/2015	GPJ	145375	0.2	285	\$57.00	Work on Reply.
7/8/2015	RCB	145375	3.7	200	\$740.00	Complete first draft of reply memorandum in support of motion for summary judgment. Confer with Atty Jackson re the same.
7/9/2015	RCB	145375	2.6	200	\$520.00	Revise and edit portions of reply memo, per input from Atty Jackson. Prepare exhibits and memo for filing.
7/13/2015	GPJ	145375	0.4	285	\$114.00	Telephone call with court and email exchanges with Mr. Jackson re appearing at hearing.
7/15/2015	GPJ	145375	3	285	\$855.00	Prepare for hearing and travel to Boise (travel time billed at half time).
7/16/2015	GPJ	145375	4	285	\$1,140.00	Travel to and from and participate in hearing (half charge for travel time). Confer with counsel after hearing re possible settlement. Telephone call with Mr. Jackson re outcome of hearing.
7/17/2015	GPJ	145375	0.1	285	\$28.50	Email exchange with Mr. Coats re ownership language.
8/17/2015	GPJ	146326	0.3	285	\$85.50	Receive and review Memorandum Decision.
8/17/2015	RCB	146326	0.2	200	\$40.00	Review and analysis of Court's memo and decision re Motion for Partial Summary Judgment
8/18/2015	GPJ	146326	0.2	285	\$57.00	Email exchange with Mr. Jackson re ruling.
9/9/2015	RCB	147428	1.9	200	\$380.00	Confer with Atty Jackson re strategy/next steps. Draft letter to Mr. Jackson re strategy and next steps in litigation
9/16/2015	RCB	147428	1.4	200	\$280.00	Confer with Atty Jackson re next steps and strategy. Draft letter to opposing counsel re depositions. Work on Subpoenas to Collier and Ms. Gilbert
9/22/2015	RCB	147428	1.8	200	\$360.00	Complete draft of Subpoenas to Gilbert's attorney and Colliers Intenational. Prepare for service
9/22/2015	GPJ	147428	0.4	285	\$114.00	Telephone call with Attorney Dunn re deposition dates.
9/28/2015	RCB	147428	0.3	200	\$60.00	Communications with Collier's re subpoena
9/8/2015	GPJ	147429	0.2	225	\$45.00	Telephone call with Mr. Jackson and confer with Attorney Bullock re strategy.
9/28/2015	GPJ	147429	0.2	225	\$45.00	Telephone call with Mr. Jackson re status.
10/2/2015	GPJ	148245	0.1	285	\$28.50	Letter to Attorney Dunn re depositions.

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10/5/2015	RCB	148245	0.8	200	\$160.00	Analysis of documents and emails produced by David Kerrick in response to Subpoena
10/7/2015	RCB	148245	0.2	200	\$40.00	Emails re response to subpoenas with Collier
10/7/2015	GPJ	148246	0.1	285	\$28.50	Email from Attorney Dunn re depositions.
10/8/2015	GPJ	148246	0.3	285	\$85.50	Letter from Attorney Dunn re depositions. Outline next steps.
10/8/2015	RCB	148246	0.3	200	\$60.00	Receipt of letter re depositions dates. Confer with Atty Jackson re the same. Emails re subpoenaed documents
10/9/2015	RCB	148246	2.7	200	\$540.00	Emails re response to subpoenas. Receipt of thumb drives from Colliers. Begin review of documents and email provided in response to Subpoenas.
10/19/2015	RCB	148246	2.5	200	\$500.00	Emails re deposition dates for Lincoln Hagood and Arlene Gilbert. Continued review and analysis of emails received from Subpoenas
10/19/2015	GPJ	148247	0.1	225	\$22.50	
10/20/2015	GPJ	148247	0.7	225	\$157.50	Telephone call with Blake re status and with Mr. Iliff re deposition.
10/21/2015	RCB	148246	0.3	200	\$60.00	Confer with Atty Jackson re depositions. Email to counsel for Johnson Thermal re the same
10/21/2015	GPJ	148247	0.1	225	\$22.50	Work on setting depositions.
10/22/2015	RCB	148246	0.2	200	\$40.00	Emails re deposition dates and locations
10/23/2015	RCB	148246	0.1	200	\$20.00	Emails re deposition dates
10/26/2015	RCB	148246	0.3	200	\$60.00	Prepare notices of deposition for Hagood, S. Johnson, J. Johnson, Erlebach and Gustaveson
10/28/2015	RCB	148246	0.2	200	\$40.00	Work on Deposition Notices. Emails re the same.
10/30/2015	RCB	148246	2.1	200	\$420.00	Receipt of Plaintiff's discovery requests to Petebilt. Begin draft of responses and objections
11/2/2015	RCB	149559	1.3	200	\$260.00	Receipt of Order to File Stipulated Trial Dates. Confer with Atty Jackson re the same. Work on responses to discovery requests submitted by Johnson Thermal
11/3/2015	RCB	149559	2.7	200	\$540.00	Work on responses to discovery requests submitted by Johnson Thermal
11/6/2015	RCB	149559	0.2	200	\$40.00	Communication to counsel for Johnson Thermal re trial dates and court's order re the same
11/9/2015	RCB	149559	0.2	200	\$40.00	Emails re trial dates
11/11/2015	RCB	149559	0.2	200	\$40.00	Emails re trial dates and stipulated motion to court
11/12/2015	RCB	149559	1.7	200	\$340.00	Many emails re trial dates. Draft Stipulated Response to Court's order re trial dates. Begin preparations for upcoming depositions (drafting outlines and reviewing supporting documents, emails)
11/13/2015	RCB	149559	6.8	200	\$1,360.00	Continue deposition preparation work (review of emails and documents, draft depo outlines of Sherri Johnson, Jeff Johnson, Lincoln Hagood)
11/16/2015	RCB	149559	6.3	200	\$1,260.00	Continue work on deposition preparation. Draft outlines for Gus Gustaveson and Dave Erlebach
11/17/2015	RCB	149559	8.3	200	\$1,660.00	Travel to Boise. Attend and participate in depositions of Lincoln Hagood, Sheri Johnson, and Jeff Johnson
11/18/2015	RCB	149559	8.8	200	\$1,760.00	Attend and participate in deposition of Gus Gustaveson and Dave Erlebach. Return to SLC from Boise

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11/20/2015	RCB	149559	1.8	200	\$360.00	Draft letter to Peterbilt re depositoins and discovery requests. Begin work on draft discovery responses.
11/23/2015	RCB	149559	0.3	200	\$60.00	Receipt of Trial Date and Scheduling Order from Court. Analysis of the same
11/25/2015	RCB	149559	1.9	200	\$380.00	Work on discovery responses. Email to Ms. Dunn re scheudling order and proposed dates/deadlines
11/30/2015	RCB	149559	0.2	200	\$40.00	Emails with Ms. Dunn re discovery responses and case management order
11/30/2015	GPJ	149559	0.1	285	\$28.50	Email exchange with Mr. Jackson re evidence.
12/1/2015	RCB	150122	0.6	200	\$120.00	Receipt of many emails re discovery responses. Brief review of documents provided by Peterbilt
12/2/2015	RCB	150122	0.5	200	\$100.00	Communicatios with counsel for JT re scheduling order. Review of proposed order.
12/3/2015	RCB	150122	0.2	200	\$40.00	Emails re scheduling order
12/4/2015	RCB	150122	0.5	200	\$100.00	Communications re case managment order. Review of the same
12/8/2015	RCB	150122	1.1	200	\$220.00	Work on responses to JT's discovery requests. Emails re the same.
12/10/2015	RCB	150122	6.1	200	\$1,220.00	Complete first draft of responses and objections to Johnson Thermal's discovery requests to Peterbilt. Review and analysis of documents to be produced in connection with the same. Email to Atty Jackson re confirmation of resposnes.
12/11/2015	RCB	150122	3.9	200	\$780.00	Continue work on discovery responses and objections. Call with Mr. Adams re the same. Analyze and prepare documents to be produced with discovery responses.
1/4/2016	RCB	151375	0.2	205	\$41.00	Emails with Ms. Rainey re deposition dates and depo verifications
1/7/2016	GPJ	151375	0.1	285	\$28.50	Email exchange with Mr. Jackson re status.
1/7/2016	RCB	151375	0.1	205	\$20.50	Call to counsel for Ms. Gilbert re deposition availability
1/13/2016	RCB	151375	0.2	205	\$41.00	Emails with counsel for Ms. Gilbert re depositions dates
1/14/2016	RCB	151375	0.3	205	\$61.50	Communications re deposition of Arlene Gilbert
1/15/2016	RCB	151375	0.2	205	\$41.00	Emails re deposition of Arlene Gilbert
1/19/2016	RCB	151375	0.1	205	\$20.50	Emails re Ms. Gilbert's deposition
1/19/2016	GPJ	151375	0.1	285	\$28.50	Email exchange with Mr. Jackson re deposition.
1/27/2016	RCB	151375	0.1	205	\$20.50	Email re Gilbert deposition
1/29/2016	RCB	151375	0.2	205	\$41.00	Emails re deposition of Ms. Gilbert
2/1/2016	RCB	152375	0.2	205	\$41.00	Communications re deposition of Ms. Gilbert
2/2/2016	RCB	152375	0.2	205	\$41.00	Communications with Johnson Thermal re deposition of Arlene Gilbert
2/3/2016	RCB	152375	1.5	205	\$307.50	Emails re deposition of Ms. Gilbert. Prepare Notice of Deposition, Subpoena and Acceptance of Service. Confer with Atty Jackson re strategy. Work on depo preparation.
2/4/2016	RCB	152375	0.7	205	\$143.50	Communications re deposition of Arlene Gilbert. Work on preparation of the same
2/5/2016	RCB	152375	1.4	205	\$287.00	Work on deposition preparations for Ms. Gilbert
2/8/2016	GPJ	152375	0.3	225	\$67.50	Forward letter to Mr. Jackson and exchange emails re Collier's involvement.
2/8/2016	RCB	152375	5.9	205	\$1,209.50	Prepare for deposition of Arlene Gilbert (Draft outline and prepare/review exhibits and emails); Call to counsel for Ms. Gilbert re deposition. Confer with Atty Jackson re the same and developments with Colliers.

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2/9/2016	RCB	152375	11.8	205	\$2,419.00	Travel to and from St. George for Deposition of Arlene Gilbert. Attend and participate in deposition of Ms. Gilbert. Confer with Atty Jackson re the same
2/11/2016	GPJ	152375	0.4	225	\$90.00	Telephone call with Mr. Jackson and receive and process Amended Scheduling Order.
2/15/2016	GPJ	152375	1	225	\$225.00	Receive and briefly analyze Motion, Memo, Affidavit and Notice of Hearing for partial Summary Judgment. Letter to Mr. Jackson enclosing pleadings.
2/16/2016	GPJ	152375	0.6	225	\$135.00	Begin review of depositions in response to Motion.
2/18/2016	RCB	152375	0.4	205	\$82.00	Confer with Atty Jackson re response to Motion for Partial Summary Judgment. Outline the same. Brief review of memo
2/22/2016	RCB	152375	0.3	205	\$61.50	Receipt and brief analysis of motion to add third-party and file third-party complaint against Colliers
2/23/2016	RCB	152375	0.3	205	\$61.50	Work on hearing related issues for summary judgment motions.
2/24/2016	GPJ	152375	0.8	225	\$180.00	Receive Motion and Memo to add 3rd Party. Letter to Blake enclosing pleadings. Consider response.
2/26/2016	RCB	152375	2.9	205	\$594.50	Begin work on oppsition/cross motion for summary judgment on lease issues (work on response to facts, begin review of depos etc.).
2/29/2016	RCB	152375	2	205	\$410.00	Continue work on Opposition/Cross Motion for Summary Judgment re lease extension
2/29/2016	GPJ	152375	0.1	225	\$22.50	Letter to Blake enclosing depositions.
3/2/2016	GPJ	153601	0.4	285	\$114.00	Telephone call with Blake re strategy and next steps to prepare for trial.
3/3/2016	RCB	153601	1.1	205	\$225.50	Work on opposition to motion for summary judgment and cross-motion
3/4/2016	RCB	153601	2.8	205	\$574.00	Review deposition testimony and prepare responses to Johnson Thermal's statement of facts. Continue work on opposition to motion for summary judgment and cross-motion
3/8/2016	RCB	153601	2.2	205	\$451.00	Continue work on motion for summary judgment and cross motion
3/16/2016	RCB	153601	2.9	205	\$594.50	Review depositions for use in motion for summary judgment and opposition memorandum. Work on draft motion.
3/17/2016	RCB	153601	1.1	205	\$225.50	Work on response to Johnson Thermal's statement of facts on summary judgment memo
3/18/2016	RCB	153601	3.3	205	\$676.50	Work on cross-motion for summary judgment. Continued review of depositions.
3/21/2016	RCB	153601	8.1	205	\$1,660.50	Continue work on intial draft of opposition memo and cross-motion (additional statement of facts, argument section, and conclusion). Research on Idaho law re ambiguity, waiver and related issues. Incorporate research into memo as well as deposition
3/22/2016	RCB	153601	4.6	205	\$943.00	Complete draft of opposition memo and cross-motion. Work on exhibits and depo transcrip support. Confer with Atty Jackson re the same
3/22/2016	GPJ	153601	0.5	225	\$112.50	Work on cross motion and opposition and forward to Mr. Jackson for review.
3/23/2016	RCB	153601	2.4	205	\$492.00	Finalize opposition memo and cross-motion. Prepare affidavit of exhibits and exhibits. Draft notice of non-opposition to motion to add-third party. Confer with Atty Jackson re the same.
3/25/2016	GPJ	153601	0.1	225	\$22.50	Status email exchange with Blake.
4/7/2016	RCB	154634	1.5	205	\$307.50	Communications with counsel for Johnson Thermal re motion for summary judgment. Review of emails re the same. Brief review and analysis of reply and opposition memo filed by JTS.
4/8/2016	GPJ	154634	0.3	225	\$67.50	Review Reply and Opposition filed by Johnson Thermal.



Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
4/11/2016	RCB	154634	0.6	205	\$123.00	Work on reply to motion for summary judgment. Work on outline for pretrial filings
4/12/2016	RCB	154634	2.8	205	\$574.00	Work on draft reply to cross motion for summary judgment. Work on draft of trial witness and exhibit lists. Email to counsel for Johnson Thermal re the same.
4/13/2016	RCB	154634	4.7	205	\$963.50	Complete draft of Reply Memo in support of cross motion for summary judgment. Email the same to Atty Jackson for review and comment. Communications with counsel for JTS re addition of Colliers and impact on Court order re witness and trial exhibits
4/20/2016	GPJ	154634	3.4	225	\$765.00	Prepare for hearing and travel to Boise.
4/21/2016	GPJ	154634	6.3	225	\$1,417.50	Participate in hearing. Travel to Salt Lake. Telephone call with Mr. Jackson re outcome of hearing.
4/21/2016	RCB	154634	0.3	205	\$61.50	Confer with Atty Jackson re SJ hearing and next steps
4/27/2016	GPJ	154634	0.5	225	\$112.50	Receive and analyze third party complaint. Letter to Mr. Jackson enclosing pleading.
5/9/2016	GPJ	155678	0.1	225	\$22.50	Receive Acceptance of Service and Third Party Complaint.
5/12/2016	GPJ	155678	0.1	225	\$22.50	Receive Notice of Hearing.
5/12/2016	RCB	155678	0.2	205	\$41.00	Emails re scheduling and conference call with Court. Receipt of Notice
5/17/2016	GPJ	155678	0.3	225	\$67.50	Telephone call with and email from Attorney Dunn re mediation.
5/23/2016	GPJ	155678	0.3	225	\$67.50	Email to and telephone call with Blake re mediation. Email to Attorney Dunn re mediation.
5/26/2016	GPJ	155678	0.2	225	\$45.00	Participate in pre-trial hearing with court.
5/26/2016	RCB	155678	0.4	205	\$82.00	Calls with Court re vacating trial and scheduling
6/6/2016	GPJ	156553	0.1	225	\$22.50	Receive and analyze three-day intent to default on Colliers.
6/6/2016	RCB	156553	0.3	205	\$61.50	Receipt of Intent to take default on Colliers. Emails re trial dates
6/7/2016	RCB	156553	0.7	205	\$143.50	Many communications with counsel for Colliers and JTS re trial dates and availability
6/7/2016	GPJ	156553	0.1	225	\$22.50	Receive Collier's Answer.
6/8/2016	RCB	156553	0.4	205	\$82.00	Communications with counsel re trial dates. Call to Court re the same
6/27/2016	RCB	156553	0.4	205	\$82.00	Review proposed amended case management report. Emails re the same.
7/5/2016	GPJ	165370	0.4	290	\$116.00	Email exchange with Mr. Jackson re status. Telephone call with and email exchanged with Attorney Dunn re status.
11/16/2016	GPJ	165369	0.2	290	\$58.00	Email from court and letter to court re: new trial date.
11/30/2016	GPJ	165369	0.3	290	\$87.00	Telephone calls with Attorney Rainey re: Stipulation and Mr. Jackson re: status. Review Stipulation on discovery dates.
12/6/2016	GPJ	165369	0.2	290	\$58.00	Letter to counsel enclosing settlement discussion letter.
1/19/2017	GPJ	165370	0.4	290	\$116.00	Telephone call with Attorney Fisher and email letter to Attorney Fisher re settlement.
1/27/2017	GPJ	165369	0.3	290	\$87.00	Telephone call with Attorney Fisher re mediator.
1/30/2017	GPJ	165370	0.1	290	\$29.00	Emails re possible mediators.
2/4/2017	GPJ	165370	0.6	290	\$174.00	Receive and review Summary Judgment Motion, Affidavit and Notice of Hearing from Colliers.
2/6/2017	GPJ	165370	0.6	290	\$174.00	Email exchange with Mr. Jackson re mediation. Telephone calls with Mr. Jackson and Attorney Fisher re mediation.
2/7/2017	GPJ	165370	0.1	290	\$29.00	Emails exchanged with Attorneys Fisher and Shirley re mediation.

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2/8/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/9/2017	GPJ	165370	0.1	290	\$29.00	Receive Notice of Hearing.
2/10/2017	GPJ	165370	0.1	290	\$29.00	Emails re mediation.
2/13/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/14/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/20/2017	GPJ	165370	0.1	290	\$29.00	Emails re mediation.
2/28/2017	RCB	165369	1.4	215	\$301.00	Outline issues and begin draft of mediation brief.
3/1/2017	RCB	166796	2	215	\$430.00	Continue work on draft of mediation brief. Analysis of deposition testimony and other documents for use in brief.
3/3/2017	RCB	166796	1.7	215	\$365.50	Continue work on draft mediation brief (statement of facts, analysis of lease language, discussion section) Analysis of damages and fees claim for use in brief.
3/6/2017	RCB	166796	5.2	215	\$1,118.00	Complete first draft of mediation brief (facts, lease language, discussion, damages)
3/7/2017	RCB	166796	2	215	\$430.00	Revise and edit mediation brief and incorporate additional damages claims. Email to GPJ for review and comment
3/7/2017	GPJ	166796	0.3	290	\$87.00	Emails from and to Bryan re mediation brief and damages.
3/8/2017	GPJ	166796	0.2	290	\$58.00	Letter from mediator with agreement.
3/9/2017	GPJ	166796	0.3	290	\$87.00	Receive Notice to Vacate hearing. Telephone call with Mr. Jackson re status.
3/10/2017	GPJ	166796	0.1	290	\$29.00	Email from and to Mr. Jackson re status.
3/13/2017	GPJ	166796	0.3	290	\$87.00	Make updates to damages section of mediation letter.
3/14/2017	GPJ	166796	0.1	290	\$29.00	Forward mediation brief to Bryan and Blake for review.
3/15/2017	GPJ	166796	0.2	290	\$58.00	Finalized mediation letter and email to Blake.
3/15/2017	RCB	166796	0.2	215	\$43.00	Confer with GPJ re edits to mediation brief. Prepare exhibits.
3/21/2017	GPJ	166796	0.7	290	\$203.00	Telephone call with Attorney Squires and email documents he requested.
3/22/2017	GPJ	166796	10	290	\$2,900.00	Travel to and from and participate in mediation.
3/23/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with mediator Squires re next steps.
3/27/2017	GPJ	166796	0.3	290	\$87.00	Telephone call with Mr. Jackson re settlement status.
3/28/2017	GPJ	166796	0.3	290	\$87.00	Telephone call with Mr. Jackson re status of communications.
3/29/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with Mr. Jackson re status.
3/30/2017	GPJ	166796	0.2	290	\$58.00	Telephone call with Blake and email re communication [REDACTED]
3/31/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with Blake re status.
4/3/2017	RCB	167743	0.8	215	\$172.00	Confer with GPJ re settlement issues. Draft letter re trial deadlines.
4/6/2017	GPJ	167743	0.2	290	\$58.00	Receive and review dismissal documents with Colliers and Johnson Thermal.
4/10/2017	GPJ	167743	0.4	290	\$116.00	Email exchange with Blake re Erhbach not settling. Forward Collier dismissal documents to Blake.
4/12/2017	RCB	167743	0.7	215	\$150.50	Receipt and analysis of letter re discovery deficiencies. Review and analysis of second set of discovery requests from JTS

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4/13/2017	RCB	167743	2	215	\$430.00	Begin work on responses to second set of discovery requests for JTS. Receipt of supplemental damages info from Peterbilt. Review and analysis of subpoenas submitted by JTS
4/13/2017	GPJ	167743	1.3	290	\$377.00	Receive and review three subpoenas. Letter to Mr. Jackson re discovery issues. Telephone call with Mr. Jackson re follow-up from letter
4/17/2017	RCB	167743	1.2	215	\$258.00	Continue work on draft responses to discovery requests. Draft supplement to initial disclosures.
4/18/2017	RCB	167743	1.8	215	\$387.00	Confer with GPJ re timeline of events and supporting damages. Review and analysis of additional documentation provided by Peterbilt for use in timeline. Analysis of other documentation for use in timeline of events and damages support
4/18/2017	GPJ	167743	1.8	290	\$522.00	Meet with Mr. Jackson and discuss outstanding issues. Outline timeline. Several telephone calls and emails re approach to settle.
4/19/2017	GPJ	167743	0.6	290	\$174.00	Telephone calls and emails with Mr. Jackson re various expenses and strategy.
4/19/2017	RCB	167743	3.8	215	\$817.00	Complete draft of Timeline of Events and Damages support with exhibits. Email to GPJ for review and comment.
4/20/2017	RCB	167743	2.3	215	\$494.50	Confer with GPJ timeline of events. Analysis of additional emails and communications between the parties. Implement email into timeline of events
4/20/2017	GPJ	167743	1	290	\$290.00	Work on summary timeline and telephone call with mediator Squires re settlement.
4/21/2017	RCB	167743	0.8	215	\$172.00	Revise and edit timeline of events. Prepare additional exhibits. Email to GPJ for review and comment.
5/1/2017	GPJ	168831	0.3	290	\$87.00	Telephone call with Mr. Jackson re power issue. Text exchange re discovery.
5/2/2017	RCB	168831	2.5	215	\$537.50	Complete draft of responses to JTS's second set of discovery requests. Gather and prepare documents responsive to requests for production
5/8/2017	RCB	168831	1.2	215	\$258.00	Revise and edit discover responses. Gather additional documents for production in response to discovery requests
5/8/2017	GPJ	168831	0.5	290	\$145.00	Telephone message for electric representative. Telephone call with Mr. Jackson re next steps. Email from Attorney Squires re futility in further discussion
5/10/2017	RCB	168831	1.2	215	\$258.00	Emails with counsel for JTS re discovery requests and extension to respond to the same. Continue work on draft responses interrogatories re mitigation.
5/12/2017	RCB	168831	2.7	215	\$580.50	Receipt and analysis of documents received by subpoena. Confer with GPJ re next steps and strategy. Begin work outlining trial strateav and binder outlining defenes claims and evidence
5/15/2017	RCB	168831	1.5	215	\$322.50	Continue work on trial strategy and binder, outlining defenes, claims and evidence.
5/16/2017	GPJ	168831	0.4	290	\$116.00	Email from and to Blake re power company issue. Telephone message and calls re power company documents.
5/17/2017	GPJ	168831	0.5	290	\$145.00	Emails re subpoena information. Email exchange with Attorney Vaughn re disqualification. Look at local rules.
5/17/2017	RCB	168831	4.7	215	\$1,010.50	Continue work on comprehensive letter to client outling case, strenghts and weaknesses, discovery, etc. Receipt of subpoena on Idaho Power from JTS. Draft subpoena on Idaho Power. Confer with GPJ re strateav and cases issues including disqualification of
5/18/2017	RCB	168831	2.1	215	\$451.50	Complete comprehensive letter to client. Work on responses to discovery requests and productino of documents. Email to GPJ re the same. Finalize subpoena to Idaho Power
5/18/2017	GPJ	168831	0.4	290	\$116.00	Email exchange with Vaughn re deposition and emails to and from Blake and Bryan re discovery.
5/22/2017	GPJ	168831	0.5	290	\$145.00	Email exchange with Bryan re discovery responses. Finalize and send with letter to Mr. Jackson. Telephone call with Attorney Fisher re status of settlement and my deposition. Telephone call with Mr. Jackson re status
5/22/2017	RCB	168831	1	215	\$215.00	Revise and edit letter to Blake. Confer with GPJ re the same. Emails to counsel for JTS re discovery reponses and document production
5/23/2017	RCB	168831	1	215	\$215.00	Emails re subpoenas and discovery responses. Finalized subpoena on Idaho Power. Work on responsees to discovery requests.
5/24/2017	RCB	168831	0.7	215	\$150.50	Emails with counsel re subpoenas and extension of time on discovery responses. Confer with GPJ re document production and discovery responses. Receipt and analysis of subpoena on Stubblefield Construction
5/24/2017	GPJ	168831	0.1	290	\$29.00	Email exchange with Bryan and Blake re discovery.
5/25/2017	GPJ	168831	0.7	290	\$203.00	Telephone call with Blake re Stubblefield subpoena. Review Stubblefield subpoena. Receive documents from Bryan to complete discovery responses
5/25/2017	RCB	168831	1.6	215	\$344.00	Work on revisions and edits to discovery requests. Confer with GPJ re the same. Work on subpoenas to be issued.
5/26/2017	RCB	168831	2.1	215	\$451.50	Revise and edit discovery responses. Confer with GPJ re the same. Prepare documents for production. Receipt and analysis of Notice of Inspection from Johnson Thermal
5/26/2017	GPJ	168831	1	290	\$290.00	Telephone call with Attorney Fisher re settlement issues. Receive subpoena to Platinum Remodel. Receive Notice of Inspection.

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5/30/2017	GPJ	168831	0.6	290	\$174.00	Receive production of remodel documents. Telephone call with Blake and email with Attorney Fisher re inspection and status.
5/30/2017	RCB	168831	0.8	215	\$172.00	Communications with counsel re discovery responses, trial issues and subpoena. Confer with GPJ re the same
5/30/2017	WBI	168831	0.6	260	\$156.00	Confer with Atty Jackson re: facts of case, defense of deposition, and trial preparation. Begin review of summary judgment motions re: same
5/31/2017	RCB	168831	2	215	\$430.00	Confer with GPJ re pre-trial. Call to Court re the same. Begin work on pre-trial brief and theory of recovery
5/31/2017	GPJ	168831	0.1	290	\$29.00	Email exchange with Attorney Fisher re deposition.
6/1/2017	WBI	169978	0.4	260	\$104.00	Review of docket and filings for deposition preparation.
6/1/2017	RCB	169978	2.4	215	\$516.00	Work on issues related to pre-trial hearing. Confer with GPJ re pre trial briefing. Work on pre-trial brief outlining statment of damages, witnesses, exhibits, etc.
6/1/2017	GPJ	169978	0.6	290	\$174.00	Telephone call with Blake re depo. Emails re Stubblefield. Emails re inspections. Email re bench trial. Letter from counsel re discovery deficiencies.
6/2/2017	GPJ	169978	0.5	290	\$145.00	Telephone call with Blake re status. Pictures of work done on other locations. Email re bench trial.
6/2/2017	RCB	169978	1.9	215	\$408.50	Receipt and analysis of Rule 37 letter from counsel for JTS on discovery response. Outline response. Confer with GPJ re the same. Work on pre-trial brief and supporting documents
6/5/2017	RCB	169978	3.9	215	\$838.50	Work on identifying exhibits and other documents for pretrial disclosures. Confer with GPJ re strategy on supplemental production. Analysis of photos sent by client. Work on response to Rule 37 letter from JTS
6/5/2017	GPJ	169978	0.4	290	\$116.00	Photographs from Mr. Jackson. Telephone call with court re bench trial.
6/6/2017	GPJ	169978	0.6	290	\$174.00	Telephone call with Blake re those present at inspections. Receive 30b6 depo notice. Email exchange with Blake re depo notice.
6/6/2017	RCB	169978	2.9	215	\$623.50	Continue work identifying documents and information for pretrial disclosures. Work on response to Rule 37 letter and email to GPJ re the same.
6/7/2017	RCB	169978	2.6	215	\$559.00	Work on pretrial disclosures and supplemental document production. Confer with GPJ re the same. Receipt of Notice of 30b6 depo.
6/9/2017	RCB	169978	0.2	215	\$43.00	Emails re supplemental discovery and additoinal witnesses
6/9/2017	GPJ	169978	0.5	290	\$145.00	Receive deposition notice. Letter to Blake and Bryan re discovery.
6/12/2017	GPJ	169978	0.3	290	\$87.00	Emails from and telephone call with Mr. Jackson re status.
6/12/2017	RCB	169978	3.7	215	\$795.50	Continue work on pre-trial brief and identification of relevant exhibits. Confer with GPJ re the same. Call to Idaho Power re subpoena.
6/13/2017	RCB	169978	5.7	215	\$1,225.50	Continue work on pre-trial breifing and preparation of trial binder. Work on draft supplemental responses to discovery requests. Review of additional documentation provided by client. Analysis of subpoenaed records from Idaho Power and Stubblefield. Draft letter to Mr Jackson re the same. Confer with GPJ re strategy and next steps.
6/13/2017	GPJ	169978	0.3	290	\$87.00	Receive and analyze subpoena responses from Stubblefield and Idaho Power.
6/14/2017	GPJ	169978	0.3	290	\$87.00	Work on stipulation documents. Email exchanges with Blake and Bryan re production.
6/14/2017	RCB	169978	6.6	215	\$1,419.00	Continue work on pre-trial brief and identification of exhibits. Call with counsel for Idaho Power re subpoena requests. Confer with GPJ re the same, strategy and discovery responses. Continue work on supplemental discovery requests and production of supplemental documents. Email to counsel re discovery responses.

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6/15/2017	RCB	169978	4.6	215	\$989.00	Revise and edit PreTrial brief pre input from WCI and GPJ. Work on pretrail preparation and exhibits. Confer with GPJ re strategy. Call with counsel for JTS re pretrial briefing and jury trial issues. Receipt and analysis of JTS' pretrial brief. Finalize and file pre-trial brief.
6/15/2017	WBI	169978	3.4	260	\$884.00	Prepare for deposition of Atty Jackson and trial preparation (complete review of all pleadings and summary judgment filings, begin review of deposition transcripts, outline claims, arguments, and relevant facts). Confer with Attys Jackson and Bullock re: same and pretrial brief. Review and edit same. Emails re: edits. Beg outline trial strategy document for conflicting notices.
6/15/2017	GPJ	169978	0.7	290	\$203.00	Telephone call with Blake re inspection, work on pre-trial disclosure and review defendant's pre trial brief.
6/16/2017	GPJ	169978	4	290	\$1,160.00	Prepare for and participate in deposition. Telephone call with and email exchanged re outcome of deposition.
6/16/2017	WBI	169978	6.1	260	\$1,586.00	Final preparation for deposition of Atty Jackson and for trial preparation (continued review of deposition transcripts and exhibits, review correspondence between counsel). Pre-deposition meeting with Atty Jackson re: strategy for deposition and trial. Appear and defend deposition. Post-deposition meeting with Attys Jackson and Bullock re: trial strategy and preparation for same.
6/16/2017	RCB	169978	2.2	215	\$473.00	Confer with WBI post depo of GPJ re issues and next steps. Receipt of supplemental disclosures from counsel for JTS. Communicatoin with Idaho Power re transformer. Outline research on constructive eviction in Idaho.
6/19/2017	RCB	169978	2	215	\$430.00	Communications re deposition of Blake Jackson. Research re timing of 30b6 depo and constructive eviction. Work on supplemental document production and review of supplemental production by JTS. Communicatinos with Idaho Power re subpoenas
6/19/2017	WBI	169978	2.1	260	\$546.00	Call with Atty Jackson re: 30(b)(6) deposition preparation. Call with Atty Bullock re: pretrial deadlines. Continued review and summary of deposition transcripts and exhibits for trial preparation.
6/19/2017	GPJ	169978	0.1	290	\$29.00	Emails from and to Blake re 30b6 deposition.
6/20/2017	GPJ	169978	3	290	\$870.00	Travel to and from and meet with Blake, Bruce and Gary to prepare for 30b6 deposition.
6/20/2017	WBI	169978	6.4	260	\$1,664.00	Complete review and summary of deposition transcripts for trial preparation. Prepare timeline of notice dates for trial presentation. Review 30(b)(6) deposition notice and exhibits for preparation to meet with client re: same. Meeting with client and Atty Jackson re: deposition preparation and trial strategy. Call and emails with Atty Bullock re: subpoenas and supplemental discovery
6/20/2017	RCB	169978	1.4	215	\$301.00	Confer with WBI re disclosures and subpoenaed records from Idaho Power. Emails to Idaho Power re documents. Review and analysis of documents received by Subpoena from Idaho Power. Outline supplemental resposes to prepare
6/21/2017	RCB	169978	2.6	215	\$559.00	Call with Idaho Power re documents and 30b6 depo. Confer with WBI and GPJ re strategy on the same. Work on supplemental discovery responses and witnesses. Begin work on lay witness disclosures.
6/21/2017	WBI	169978	1.6	260	\$416.00	Call with Atty Bullock re: supplemental disclosures and witness designations. Call with Idaho Power re: witness for transformer removal. Receive emails from client re: supplemental disclosures. Review emails produced by Colliers for trial exhibits.
6/21/2017	GPJ	169978	1.2	290	\$348.00	Telephone call with Blake re various matters. Text exchange re Idaho Power. Emails re update on exhibits. Emails exchanged with Vaughn re depositions.
6/22/2017	GPJ	169978	0.9	290	\$261.00	Participate in pre trial hearing. Work on Supplemental responses. Deal with Idaho Power subpoena. Emails re 7/6 travel.
6/22/2017	WBI	169978	3	260	\$780.00	Draft subpoena, acceptance of service and cover letter for Idaho Power deposition. Emails with Attys Jackson and Bullock re: same. Review and edit supplemental witness and document disclosures. Review communications from Colliers re: timeline of notice and exhibits for trial. Pretrial conference with court re: bench trial and schedule. Call with Atty Jackson re: same.
6/22/2017	RCB	169978	6.2	215	\$1,333.00	Confer with GPJ re witness lists, pre-trial hearing, and supplemental discovery. Participate in pre-trial conference with Court. Call to A-1 Heating re heater issues. Draft second supplemental discovery responses. Draft lay witness disclosures. Draft 30(b)(6) notice to Idaho Power. Confer with WBI re the same. Identify additional documents for use at trial.

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6/23/2017	RCB	169978	2.4	215	\$516.00	Receipt and analysis of first supplemental discovery responses from JTS. Review and analysis of documents produced with the same. Finalize and file Second Supplemental Responses to Discovery. Draft Verification. Analysis of Defendant's Witness List. Calls with A-1 Heating re service of heaters and invoice. Confer with WBI re the same.
6/23/2017	WBI	169978	0.3	260	\$78.00	Review disclosures by Defendants. Confer with Atty Bullock re: same and Idaho Power subpoena.
6/23/2017	GPJ	169978	0.3	290	\$87.00	Telephone call with Blake re Idaho Power. Emails re travel. Forward and receive verification signature.
6/26/2017	GPJ	169978	0.2	290	\$58.00	Letter and email exchange with Attorney Fisher re 30b6 topics.
6/26/2017	WBI	169978	0.1	260	\$26.00	Confer with Atty Bullock re: acceptance of service of subpoena by Idaho Power.
6/26/2017	RCB	169978	0.5	215	\$107.50	Calls with Idaho Power re deposition notice and acceptance of service. Emails re the same. Confer with WBI re response.
6/27/2017	RCB	169978	0.3	215	\$64.50	Confer with WBI re Idaho Power deposition. Emails re the same.
6/27/2017	WBI	169978	0.3	260	\$78.00	Call with Atty Jackson re: Idaho Power deposition. Confer with Atty Bullock re: scheduling same. Review motion for pro hac vice admission.
6/27/2017	GPJ	169978	0.1	290	\$29.00	Text exchange with Mr. Jackson re evidence.
6/28/2017	GPJ	169978	0.7	290	\$203.00	Receive and begin review of deposition transcript. Letter to Mr. Jackson enclosing transcript. Email from Mr. Jackson re additional documents. Telephone call with Mr. Jackson re reaction to transcript.
6/28/2017	WBI	169978	0.3	260	\$78.00	Calls with Idaho Power and Attys Jackson and Bullock re: scheduling deposition dates. Emails re: same.
6/28/2017	RCB	169978	1.8	215	\$387.00	Call to counsel of Idaho Power re 30b6 deposition. Confer with WBI re the same. Draft amended notice of deposition and acceptance of service. Emails with counsel re subpoenaed records from Idaho Power. Work on document supplementation
6/29/2017	RCB	169978	1.3	215	\$279.50	Receipt and analysis of letter from JTS re alleged discovery deficiencies. Emails re the same. Analysis of GPJ depo. Work on trial exhibits
6/29/2017	WBI	169978	0.3	260	\$78.00	Emails re: Idaho Power deposition date. Call re: same. Receive and review Defendant's witness disclosure. Complete and sign pro hac vice admission form for filing.
6/29/2017	GPJ	169978	0.8	290	\$232.00	Finalize review of depo and send letter to reporter. Letter re discovery from counsel. Forward letter to Bryan.
6/30/2017	GPJ	169978	0.2	290	\$58.00	Telephone call with Blake re discovery response.
6/30/2017	RCB	169978	1	215	\$215.00	Work on trial binder and exhibit lists. Confer with GPJ re the same. Emails re document production and response to JTS's letter.
7/3/2017	GPJ	171065	0.2	290	\$58.00	Emails exchanged with Bryan re discovery responses.
7/3/2017	RCB	171065	0.5	215	\$107.50	Review of additional damages support (income and expense report). Emails with GPJ re the same.
7/5/2017	RCB	171065	5.3	215	\$1,139.50	Work on supplemental discovery requests and preparation of trial binder and 30b6 deposition. Respond to JTS request for additional documents. Prepare and produced additional documents related to damages and lost income analysis.
7/5/2017	GPJ	171065	2.4	290	\$696.00	Work through pictures disclosed. Travel to and from and meet with Blake re depositions. Emails re financials.

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7/5/2017	WBI	171065	0.2	260	\$52.00	Emails re: supplemental disclosure and pro hac vice admission.
7/6/2017	WBI	171065	0.3	260	\$78.00	Emails and call with Attys Jackson and Bullock re: deposition [REDACTED]
7/6/2017	RCB	171065	2.4	215	\$516.00	Text messages and emails with GPJ re damages. Work on supplemental production and drafting of supplemental discovery responses. [REDACTED]
7/6/2017	GPJ	171065	10	290	\$2,900.00	Travel to and from and participate in 30b6 depositions. Work on assignment research.
7/7/2017	RCB	171065	6	215	\$1,290.00	Receipt and analysis of JTS's second supplemental discovery responses. Confer with WBI and GPJ re issues related to damages [REDACTED] [REDACTED] Begin trial research re law of case including mitigation, constructive
7/7/2017	GPJ	171065	0.6	290	\$174.00	Telephone call with Blake re strategy. Review lease and work on strategy.
7/7/2017	WBI	171065	0.8	260	\$208.00	[REDACTED]
7/8/2017	GPJ	171065	0.2	290	\$58.00	Telephone call with Blake re strategy.
7/10/2017	GPJ	171065	0.2	290	\$58.00	Text exchange with Blake re status and review letter.
7/10/2017	RCB	171065	4.8	215	\$1,032.00	Complete draft of supplemental discovery responses. Review and analysis of Lease Agreement and confer with WBI and GPJ re strategy [REDACTED] Emails with counsel re discovery responses. Prepare supplemental document production. Edit of letter to accompany lease and discovery supplements.
7/10/2017	WBI	171065	1.2	260	\$312.00	Review lease agreement forwarded by client. Emails with Atty Jackson and Bullock re: same and supplemental disclosures [REDACTED] [REDACTED] Draft letter re: same. Emails with Atty Jackson and Bullock re: review of supplemental discovery disclosures.
7/11/2017	WBI	171065	0.1	260	\$26.00	Email with opposing counsel re: supplemental disclosures and lease agreement.
7/11/2017	RCB	171065	3.4	215	\$731.00	Analysis and outline of Idaho Case law on causes of action and defenses in preparation for trial and use in trial binder. Email from counsel re lease agreement. Finalized and produced supplemental discovery.
7/12/2017	RCB	171065	1	215	\$215.00	Emails with counsel re lease agreement. Confer with GPJ re the same. Work on trial binder and exhibit list
7/12/2017	WBI	171065	0.2	260	\$52.00	Emails re: lease agreement. Confer with Atty Bullock re: same.
7/14/2017	RCB	171065	0.2	215	\$43.00	Emails re stipulated exhibit lists
7/16/2017	GPJ	171065	0.1	290	\$29.00	Emails exchanged with Attorney Perkins re Exhibit Exchanges.
7/17/2017	RCB	171065	1.8	215	\$387.00	Confer with GPJ re next steps, Idaho Power deposition, and exhibit lists. Work on exhibit binder. Communications with Idaho Power and opposing counsel re deposition. Draft amended notice of depo and acceptance of service. Prepare for filing with Court.
7/17/2017	WBI	171065	0.2	260	\$52.00	Confer with Atty Jackson re: status and preparation for Idaho Power deposition.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
7/18/2017	WBI	171065	3.6	260	\$936.00	Draft deposition outline for Idaho Power (draft questions, review documents for exhibits, confer with Atty Bullock re: same). Forward to Atty Jackson with analysis. Receive and begin review of Defendant's motion in limine to exclude damages evidence. Confer with Atty Bullock re: response date. Review Idaho Rule re: same.
7/18/2017	RCB	171065	1.8	215	\$387.00	Receipt and brief analysis of motion in limine re damages. Confer with WBI re the same and deadlines. Work on exhibit list and trial binder.
7/19/2017	RCB	171065	1.8	215	\$387.00	Analysis of Motion on Limine re lease. Emails re the same. Outline response and timing of the same. Work on trial binder and identification of exhibits. Work on Idaho Power depo prep.
7/19/2017	WBI	171065	0.3	260	\$78.00	Emails re: preparation for trial.
7/19/2017	GPJ	171065	0.8	290	\$232.00	Receive and review Motion in Limine and forward to Blake. Book flights for trial. Telephone calls with Blake re Motion.
7/20/2017	WBI	171065	6.3	260	\$1,638.00	Calls with Atty Jackson and client re: facts for memorandum in opposition to motion in limine. Emails re: same. [REDACTED] Begin draft memorandum in opposition to motion in limine. Review produced documents and deposition summaries for case background. Calls with Atty Bullock re: same and
7/20/2017	RCB	171065	4.9	215	\$1,053.50	Conduct research and analysis of Idaho case law re damages for breach of contract, unlawful detainer, and injury to property for use in opposition to motion in limine. Conduct research and analysis of Idaho case law to support claims and for use in defense of counterclaims for trial. Work on depo preparation for Idaho Power Depo. Emails re the same. Review of depositions of Bruce Adams and
7/20/2017	GPJ	171065	2.2	290	\$638.00	Telephone call with Blake and email [REDACTED] Receive and begin review of transcripts. Prepare for deposition. Telephone calls with Blake re deposition.
7/21/2017	GPJ	171065	8.5	290	\$2,465.00	Travel to and from and participate in Idaho Power deposition. Provide phone report to Mr. Jackson.
7/21/2017	RCB	171065	7.9	215	\$1,698.50	Additional research of Idaho Case law to support damages claims for breach of contract, unlawful detainer, injury to property and good faith and fair dealing. Draft research outline. Confer with WBI re opposition memo to motion in limine. Revise and edit memo based on research. Draft declaration of Blake Jackson to support opposition memo. Confer with WBI and GPJ re Idaho Power
7/21/2017	WBI	171065	8.6	260	\$2,236.00	Continued draft memorandum in opposition to motion in limine (complete background and facts, citations to depositions and exhibits, Arg. I - no avoidance of lease agreement, Arg. II - alternative minimum damages). Emails with Attys Jackson and Bullock, and client re: same. Calls and emails with Atty Bullock re: legal research and draft declaration. Review and edit same. Calls with
7/22/2017	WBI	171065	0.3	260	\$78.00	Review and incorporate client edits to declaration. Emails re: same.
7/24/2017	WBI	171065	0.6	260	\$156.00	Review and edit Jackson declaration per emails with Atty Jackson. Emails and call with Atty Jackson re: same. Emails re: supplemental disclosure.
7/24/2017	RCB	171065	2.2	215	\$473.00	Draft supplemental discovery responses and work on Declaration of Blake for use with opposition memo. Emails re the same. Prepare documents for production. Send supplemental responses to counsel. Receipt and analysis of supplemental responses from Johnston Thermal and documents produced with the same.
7/24/2017	GPJ	171065	1	290	\$290.00	Telephone call with and email exchanged with Mr. Jackson re declaration. Email exchange with Blair re Response to Motion in Limine. Work to finalize Supplemental Response.
7/25/2017	RCB	171065	4.9	215	\$1,053.50	Confer with WBI and GPJ re strategy and next steps. Call to counsel re appearing telephonically at hearing. Draft motion and order re the same. Work on opposition to motion in limine. Research and analysis of Idaho law for use in memo and trial.
7/25/2017	WBI	171065	7.1	260	\$1,846.00	Conference call with Attys Jackson and Bullock re: strategy for brief and trial. Review revised declaration for Blake Jackson and incorporate changes into memorandum in opposition to motion in limine. Research Idaho authorities re: special damages on unlawful detainer, consequential damages on breach of contract, malicious injury to property, and mitigation. Incorporate same into
7/26/2017	WBI	171065	0.8	260	\$208.00	Continued draft pretrial brief (review of exhibits). Confer with Atty Bullock re: same. Draft final edits to memorandum in opposition to motion in limine.



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7/26/2017	GPJ	171065	1	290	\$290.00	Email exchange with Blake re memo, declaration. Telephone call with Blake and work through changes.
7/26/2017	RCB	171065	7	215	\$1,505.00	Revise and edit memo opposing motion in limine. Additional research of ID law re damages for use in memo. Confer with WBI and GPJ re the same. Prepare exhibits to memo. Finalize and file motion to appear telephonically. Instruct staff on filing of memo.
7/27/2017	RCB	171065	2.8	215	\$602.00	Work on pre-trial disclosures and prepare documents supporting damages calculation. Confer with WBI re the same. Call to Court re telephonic appearance order.
7/28/2017	RCB	171065	3	215	\$645.00	Work on pretrial exhibit list and identification of documents for use in the same. Work on damages support documentation. Confer with WBI re exhibit list. Research of Idaho law re JTS's causes of action
7/31/2017	RCB	171065	2.8	215	\$602.00	Continue work on exhibit list. Receipt and analysis of exhibit list from JTS and Reply in support of Motion in Limine. Emails with counsel re exhibit lists. Confer with GPJ re the same. Work on trial law summary
7/31/2017	GPJ	171065	0.4	290	\$116.00	Receive exhibit list and email to Mr. Jackson. Telephone call with Mr. Jackson re lease agreement.
8/1/2017	RCB	172053	4.2	215	\$903.00	Analysis of JTS's trial exhibit list. Receipt and analysis of Deposition of Idaho Power. Communications with counsel re exhibit lists and Colliers documents. Cross check colliers documents with our exhibit list. Confer with WBI re the same. Analysis of Idaho case law re damages and constructive eviction
8/1/2017	WBI	172053	0.5	260	\$130.00	Confer with Atty Jackson re: preparation for hearing on motion in limine and trial strategy. Emails from client re: same. Receive and review Defendant's reply memorandum.
8/1/2017	GPJ	172053	0.7	290	\$203.00	Work on document list and Reply. Forward both to Blake for review. Also forward depo transcript of Idaho Power.
8/2/2017	GPJ	172053	2.3	290	\$667.00	Participate and prepare for hearing. Telephone call with Bruce and Blake re outcome of hearing. Discuss strategy. Work on amended witness disclosure.
8/2/2017	WBI	172053	2.5	260	\$650.00	Prepare for motion in limine hearing (review briefing and outline oral argument). Pre-hearing meeting with Atty Jackson re: same and trial strategy. Appear and argue motion.
8/2/2017	RCB	172053	2.2	215	\$473.00	Confer with GPJ and WBI re limine hearing and strategy. Participate in hearing call. Work on trial subpoenas for witnesses and trial exhibits. Receipt of amended lay witness filing from Defendant. Emails re the same.
8/3/2017	RCB	172053	2.9	215	\$623.50	Communications with counsel re stipulated exhibits. Additional review of exhibits and documents identified by JTS. Continue work on research of supporting law for causes of action and defenses
8/4/2017	RCB	172053	2	215	\$430.00	Continued review and analysis of JTS's trial exhibits and documents. Emails re the same. Continue work on trial subpoenas.
8/7/2017	RCB	172053	4.4	215	\$946.00	Receipt of trial subpoena from JTS. Complete draft of trial subpoenas for Hagood, Schoonover, the Johnsons and Gustaveson. Draft Acceptance of Service. Emails to counsel re acceptance of service. Analysis of email from Black re trial points. Confer with WBI re trial exhibits and preparation. Work on trial law outline re unlawful detainer and mitigation of damages
8/7/2017	WBI	172053	6.5	260	\$1,690.00	Trial preparation (draft trial examination outlines for Sheri Johnson and Gus Gustaveson, review exhibits for same). Review and edit trial subpoenas. Confer with Atty Bullock re: same. Emails and calls with Atty Jackson re: trial preparation.
8/7/2017	GPJ	172053	0.3	290	\$87.00	Email exchange with Blake re ideas. Review subpoenas for trial.
8/8/2017	WBI	172053	10.8	260	\$2,808.00	Continued draft trial examination outlines (Gus Gustaveson, Jeff Johnson, and Lincoln Hagood, draft edits to Sheri Johnson, review and incorporation deposition transcripts and exhibits re: same). Review client suggestions. Review and edit pretrial disclosures. Forward to Atty Jackson with assessment. Emails with Atty Bullock re: service of trial subpoenas. Confer re: same and research for

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8/8/2017	RCB	172053	4	215	\$860.00	Continue work on draft trial subpoenas for Hagood and Gustaveson. Emails with counsel re the same. Conduct westlaw search for updated address of Gustaveson. Confer with WBI re trial subpoenas and trial prep. Continue work on trial law outline re unlawful detainer and mitigation of damages. Emails with counsel re exhibit lists and acceptance of service of trial subpoenas. Receipt of
8/9/2017	RCB	172053	4.4	215	\$946.00	Continue work on trial exhibit lists and identification of exhibits. Call with counsel for JTS re the same. Confer with WBI re strategy and documents. Work on trial law binder and research of ID law re mitigation of damages and constructive eviction
8/9/2017	WBI	172053	4.3	260	\$1,118.00	Continued trial preparation (confer with Atty Jackson re: examination outlines). Review and edit pretrial disclosures. Confer with Atty Bullock re: same and attorney fee procedure. Call with opposing counsel re: stipulated exhibits and potential settlement. Emails re: same.
8/9/2017	GPJ	172053	0.4	290	\$116.00	Work through witness outlines and exhibit lists.
8/10/2017	WBI	172053	3	260	\$780.00	Appear for scheduling conference with court and opposing counsel. Meeting with Atty Jackson re: trial preparation. Emails re: acceptance of service of Gustaveson subpoena. Continued draft trial examination outlines (review Idaho Power deposition, edits to Gustaveson and Hagood outlines per meeting). Emails re: case.
8/10/2017	RCB	172053	5.4	215	\$1,161.00	Conduct additional research re ID law on unlawful detainer, attorney fees, eviction and mitigation. Draft memo and email to WBI for review. Analysis and comparison of exhibit list prepared by Caldwell. Emails re the same.
8/11/2017	RCB	172053	1.1	215	\$236.50	Receipt of deposition notices for Bixler and Hagood from JTS. Emails re exhibit lists. Confer with WBI re the same. Begin draft cross-exam questions re constructive eviction
8/11/2017	WBI	172053	1	260	\$260.00	Continued trial preparation (edit Gustaveson trial exam outline per additional documents and themes from Atty Jackson and client). Emails with opposing counsel re: exhibit list.
8/14/2017	WBI	172053	6.2	260	\$1,612.00	Continued trial preparation (draft trial examination outline for Blake Jackson, review Bruce Adams deposition for same, edits to other outlines per additional documents and deposition review). Email with opposing counsel re: trial exhibits.
8/14/2017	RCB	172053	0.4	215	\$86.00	Receipt of Affidavit of Service of Trial Subpoena on Lincoln. Get filed with Court. Emails re the same.
8/15/2017	RCB	172053	0.4	215	\$86.00	Work on trial subpoenas and attendance at trial of witnesses. Emails re the same
8/15/2017	WBI	172053	4	260	\$1,040.00	Complete trial examination outlines (complete Blake Jackson and Gary Sommercorn outlines, draft outline for Bruce Adams). Email with Atty Jackson re: same and document review.
8/15/2017	GPJ	172053	0.2	290	\$58.00	Receive deposition notices and telephone call with Mr. Jackson.
8/16/2017	RCB	172053	0.4	215	\$86.00	Receipt and analysis of trial subpoenas of JTS for Bixler, Schoonover, and Hagood. Emails re the same
8/17/2017	GPJ	172053	0.3	290	\$87.00	Email exchanges with Blake re witness questions.
8/17/2017	WBI	172053	1.5	260	\$390.00	Confer with Atty Jackson re: trial preparation. Review client edits re: same and draft edits to trial examination outlines.
8/18/2017	WBI	172053	4.9	260	\$1,274.00	Meeting with Atty Jackson re: trial strategy and edits to trial examination outlines and additional information from client per email review. Review same and documents from Atty Jackson's deposition and incorporate edits and revisions to examination outlines (Sheri Johnson, Gus Gustaveson, Jeff Johnson, and Bruce Adams). Email with opposing counsel re: exhibits.
8/18/2017	GPJ	172053	1.8	290	\$522.00	Telephone call with Blake re trial issues. Prepare for witnesses. Text exchanges with Blake re trial.
8/18/2017	RCB	172053	0.3	215	\$64.50	Confer with WBI re trial prep and discovery responses.
8/21/2017	RCB	172053	1.7	215	\$365.50	Work on trial prep ie case law reaserch, deposition designations, trial exhibits. Emails re the same. Call to counsel in Idaho re exhibits. Confer with WBI re the same.

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8/21/2017	WBI	172053	6.3	260	\$1,638.00	Final preparation for trial (review and edit all trial examination outlines, prepare exhibits, confer with Atty Jackson re: same and strategy meeting with clients for preparation). Calls and emails with opposing counsel re: exhibit lists and deposition designations.
8/22/2017	WBI	172053	8.2	260	\$2,132.00	Final trial preparation (complete edits to all trial examination outlines, prepare exhibits). Emails with opposing counsel re: witness arrangements and exhibit lists. Review deposition designations for Arlene Gilbert. Emails with opposing counsel re: same. Confer with Atty Bullock re: final research and preparation. Confer with Atty Jackson re: same. Client meeting with witnesses Blake Jackson, Bruce Adams, and Gary Sommercorn for examination preparation. Call with Atty Jackson re: same.
8/22/2017	GPJ	172053	3.5	290	\$1,015.00	Meet with Blake, Bruce, Gary and Bill to prepare for trial. Continue trial preparations.
8/22/2017	RCB	172053	2.6	215	\$559.00	Calls to witnesses re trial attendance. Calls to counsel in ID re the same. Review of Gilbert depo for transcript designations. Confer with WBI re trial exhibits and preparation and depositions.
8/23/2017	RCB	172053	0.7	215	\$150.50	Calls to Lincoln re trial attendance. Call and texts with GPJ re the same. Communications with counsel or Schoonover re trial attendance. Confer with WBI re the same
8/23/2017	GPJ	172053	10	290	\$2,900.00	Travel to and participate in trial as well as prepare for day 2.
8/23/2017	WBI	172053	10	260	\$2,600.00	Travel to Caldwell, Idaho for trial. Present Trial Day 1 (witnesses: Sheri Johnson, Gus Gustaveson, Jeff Johnson, Gary Sommercorn). Post-trial meetings with Atty Jackson and client re: examination preparation for Day 2. Review and edit examination outlines for same.
8/24/2017	WBI	172053	10	260	\$2,600.00	Present Trial Day 2 (pretrial meetings with and preparation of witnesses, witnesses: Brian Bixler, Lincoln Hagood, Nick Schoonover, Bruce Adams, and Blake Jackson). Post-trial meetings with clients. Continued preparation for Day 3 (review Erlebach deposition and draft examination outline, prepare for Atty Jackson and opposing counsel examinations, review deposition and emails re: same).
8/24/2017	GPJ	172053	10	290	\$2,900.00	Participate in trial and prepare for day 3.
8/25/2017	GPJ	172053	10	290	\$2,900.00	Participate in trial and travel to Salt Lake.
8/25/2017	WBI	172053	10	260	\$2,600.00	Presentation and defense of counterclaims for Trial Day 3 (pre-trial meeting and preparation with Atty Jackson, witnesses: Blake Jackson, Kristin Dunn, and Dave Erlebach, closing remarks and schedule for closing arguments by brief, confer with opposing counsel re: same). Return travel to Salt Lake City, Utah.
8/28/2017	WBI	172053	0.2	260	\$52.00	Confer with Atty Bullock re: deposition designations to send to court. Prepare files for closing arguments.
8/31/2017	WBI	172053	0.2	260	\$52.00	Confer with Atty Bullock re: post-trial submissions.
8/31/2017	RCB	172053	0.2	215	\$43.00	Confer with WBI re post trial filings and depo designations
9/1/2017	WBI	173029	0.1	260	\$26.00	Emails with opposing counsel and court re: deposition designations.
9/1/2017	RCB	173029	0.3	215	\$64.50	Emails re Gilbert depo designations. Review of designations for approval

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
9/18/2017	WBI	173029	0.1	260	\$26.00	Confer with Atty Bullock re: status of trial transcript.
9/22/2017	WBI	173029	2.6	260	\$676.00	Begin draft closing trial brief (unlawful detainer section). Research Idaho authority re: holdover tenancy.
9/25/2017	WBI	173029	6.2	260	\$1,612.00	Continued draft closing trial brief (completion sections re: unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, research Idaho authorities re: same). Review A. Gilbert deposition designations and exhibits for incorporating facts.
9/26/2017	WBI	173029	5	260	\$1,300.00	Continued draft closing trial brief (edit liability sections, draft law on special and consequential damages, rent due, research Idaho case law re: same). Calls with opposing counsel re: briefing schedule and transcript. Email update to Atty Jackson re: same.
9/27/2017	WBI	173029	6.9	260	\$1,794.00	Continued draft closing trial brief (complete sections re: special and consequential damages, intentional injury, alternative minimum damages, and research Idaho authorities re: same and incorporate exhibits). Emails with opposing counsel re: due date and brief length.
9/28/2017	WBI	173029	6	260	\$1,560.00	Complete closing trial brief (complete sections re: mitigation, treble damages, alternative minimum damages, attorney fees, repair costs, and general edits and revisions to all sections). Emails with Atty Jackson re: review of brief for final incorporation of trial transcript citations and client review.
10/2/2017	WBI	174615	0.1	260	\$26.00	Call to clerk re: trial transcript.
10/3/2017	WBI	174615	0.3	260	\$78.00	Emails with court reporter and client re: trial transcript and closing trial brief.
10/9/2017	WBI	174615	0.8	260	\$208.00	Receive Transcript: Day 1. Begin review for incorporation into closing trial brief.
10/10/2017	WBI	174615	0.8	260	\$208.00	Continued review of Transcript: Day 1.
10/16/2017	WBI	174615	5.7	260	\$1,482.00	Receive Transcript: Day 2. Continued review of transcripts for incorporating individual witness testimony into closing trial brief (S. Johnson, G. Gustaveson, J. Johnson, G. Sommercorn, B. Bixler, L. Hagood, N. Schoonover, and B. Adams). Draft citations into brief and general edits. Email with Atty Jackson re: same.
10/23/2017	WBI	174615	0.2	260	\$52.00	Emails with court reporter re: last day transcript. Forward to Atty Jackson re: same.
11/6/2017	WBI	175873	0.1	260	\$26.00	Receive final transcript. Email with Atty Jackson re: same.
11/7/2017	WBI	175873	4.9	260	\$1,274.00	Complete review of trial transcript to incorporate into closing trial brief (B. Jackson, K. Dunn, D. Ehrlebach). Complete edit of closing trial brief (incorporate citations to testimony, complete research, general edits for content and page limitation). Emails with Atty Jackson re: final brief. Email with opposing counsel re: due date (11/20).
11/20/2017	WBI	175873	0.5	260	\$130.00	Final review and edits to closing trial brief. Prepare and file same.
11/21/2017	WBI	175873	0.3	260	\$78.00	Receive and review Defendant's closing trial brief. Email re: same.
1/8/2018	WBI		0.50	270	\$135.00	Receive and review order from trial court with findings of fact and conclusions of law. Confer with Atty Jackson re: attorney fee motion. Confer with Atty Bullock re: deadlines.
1/11/2018	WBI		3.60	270	\$972.00	Research Idaho Rules of Civil Procedure re: form of judgment and memorandum of attorney fees and costs. Begin draft judgment and memorandum. Confer with Atty Jackson re: same. Request and begin review of billing statements from accounting for summary of fees and draft of supporting attorney declaration.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
1/12/2018	WBI		2.80	270	\$756.00	Continued draft memorandum of attorney fees and costs and supporting attorney affidavit. Continued review of billing entries for same and redactions of privileged information. Prepare schedule for affidavit. Confer with Atty Bullock re: deadline for submission.
1/15/2018	WBI		1.80	270	\$486.00	Complete supporting attorney affidavit and form of judgment. Review attorney fee schedule. Emails re: same.
1/15/2018	GPJ		0.40	290	\$116.00	Review Affidavit to finalize. Emails from and to Mr. Jackson.
1/15/2018	RCB		0.70	220	\$154.00	Work on draft motion for attorney fees and costs

SUBTOTAL \$185,137.00

**COURT FILING FEES**

1/19/2015	E125	140039			\$166.00	Fee for filing With Canyon County Clerk.
6/10/2015	E126	144390			\$325.00	Pro Hac Vice Admission to Idaho State Bar for Ryan Bullock.
6/18/2015	E112	144390			\$325.00	Pro Hac Vice Admission to Idaho State Bar for Graden Jackson

SUBTOTAL \$816.00

**PROCESS SERVICE FEES**

1/29/2015	E113	140806			\$129.80	Process service by Tri County Process.
3/26/2015	E113	141477			\$133.00	Process service by Tri County Process.
4/23/2015	E113	142740			\$45.00	Process service of Johnson Thermal Systems by Tri-County Process servicing, LLC.
10/6/2015	E113	148245			\$77.00	Process Service on Colliers International by Tri-County Process Serving
10/6/2015	E113	148245			\$89.00	Process service on David E. Kerrick Law Offices by Tri-County Process Serving
11/5/2015	E113	149559			\$77.00	Process service on Lincoln Hagood by Tri-County Process Serving
6/13/2017	E113	169978			\$62.00	Process service of Idaho Power by Tri-County Process Serving
8/18/2017	E113	172053			\$79.00	Process service of Lincoln Hagood by Tri-County Process Serving
9/13/2017	E113	173029			\$15.00	Process service of Darrell "Gus" Gustaveson by Tri-County Process Serving, LLC

SUBTOTAL \$706.80

**WITNESS FEES**

2/10/2016	E114	152375			\$20.00	Witness fee for Arlene Gilbert.
6/23/2017	E114	169978			\$20.30	WBI Witness fee for Idaho Power.
8/8/2017	E114	172053			\$20.91	Witness fee and mileage for Darrell Gustaveson.
8/9/2017	E114	172053			\$43.51	Witness fee and mileage for Lincoln Hagood.
8/21/2017	E114	172053			\$28.13	Witness fee for Nick Schoonover.

SUBTOTAL \$132.85

**TRANSCRIPTS**

12/10/2015	E115	150122			\$1,149.90	Deposition of Jeff and Sheri Johnson, Lincoln Hagood, Gus Gustaveson, Dave Erlebach on November 17 through November 18, 2015 hv. OnA Court Reporting
2/29/2016	E115	152375			\$310.65	Deposition of Arlene Gilbert by Utah Court Reporting and Transcription
6/29/2017	E115	169978			\$263.00	Court reporter fee for the deposition of Graden Jackson by Q&A Court Reporting
11/6/2017	E126				\$1,481.12	Trial Transcript Fee

SUBTOTAL \$3,204.67

**COPYING**

1/14/2015	E101	140039			\$1.00	Legal Photocopies
3/2/2015	E101	141477			\$1.10	Legal Photocopies
3/4/2015	E101	141477			\$2.60	Legal Photocopies
4/28/2015	E101	142740			\$1.80	Legal Photocopies
4/28/2015	E101	142740			\$1.80	Legal Photocopies
4/30/2015	E101	143512			\$12.10	Legal Photocopies
5/15/2015	E101	143512			\$9.80	Legal Photocopies
6/4/2015	E101	144390			\$1.00	Legal Photocopies <sup>662</sup>

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/4/2015	E101	144390			\$0.60	Legal Photocopies
10/28/2015	E101	148246			\$3.20	Legal Photocopies
11/13/2015	E101	149559			\$1.00	Legal Photocopies
11/13/2015	E101	149559			\$1.00	Legal Photocopies
11/16/2015	E102	149559			\$16.00	Color Copies
11/16/2015	E101	149559			\$22.80	Legal Photocopies
11/20/2015	E101	149559			\$1.10	Legal Photocopies
12/11/2015	E101	150122			\$1.40	Legal Photocopies
12/11/2015	E101	150122			\$3.40	Legal Photocopies
2/8/2016	E101	152375			\$11.40	Legal Photocopies
3/18/2016	E101	153601			\$3.70	Legal Photocopies
3/18/2016	E101	153601			\$1.30	Legal Photocopies
3/21/2016	E101	153601			\$4.40	Legal Photocopies
3/21/2016	E101	153601			\$1.50	Legal Photocopies
3/21/2016	E101	153601			\$2.60	Legal Photocopies
3/21/2016	E101	153601			\$1.10	Legal Photocopies
3/22/2016	E101	153601			\$0.10	Legal Photocopies
3/23/2016	E101	153601			\$1.30	Legal Photocopies
3/23/2016	E101	153601			\$13.20	Legal Photocopies
4/7/2016	E101	154634			\$0.20	Legal Photocopies
4/14/2016	E101	154634			\$1.20	Legal Photocopies
6/15/2017	E102	169978			\$38.00	Color Copies
6/15/2017	E101	169978			\$1.00	Legal Photocopies
6/15/2017	E101	169978			\$1.60	Legal Photocopies
6/15/2017	E101	169978			\$2.00	Legal Photocopies
6/16/2017	E102	169978			\$35.00	Color Copies
6/16/2017	E102	169978			\$14.00	Color Copies
6/16/2017	E102	169978			\$31.00	Color Copies
6/16/2017	E102	169978			\$1.00	Color Copies
6/16/2017	E101	169978			\$3.10	Legal Photocopies
6/16/2017	E101	169978			\$1.50	Legal Photocopies
6/16/2017	E101	169978			\$1.50	Legal Photocopies
6/16/2017	E101	169978			\$1.40	Legal Photocopies
6/16/2017	E101	169978			\$1.10	Legal Photocopies
6/16/2017	E101	169978			\$2.60	Legal Photocopies
6/16/2017	E101	169978			\$1.10	Legal Photocopies
6/19/2017	E102	169978			\$69.00	Color Copies
6/19/2017	E101	169978			\$23.70	Legal Photocopies
6/23/2017	E101	169978			\$1.20	Legal Photocopies
7/5/2017	E101	171065			\$5.70	Legal Photocopies
7/5/2017	E101	171065			\$1.80	Legal Photocopies
7/5/2017	E101	171065			\$3.50	Legal Photocopies
7/5/2017	E101	171065			\$3.50	Legal Photocopies
7/10/2017	E101	171065			\$1.40	Legal Photocopies
7/11/2017	E102	171065			\$1.00	Color Copies
7/11/2017	E101	171065			\$1.60	Legal Photocopies
7/11/2017	E101	171065			\$3.00	Legal Photocopies
7/26/2017	E101	171065			\$4.90	Legal Photocopies
7/26/2017	E101	171065			\$1.10	Legal Photocopies663

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
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7/31/2017	E101	171065			\$1.20	Legal Photocopies
SUBTOTAL					\$382.20	

**TRAVEL**

7/30/2015	E110	145375			\$953.20	GPJ Airfare to Idaho for hearing on July 13, 2015.
7/30/2015	E110	145375			\$303.97	GPJ Lodging while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$32.00	GPJ Parking at Salt Lake International Airport while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$76.00	GPJ Taxi while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$79.00	GPJ Taxi while in Idaho for hearing on July 16, 2015.
11/11/2015	E110	149559			\$565.70	RCB Airfare for depositions in Boise on November 17, 2015.
11/24/2015	E110	149559			\$14.61	RCB Cab while in Boise for depositions on November 18, 2015.
11/24/2015	E110	149559			\$247.47	RCB Lodging while in Boise for depositions on November 18, 2015.
11/24/2015	E111	149559			\$12.22	RCB Meal while in Boise for depositions on November 17, 2015.
11/24/2015	E111	149559			\$12.34	RCB Meal while in Boise for depositions on November 18, 2015.
11/24/2015	E110	149559			\$18.00	RCB Parking at Salt Lake International Airport while in Boise for depositions on November 18, 2015.
2/16/2016	E111	152375			\$6.43	RCB Meal while in St. George for deposition of Arlene Gilbert on February 9, 2016
2/16/2016	E124	152375			\$313.20	RCB Round trip mileage from Salt Lake City to St. George for deposition of Arlene Gilbert on February 9, 2016 (580 miles round
4/26/2016	E110	154634			\$547.70	GPJ Airfare to Boise for hearing on April 15, 2016.
4/26/2016	E110	154634			\$3.60	GPJ Gas for rental car while in Boise for hearing on April 21, 2016.
4/26/2016	E111	154634			\$7.19	GPJ Meal while in Boise for hearing on April 21, 2016.
4/26/2016	E111	154634			\$10.02	GPJ Meal while in Boise for hearing on April 21, 2016.
4/26/2016	E110	154634			\$32.00	GPJ Parking at Salt Lake International Airport while in Boise for hearing on April 21, 2016.
4/26/2016	E110	154634			\$51.37	GPJ Rental car while in Boise for hearing on April 20, 2016.
7/28/2017	E110	171065			\$93.00	GPJ Airport and tax rides while traveling on July 21, 2017.
7/28/2017	E110	171065			\$803.80	GPJ Round trip airfare to Boise for trial on August 23-25, 2017 for Graden Jackson and William Ingram)
7/28/2017	E110	171065			\$763.90	GPJ Rount trip airfare to Bosie on July 21, 2017 for deposition.
SUBTOTAL					\$4,946.72	

**ONLINE LEGAL RESEARCH**

3/18/2015	E106	141477			\$90.00	Online Research
4/17/2015	E106	142740			\$76.61	Online Research
8/17/2015	E106	146326			\$10.15	Online Research
4/11/2016	E106	154634			\$16.28	Online Research
4/15/2016	E106	154634			\$205.48	Online Research
7/20/2017	E106	171065			\$34.18	Online Research for Westlaw
8/15/2017	E106	172053			\$121.70	Online Research for Westlaw
8/15/2017	E106	172053			\$497.26	Online Research for Westlaw
9/19/2017	E106	173029			\$161.84	Online Research for Westlaw
10/20/2017	E106	174615			\$178.76	Online Research for Westlaw
12/21/2017	E106				\$205.46	Online Research for Westlaw
SUBTOTAL					\$1,597.72	

**LONG DISTANCE PHONE CALLS**

12/30/2014	E105	139151			\$0.10	1(208)459-4574 Long Distance Phone
12/30/2014	E105	139151			\$0.10	1(208)703-7916 Long Distance Phone
3/20/2015	E105	141477			\$1.00	1(208)454-7576 Long Distance Phone
12/4/2015	E105	150122			\$0.60	1(208)345-7000 Long Distance Phone
5/26/2016	E105	155678			\$0.20	1(208)454-7300 Long Distance Phone
6/8/2016	E105	156553			\$0.30	1(208)454-7300 Long Distance Phone
4/20/2017	E105	167743			\$1.60	1(208)383-3911 Long Distance Phone
5/22/2017	E105	168831			\$0.10	1(208)345-7000 Long Distance Phone
5/26/2017	E105	168831			\$1.60	1(208)345-7000 Long Distance Phone

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/5/2017	E105	169978			\$0.10	1(208)454-7375 Long Distance Phone

SUBTOTAL \$5.70

**MISCELLANEOUS**

3/9/2015	E107	141477			\$20.02	Federal Express delivery to Clerk of the Court, Third District Court.
3/20/2015	E107	143512			\$15.68	Federal Express delivery to Third District Court.
6/10/2015	E108	144390			\$13.95	Federal Express delivery to Idaho State Bar Association
6/14/2015	E126	144390			\$60.00	GPJ Certificates of Good Standing from the Utah State Bar.
7/9/2015	E108	145375			\$28.24	Federal Express delivery to Third District Court.
6/23/2017	E102	169978			\$20.00	WBI Certificate of Good Standing from Utah State Bar
6/28/2017	E126	169978			\$325.00	WBI- Fee to the Idaho State Bar for admittance Pro Hac Vice.
7/26/2017	E108	172053			\$33.51	Federal Express delivery to Third District Court of ID
8/8/2017	E108	172053			\$15.06	Federal Express delivery to Tri-County Process Serving

SUBTOTAL \$531.46

Total Fees Billed	\$185,137.00
Total discounts	\$8,000.00
Total expense billed	\$24,116.78
 Total on matter	 \$201,253.78



Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

---

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**MEMORANDUM OF  
ATTORNEY FEES AND COSTS**

Case No. CV15-587

Judge Chris Nye

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Pursuant to Idaho Rule of Civil Procedure 54(d)(4) and (e)(5), Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this memorandum of attorney fees and costs, and respectfully requests that the amounts stated herein be included with the Court’s final judgment.<sup>1</sup> This memorandum is based on the *Findings of Fact and Conclusions of Law* entered by the Court on January 4, 2018, and supported by the accompanying *Affidavit of William B. Ingram* (“Attorney Aff.”), **Exhibit 1**, and below-cited

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<sup>1</sup> In accordance with the Court’s order, a proposed judgment is submitted concurrently herewith. Idaho R. Civ. P. 2.3

authorities and contract provision.

**ATTORNEY FEES**

Pursuant to Contract or Statute. In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

Idaho R. Civ. P. 54(e)(1).

Attorney fees. In any action brought under the provisions of this chapter [Forcible Entry and Unlawful Detainer], except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees. . . .

Idaho Code § 6-324.

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney’s fee to be fixed by such court, in addition to the costs allowed by law.

*Commercial Lease Agreement* (Ex. 1) at 5.

As the prevailing party, CLC is entitled to the following amounts of attorney fees and legal research costs, which were reasonably incurred in this action in accordance with Idaho R. Civ. P. 54(e)(3), as set forth in the *Affidavit of William B. Ingram*:

<u>Description</u>	<u>Amount</u>
Attorney Fees	\$.....177,137.00
Legal Research Costs	\$.....1,597.72
<b>TOTAL</b>	<b>\$.....178,734.72</b>

*Attorney Aff.* (Ex. 1) at ¶¶ 6-29 and Sch. 1 thereto.

**COSTS**

Parties Entitled to Costs. Except when otherwise limited by these rules, costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Idaho R. Civ. P. 54(d)(1)(A).

As the prevailing party, CLC is entitled to the following costs as a matter of right in accordance with Idaho R. Civ. P. 54(d)(1)(C):

<u>Description</u>	<u>Amount</u>
Court Filing Fees	\$.....816.00
Service Fees	\$.....706.80
Witness Fees	\$.....132.85
Transcripts (deposition and trial)	\$.....3,204.67
Copying Charges	\$.....382.20
<b>TOTAL</b>	<b>\$.....5,242.52</b>

*Ingram Aff.* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto.

CLC submits that it is further entitled to the following discretionary costs in accordance with Idaho R. Civ. P. 54(d)(1)(D):

<u>Description</u>	<u>Amount</u>
Travel Costs	\$.....4,946.72
Long Distance Telephone Charges	\$.....5.70
Misc. Costs (FedEx and admission fees)	\$.....531.46
<b>TOTAL</b>	<b>\$.....5,483.88</b>

*Ingram Aff.* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto.

DATED this 17<sup>th</sup> day of January, 2018.

STRONG & HANNI

*/ s / William B. Ingram*

---

Graden P. Jackson  
 William B. Ingram  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 17<sup>th</sup> day of January, 2018.

Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

( ) U.S. Mail, postage prepaid  
( ) Facsimile  
(X) Email/CM/ECF Filing  
[kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)

Rebecca A. Rainey  
Angie Perkins  
FISHER RAINEY HUDSON  
950 W. Bannock Street, Suite 630  
Boise, ID 83702

( ) U.S. Mail, postage prepaid  
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[rar@frhtriallawyers.com](mailto:rar@frhtriallawyers.com)  
[angie@frhtriallawyers.com](mailto:angie@frhtriallawyers.com)

*/ s / Sariah Runnells, legal secretary*

---

# EXHIBIT “1”

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

---

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**AFFIDAVIT OF  
WILLIAM B. INGRAM**

Case No. CV15-587

Judge Chris Nye

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STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE        )

Pursuant to Idaho Rule of Civil Procedure 54(e)(5), William B. Ingram, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for Plaintiff Caldwell Land & Cattle, LLC (“CLC”) in the above-captioned action (the “Action”) against Defendant Johnson Thermal Systems, Inc. (“JTS”).

3. I am a shareholder with the law firm Strong & Hanni, which has represented CLC throughout this Action.

4. In preparing this affidavit, I have reviewed the time, billing, and expense records associated with this Action that have been maintained by Strong & Hanni in the ordinary course of business, as well as the briefings of the parties and orders by the Court that have been filed in the Lawsuit.

5. I am licensed to practice law in the State of Utah (admitted *pro hac vice* in this Action) and have been a member in good standing of the Utah State Bar Association since 2005.

**Time Spent and Work Performed by Attorneys in this Action**

6. I am lead trial counsel and have represented CLC in this Action since approximately June 2017.

7. Since becoming lead trial counsel, I have actively participated in and overseen all aspects of this Action, and am personally familiar with the nature and amount of legal work that has been performed; I am also personally familiar with the other individual lawyers who performed work on this Action before my representation.

8. The legal services that I have rendered for CLC related to this Action have included, among other things, reviewing pleadings and memoranda filed with the Court; preparing for and defending the deposition of Graden P. Jackson (noticed and taken by JTS); reviewing and exchanging correspondence with counsel for JTS; coordinating and preparing for the deposition

of Idaho Power; reviewing deposition transcripts and preparing witness examinations and exhibits for trial; reviewing and drafting supplemental discovery and pretrial disclosures, objections, motions in limine, and the opening trial brief; preparing and appearing for telephonic pretrial hearings; coordinating appearances of witnesses for trial; consulting with the client; preparing for, attending, and presenting evidence in support of CLC's claims at trial and defending against JTS's counterclaims; reviewing trial transcripts and drafting the closing trial brief; and other related services.

9. The hourly rate for my services in this Action has been \$260.00 and \$270.00.

10. I have also been assisted in this Action by Graden P. Jackson and Ryan C. Bullock who are attorneys with Strong & Hanni.

11. Graden P. Jackson (admitted *pro hac vice* in this Action) is a shareholder with Strong & Hanni and has been a member in good standing with the Utah State Bar Association since 1999. The legal services that Mr. Jackson has rendered for CLC related to this Action have included, among other things, consulting with the client; drafting and exchanging numerous correspondence and communications with counsel for JTS; reviewing pleadings, summary judgment motions, and memoranda filed with the Court; reviewing discovery responses; preparing for and participating in mediation with JTS; preparing for and defending the depositions of CLC, Blake Jackson, Bruce Adams, and Gary Sommercorn; preparing for and being deposed (in a deposition noticed and taken by JTS); preparing for and taking the deposition of Idaho Power; reviewing deposition transcripts and preparing witness examinations and exhibits for trial; reviewing pretrial disclosures, objections, motions in limine, and opening trial brief; preparing and appearing for telephonic pretrial hearings; preparing for, attending, and presenting evidence in



support of CLC's claims at trial and defending against JTS's counterclaims; reviewing the closing trial brief; and other related services.

12. Mr. Jackson has represented the Jackson Group, CLC, and other related entities since approximately 2008.

13. The hourly rate for Mr. Jackson's services in this Action has been between \$225.00 and \$290.00.

14. Ryan C. Bullock (admitted *pro hac vice* in this Action) is a shareholder with Strong & Hanni and has been a member in good standing with the Utah State Bar Association since 2008. The legal services that Mr. Bullock has rendered for CLC related to this Action have included, among other things, drafting and preparing pleadings, summary judgment motions, and memoranda filed with the Court; drafting discovery requests, subpoenas, and discovery responses; reviewing and preparing document productions; drafting a mediation brief; preparing for and taking the depositions of JTS, Gus Gustaveson, Jeff Johnson, Dave Erlebach, Sheri Johnson, Lincoln Hagood, and Arlene Gilbert; reviewing deposition transcripts and exhibits, and preparing witness examinations and exhibits for trial; drafting pretrial disclosures, objections, and motions in limine; preparing and appearing for telephonic pretrial hearings; drafting trial subpoenas and coordinating appearances of witness; and other related services.

15. The hourly rate for Mr. Bullock's services in this Action has been between \$200.00 and \$220.00.

16. Mr. Jackson was previously assisted in this Action by Roman R. Groesbeck, who is a former associate of Strong & Hanni and member in good standing with the Utah State Bar Association. Mr. Groesbeck provided assistance and support from the commencement of the

Action until approximately June 2015. His legal services included, among other things, researching, drafting, and preparing pleadings; drafting summary judgment briefs; and other related services.

17. The hourly rate for Mr. Groesbeck's services in this Action was \$195.00 and \$200.00.

18. I am personally familiar with Strong & Hanni's billing practices, including the time, manner, and method of recording and billing for legal services performed.

19. All Strong & Hanni attorneys who provided services in this Action, namely Messrs. Jackson, Bullock, Groesbeck, and myself, have logged their time in the ordinary course of business, consistent with Strong & Hanni's standard billing practices, at the rates identified above.

20. Consistent with Strong & Hanni's standard billing practices, monthly statements have been regularly maintained for this Action, which are compiled from each attorney's contemporaneous time records and memorialize what services were performed, when, by whom, and the amount of time expended.

21. The hours expended, hourly rates, attributable fees, and descriptions of the work performed by each attorney in this Action (reviewed and redacted for privilege<sup>1</sup>) is reflected in the attached **Schedule 1**, which has been generated from the above-described billing records maintained by Strong & Hanni.

22. The total attorney fees for legal services rendered by Strong & Hanni in this Action through January 15, 2018, is \$177,137.00 (\$185,137.00 less courtesy discounts of \$8,000.00).

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<sup>1</sup> By attaching these descriptions, CLC and Strong & Hanni do not waive the attorney-client and work product privileges.

23. The total legal research costs incurred by Strong & Hanni in this Action through January 15, 2018, is \$1,597.72.

**Reasonableness of Attorney Fees**

24. I have reviewed Strong & Hanni's billing statements from each month to ensure that the rates, services performed, amount of time, and fees charged have been fair, reasonable, and appropriate.

25. Strong & Hanni periodically reviews its rates to ensure that they are consistent with the market rates charged by law firms of comparable size and experience in the area.

26. I have also conferred with other shareholders of Strong & Hanni who are licensed to practice in Idaho to confirm that the hourly rates billed in this Action are reasonable for services of a similar nature under the facts and circumstances of this case.

27. Based on my experience, I believe that the hours expended by each attorney and the amounts billed in this Action have been reasonably and necessarily incurred, and are in accordance with the standards in the legal community for similar work of similarly skilled attorneys under similar circumstances. In particular, this Action has involved, among many other things, (a) claims and counterclaims asserted by both parties; (b) third-party claims asserted by JTS (previously dismissed); (c) numerous settlement communications and participation in formal mediation; (d) review and production of written discovery and numerous documents; (e) ten depositions (six taken by CLC and four taken by JTS); (f) engaging with four attorneys retained by JTS; (g) preparation and filing of motions for summary judgment filed by both parties, motions to exclude evidence, and pretrial briefing; (h) calculations of lost costs and lost profits evidence; (i) preparation for and presentation of a three-day trial, including eleven witnesses and many

exhibits; (j) post-trial briefing; and (k) the Court's resolution of several facts and conclusions of law.

28. CLC has prevailed on its claims for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, and has been awarded \$86,389.26 in damages for rent due, damage and repair to property, lost costs, and lost profits; whereas JTS has been unsuccessful in its affirmative defenses and counterclaims for breach of contract and constructive eviction. *Findings of Fact and Conclusions of Law (1/4/18)*.

29. Both parties prayed to recover attorney fees and costs in their respective pleadings according to their written contract and as allowed by statute.

#### Costs

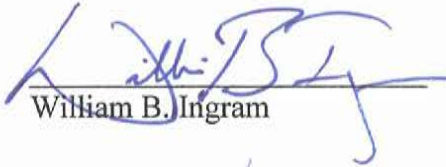
30. Strong & Hanni has also incurred various costs on behalf of CLC related to this Action, including court filing fees, service fees, witness fees, copying charges, and transcripts for deposition and trial, which are identified and summarized in **Schedule 1**.

31. The total costs incurred by Strong & Hanni on behalf of CLC in this Action through January 15, 2018, is \$10,726.40 (\$12,324.12 total expenses, less legal research costs of \$1,597.72, *supra*).

32. For the same reasons above, I believe that these costs have been reasonably and necessarily incurred in this Action.

Further your affiant sayeth naught.

DATED this 17<sup>th</sup> day of January, 2018.

  
William B. Ingram

SUBSCRIBED AND SWORN BEFORE ME this 17<sup>th</sup> day of January, 2018.

  
**Shannon L. Sullivan**  
Notary Public State of Utah  
My Commission Expires on:  
April 25, 2021  
Comm. Number: 694772



**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **AFFIDAVIT OF WILLIAM B. INGRAM** to be delivered via email, to the following counsel of record this 17<sup>th</sup> day of January, 2018.

Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
225 N. 9<sup>th</sup> Street, Ste. 810  
Boise, ID 83702

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Rebecca A. Rainey  
Angie Perkins  
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*/ s / Sariah Runnells, legal secretary*

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# SCHEDULE 1



**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

**Case No. CV15-587 (Idaho 3d Jud. Dist.)**

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
12/29/2014	ZRRG	139151	2.9	195	\$565.50	Interoffice conference with Atty. G. Jackson re: current facts of dispute, preparation of response letter to Tenant's counsel; receive and analyze many e-mails between Tenant and real estate agent re: timing to vacate property, lease negotiations, and related items; outline and draft response letter; e-mail same to Atty. G. Jackson for review and revision.
12/30/2014	ZRRG	139151	0.8	195	\$156.00	Receive and review e-mail from Mr. Jackson re: comments to draft response letter; prepare revised response letter based on same; e-mail revised letter to Atty. G. Jackson for review and signature.
1/5/2015	GPJ	140039	0.6	285	\$171.00	Emails from and to Blake re building details. Emails exchanged with counsel re status.
1/6/2015	GPJ	140039	0.4	285	\$114.00	Telephone call with Attorney Dunn and email Mr. Jackson re negotiating.
1/7/2015	GPJ	140039	0.2	285	\$57.00	Emails from and to Attorney Dunn and Mr. Jackson re settlement.
1/8/2015	GPJ	140039	0.3	285	\$85.50	Emails from and to Attorney Dunn and Mr. Jackson re negotiations.
1/9/2015	GPJ	140039	0.2	285	\$57.00	Emails exchanged with Mr. Jackson and Attorney Dunn re settlement.
1/12/2015	GPJ	140039	0.7	285	\$199.50	Emails from and to counsel re ongoing negotiations. Letter re counterproposal. Telephone call with and email exchange with Mr. Jackson re status.
1/13/2015	GPJ	140039	1.3	285	\$370.50	Many calls and emails from and to Attorney Dunn and Mr. Jackson. Outline complaint.
1/14/2015	GPJ	140039	0.6	285	\$171.00	Telephone call with Mr. Jackson and forward a draft copy of Complaint.
1/14/2015	ZRRG	140039	4.7	200	\$940.00	Voicemail from Atty. G. Jackson re: preparing complaint; review and analyze lease amendments, notice of termination, and property purchase closing documents; conduct additional research re: pleading requirements; outline and draft complaint; copy of complaint
1/15/2015	GPJ	140039	0.5	285	\$142.50	Email from and to and telephone call with Mr. Jackson re next steps and reaction to counter. Emails from and to Attorney Dunn re complaint.
1/16/2015	GPJ	140039	0.4	285	\$114.00	Email from and to Mr. Jackson and Attorney Dunn re negotiations. Letter to Attorney Dunn re signed complaint.
1/16/2015	ZRRG	140039	0.5	200	\$100.00	Finalize complaint for unlawful detainer; prepare correspondence and send same for filing with Court.
1/19/2015	GPJ	140039	0.3	285	\$85.50	Letter to Mr. Jackson enclosing Operating Agreement. Email exchanges re damages.
1/20/2015	GPJ	140039	1	285	\$285.00	██████████ Telephone calls with Attorney Dunn and Mr. Jackson re settlement. Emails re damages exchanged with Blake.
1/21/2015	GPJ	140039	0.5	285	\$142.50	Finalize letter to Mr. Jackson re next steps. Emails from and to Lincoln and Attorney Dunn re negotiations. Telephone call with Attorney Dunn and Telephone call with Mr. Jackson re negotiations.
1/22/2015	GPJ	140039	0.8	285	\$228.00	Telephone calls and emails from and to Attorney Dunn and Mr. Jackson re settlement. ██████████
1/23/2015	GPJ	140039	1	285	\$285.00	Emails from and to Attorney Dunn re settlement. ██████████ Email exchange with Mr. Jackson re settlement. Telephone calls with Attorney Dunn and Mr. Jackson re settlement.
1/26/2015	GPJ	140039	0.1	285	\$28.50	Status email with Mr. Jackson.



Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
1/28/2015	GPJ	140039	0.3	285	\$85.50	Email exchange with Attorney Dunn re not moving. Text exchange with Mr. Jackson.
1/29/2015	GPJ	140039	0.4	285	\$114.00	Email exchange with Attorney Dunn re demand. Email exchange with and telephone call with Mr. Jackson.
1/29/2015	ZRRG	140039	0.5	200	\$100.00	E-mails with Atty. G. Jackson and assistant re: service of complaint; work on summons and service items.
2/4/2015	GPJ	140806	0.1	285	\$28.50	Text exchange with Mr. Jackson re status.
2/5/2015	GPJ	140806	0.6	285	\$171.00	Text exchange and telephone call with Blake re status. Receive check and forward with cover letter to Mr. Coats.
2/6/2015	GPJ	140806	0.5	285	\$142.50	Email from and to Mr. Jackson re January rent. Telephone call with Mr. Jackson re contact from Attorney Dunn. Email from Attorney Dunn.
2/9/2015	GPJ	140806	0.6	285	\$171.00	Telephone call with Attorney Dunn. [REDACTED] Emails from and to Blake and Attorney Dunn re resolution.
2/11/2015	GPJ	140806	0.4	285	\$114.00	Telephone call and email with Blake re steps with tenant. [REDACTED].
2/12/2015	GPJ	140806	0.1	285	\$28.50	Telephone call with Attorney Dunn re status.
2/16/2015	GPJ	140806	0.3	285	\$85.50	Email exchange with and phone call with Mr. Jackson re approach. Email to Attorney Dunn re settlement.
2/17/2015	GPJ	140806	0.6	285	\$171.00	Telephone calls and emails exchanged with Mr. Jackson and Attorney Dunn.
2/18/2015	GPJ	140806	0.5	285	\$142.50	Telephone call with Mr. Jackson re status. Receive Notice of Appearance. Email to and from Attorney Dunn re settlement discussions.
2/20/2015	GPJ	140806	0.3	285	\$85.50	Email from Attorney Dunn re status and to Mr. Jackson.
2/23/2015	GPJ	140806	0.2	285	\$57.00	Email from Attorney Dunn and forwarded to Mr. Jackson.
2/24/2015	GPJ	140806	0.5	285	\$142.50	Emails from and to Attorney Dunn and Mr. Jackson re settlement. Telephone call with Mr. Jackson re damages.
2/25/2015	GPJ	140806	0.7	285	\$199.50	Emails exchanged with Attorney Dunn and Mr. Jackson. Telephone call with court re trial dates. Draft Notice of Intent to enter default.
2/26/2015	GPJ	140806	0.3	285	\$85.50	Email exchange with Attorney Dunn re Notice and Motion to Strike.
2/26/2015	ZRRG	140806	1.9	200	\$380.00	Telephone call with Atty. G. Jackson re: motion to strike filed by defendants, strategy; review motion to strike and notice of hearing; begin to conduct additional research re: non-possessory causes of action for amended complaint.
2/27/2015	ZRRG	140806	5.4	200	\$1,080.00	Finish researching non-possessory causes of action for amended complaint; interoffice conference with Atty. G. Jackson re: go-forward strategy; research Idaho Rule of Civ. Procedure re: procedure to amend complaint; outline and begin to draft amended
2/27/2015	GPJ	140806	1	285	\$285.00	Emails from and to Attorney Dunn and Mr. Jackson re next steps. Work on research for amended Complaint.
3/2/2015	ZRRG	141477	2.3	200	\$460.00	Finish drafting initial draft of verified amended complaint; prepare exhibits for same; copy to Atty. G. Jackson for review and revision; e-mails with Atty. G. Jackson re: modifications to draft, finalizing same; finalize initial draft verified amended complaint and
3/2/2015	GPJ	141477	0.6	285	\$171.00	Finalize Verified Amended Complaint. Letter to Mr. Jackson for approval. Emails exchanged with Mr. Jackson re status.
3/3/2015	GPJ	141477	1.7	285	\$484.50	Receive Order re setting case deadlines. Email from and to Attorney Dunn re amended complaint. Emails from and to and telephone call with Mr. Jackson re case facts, new evidence about property destruction. Emails to Attorney Dunn re property
3/3/2015	ZRRG	141477	0.4	200	\$80.00	Confer with Atty. G. Jackson re: strategy, communications with opposing counsel.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
3/4/2015	ZRRG	141477	2.8	200	\$560.00	Telephone call with Atty. G. Jackson re: additional events and actions taken by defendants to building, modification of verified amended complaint to incorporate same; interoffice conference with Atty. Bullock re: same, strategy for additional causes of action;
3/4/2015	GPJ	141477	1.2	285	\$342.00	Outline changes to complaint. Email to Attorney Dunn. Email new Amended Complaint. Address new issues.
3/4/2015	RCB	141477	0.8	200	\$160.00	Confer with Atty Groesbeck re potential causes of action (bad faith, malicious destructino of property). Analysis of Idaho law re the same. Review and edit of Verified Amended Complaint.
3/5/2015	GPJ	141477	0.3	285	\$85.50	Emails exchanged with Attorney Dunn and Mr. Jackson re various matters.
3/6/2015	ZRRG	141477	0.5	200	\$100.00	Prepare stipulated motion to file amended complaint and proposed order re: same.
3/9/2015	ZRRG	141477	0.4	200	\$80.00	E-mails with Atty. G. Jackson re: stipulation, next steps; instructions to assistant re: communications with opposing counsel.
3/9/2015	GPJ	141477	0.4	285	\$114.00	Email from Mr. Jackson re furnace repair and cancellation of hearing.
3/10/2015	GPJ	141477	0.5	285	\$142.50	Receive letter vacating hearing. Email re power box. Letter to Attorney Dunn enclosing list.
3/10/2015	ZRRG	141477	0.1	200	\$20.00	Receive and review letter from opposing counsel re: vacating motion to strike hearing.
3/13/2015	GPJ	141477	0.1	285	\$28.50	Status email exchanged with Mr. Jackson.
3/16/2015	GPJ	141477	0.2	285	\$57.00	Letter to Attorney Dunn re moving ahead.
3/17/2015	GPJ	141477	0.6	285	\$171.00	Letter exchange with Attorney Dunn. Email and text exchange with Mr. Jackson re how to proceed.
3/20/2015	GPJ	141477	0.1	285	\$28.50	Email from and to Attorney Dunn re service.
3/20/2015	ZRRG	141477	1.6	200	\$320.00	E-mails with Atty. G. Jackson re: filing issues with amended complaint; review letter from opp. counsel re: same; telephone call with ID court clerk re: filing procedure; research ID R. Civ. Pro. re: same, service; prepare revised amended complaint for filing with court; send for filing.
3/26/2015	ZRRG	141477	0.3	200	\$60.00	Work on service of amended complaint issues; prepare summons and amended complaint and send for service.
4/1/2015	GPJ	142740	0.3	285	\$85.50	Email from and to Mr. Jackson re status. Outline next steps.
4/1/2015	ZRRG	142740	1.6	200	\$320.00	Interoffice meeting with Atty. Bullock re: go-forward strategy, including procedural issues, dispositive motion timing, discovery, and related items; begin to work on same.
4/1/2015	RCB	142740	1.3	200	\$260.00	Confer with Atty Groesbeck re status of case and strategy. Outline motion for summary judgment and proposed discovery. Analysis of Idaho Rules of Procedure for timing of motion and discovery.
4/2/2015	RCB	142740	0.5	200	\$100.00	Confer with Attys Groesbeck and Turner re procedural steps on motion for summary judgment, diclosures and timing. Confer with Atty Groesbeck re strategy and next steps. Outline the same.
4/2/2015	ZRRG	142740	0.3	200	\$60.00	Work on go-forward procedural and litigation strategy issues.
4/8/2015	RCB	142740	1.6	200	\$320.00	Begin draft of motion for summary judgment on all claims. Analysis of Idaho Law re unlawful detainer for use in summary judgment motion. Confer with Atty Groesbeck re status and strategy
4/8/2015	ZRRG	142740	4.9	200	\$980.00	Research Idaho Rules of Civil Procedure Rules 26, 33, 34, and 36 re: discovery practice; work on preparing initial draft of interrogatories, requests for production and requests for admission.
4/8/2015	GPJ	142740	0.3	285	\$85.50	Telephone call with Mr. Jackson re customer issue.
4/9/2015	RCB	142740	2.3	200	\$460.00	Continue work on draft motion for summary judgment (draft standard for summary judgment and argument re contract and unlawful detainer). Analysis of Idaho case law in support of position for unlawful detainer.

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4/10/2015	ZRRG	142740	0.4	200	\$80.00	Finalize initial discovery requests; copy of same to Atty. Bullock for review and revision; confer with Atty. Bullock re: MSJ strategy.
4/13/2015	GPJ	142740	0.8	285	\$228.00	Telephone call with Mr. Jackson re responsive pleading. Receive and analyze Answer and Counterclaim. Email from Mr. Jackson re next steps.
4/13/2015	GPJ	142740	0.3	225	\$67.50	Telephone call with Mr. Jackson re customer issue.
4/14/2015	ZRRG	142740	0.9	200	\$180.00	Review and begin to analyze answer and counterclaim of Johnson Thermal.
4/21/2015	GPJ	142740	0.2	285	\$57.00	Telephone call with Mr. Jackson re status.
4/27/2015	ZRRG	142740	1	200	\$200.00	Begin to outline and draft reply to counterclaim.
4/28/2015	ZRRG	142740	2.7	200	\$540.00	Finish preparing reply to counterclaim; revise draft first set of discovery responses; e-mail same to Atty. G. Jackson for review and comment; confer with Atty. Bullock re: initial arguments for partial summary judgment motion.
4/28/2015	GPJ	142740	0.2	285	\$57.00	Finalize pleadings and forward to Mr. Jackson for review.
4/28/2015	RCB	142740	1.8	200	\$360.00	Confer with Atty Groesbeck re Reply to Counterclaim, Motion for Summary Judgment and discovery requests. Continue work on motion for summary judgment (outlining facts, reviewing answer to complaint, setting up intro)
4/29/2015	RCB	142740	4.6	200	\$920.00	Continue work on motion for summary judgment (draft fact section, introduction, argument (i) liable for unlawful detainer (ii) breached the lease agreement (iii) breached covenant of good faith and fair dealing (iv) liable for attorney fees); Confer with Atty
4/29/2015	GPJ	142740	0.3	285	\$85.50	Look at Motion for Summary Judgment and forward to Mr. Jackson for approval.
4/29/2015	ZRRG	142740	0.7	200	\$140.00	Make additional revisions to reply to counterclaim; work on motion for partial summary judgment items.
4/30/2015	ZRRG	142740	2.5	200	\$500.00	Review and revise draft memorandum for partial summary judgment; finalize reply to counterclaim and first set of discovery requests; e-mails with Atty. G. Jackson re: verification issue; prepare verification and e-mail same to Atty. G. Jackson for provision
4/30/2015	GPJ	142740	0.7	285	\$199.50	Email from and to Mr. Jackson re changes to Motion for Summary Judgment. Email re verification. Work on minor edits to pleadings.
4/30/2015	RCB	142740	2.9	200	\$580.00	Revised and edit Motion and Memo in Support of Motion for Partial Summary Judgment per input from Attys Jackson and Groesbeck; Confer with Atty Jackson and Groesbeck re filing of Reply, and Discovery; Analysis of Idaho Rules of Civil Procedure re
5/4/2015	ZRRG	143512	0.1	200	\$20.00	Receive and briefly review new scheduling order.
5/4/2015	RCB	143512	0.1	200	\$20.00	Receipt of Order from Court re scheduling conference
5/7/2015	RCB	143512	0.3	200	\$60.00	Confer with Atty Groesbeck re status conference. [REDACTED]
5/7/2015	GPJ	143512	0.1	285	\$28.50	Receive Notice of Address Change.
5/11/2015	ZRRG	143512	0.5	200	\$100.00	Confer with Atty. G. Jackson re: scheduling hearing items, strategy; work on pro hac vice applications.
5/12/2015	ZRRG	143512	0.3	200	\$60.00	Participate in telephonic scheduling conference with Atty Bullock, opposing counsel and court.
5/12/2015	RCB	143512	0.3	200	\$60.00	Participate in telephonic scheduling conference with Court. Confer with Atty Jackson re the same.
5/26/2015	ZRRG	143512	0.2	200	\$40.00	Confer with Atty. G. Jackson re: status of matter; confer with Atty. Bullock re: preparing motion to set hearing date for motion for partial summary judgment.
6/3/2015	ZRRG	144390	0.7	200	\$140.00	Begin to review and analyze defendant's responses to discovery requests.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/4/2015	ZRRG	144390	1.5	200	\$300.00	Finish initial review and analysis of defendant's discovery responses and production of documents.
6/5/2015	GPJ	144390	0.2	285	\$57.00	Telephone call re various topics with Mr. Jackson.
7/2/2015	GPJ	145375	0.3	285	\$85.50	Status call with Mr. Jackson. Receive and briefly review pleadings.
7/6/2015	RCB	145375	3.6	200	\$720.00	Review and analyze opposition to motion for summary judgment and affidavit in support filed by Johnson Thermal. Outline response. Begin draft of reply memorandum. Confer with Atty Jackson re the same.
7/7/2015	RCB	145375	4.9	200	\$980.00	Continue work on draft of Reply Memo in support of Motion for Summary Judgment; Analyze responses to discovery requests and review documents produced by Johnson Thermal for incorporation into memo
7/7/2015	GPJ	145375	0.5	285	\$142.50	Receive Opposition and Declaration. Letter to Mr. Jackson enclosing pleadings. Email exchange re appearing telephonically.
7/8/2015	GPJ	145375	0.2	285	\$57.00	Work on Reply.
7/8/2015	RCB	145375	3.7	200	\$740.00	Complete first draft of reply memorandum in support of motion for summary judgment. Confer with Atty Jackson re the same.
7/9/2015	RCB	145375	2.6	200	\$520.00	Revise and edit portions of reply memo, per input from Atty Jackson. Prepare exhibits and memo for filing.
7/13/2015	GPJ	145375	0.4	285	\$114.00	Telephone call with court and email exchanges with Mr. Jackson re appearing at hearing.
7/15/2015	GPJ	145375	3	285	\$855.00	Prepare for hearing and travel to Boise (travel time billed at half time).
7/16/2015	GPJ	145375	4	285	\$1,140.00	Travel to and from and participate in hearing (half charge for travel time). Confer with counsel after hearing re possible settlement. Telephone call with Mr. Jackson re outcome of hearing.
7/17/2015	GPJ	145375	0.1	285	\$28.50	Email exchange with Mr. Coats re ownership language.
8/17/2015	GPJ	146326	0.3	285	\$85.50	Receive and review Memorandum Decision.
8/17/2015	RCB	146326	0.2	200	\$40.00	Review and analysis of Court's memo and decision re Motion for Partial Summary Judgment
8/18/2015	GPJ	146326	0.2	285	\$57.00	Email exchange with Mr. Jackson re ruling.
9/9/2015	RCB	147428	1.9	200	\$380.00	Confer with Atty Jackson re strategy/next steps. Draft letter to Mr. Jackson re strategy and next steps in litigation
9/16/2015	RCB	147428	1.4	200	\$280.00	Confer with Atty Jackson re next steps and strategy. Draft letter to opposing counsel re depositions. Work on Subpoenas to Collier and Ms. Gilbert
9/22/2015	RCB	147428	1.8	200	\$360.00	Complete draft of Subpoenas to Gilbert's attorney and Colliers Intenational. Prepare for service
9/22/2015	GPJ	147428	0.4	285	\$114.00	Telephone call with Attorney Dunn re deposition dates.
9/28/2015	RCB	147428	0.3	200	\$60.00	Communications with Collier's re subpoena
9/8/2015	GPJ	147429	0.2	225	\$45.00	Telephone call with Mr. Jackson and confer with Attorney Bullock re strategy.
9/28/2015	GPJ	147429	0.2	225	\$45.00	Telephone call with Mr. Jackson re status.
10/2/2015	GPJ	148245	0.1	285	\$28.50	Letter to Attorney Dunn re depositions.

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10/5/2015	RCB	148245	0.8	200	\$160.00	Analysis of documents and emails produced by David Kerrick in response to Subpoena
10/7/2015	RCB	148245	0.2	200	\$40.00	Emails re response to subpoenas with Collier
10/7/2015	GPJ	148246	0.1	285	\$28.50	Email from Attorney Dunn re depositions.
10/8/2015	GPJ	148246	0.3	285	\$85.50	Letter from Attorney Dunn re depositions. Outline next steps.
10/8/2015	RCB	148246	0.3	200	\$60.00	Receipt of letter re depositions dates. Confer with Atty Jackson re the same. Emails re subpoenaed documents
10/9/2015	RCB	148246	2.7	200	\$540.00	Emails re response to subpoenas. Receipt of thumb drives from Colliers. Begin review of documents and email provided in response to Subpoenas.
10/19/2015	RCB	148246	2.5	200	\$500.00	Emails re deposition dates for Lincoln Hagood and Arlene Gilbert. Continued review and analysis of emails received from Subpoenas
10/19/2015	GPJ	148247	0.1	225	\$22.50	
10/20/2015	GPJ	148247	0.7	225	\$157.50	Telephone call with Blake re status and with Mr. Iliff re deposition.
10/21/2015	RCB	148246	0.3	200	\$60.00	Confer with Atty Jackson re depositions. Email to counsel for Johnson Thermal re the same
10/21/2015	GPJ	148247	0.1	225	\$22.50	Work on setting depositions.
10/22/2015	RCB	148246	0.2	200	\$40.00	Emails re deposition dates and locations
10/23/2015	RCB	148246	0.1	200	\$20.00	Emails re deposition dates
10/26/2015	RCB	148246	0.3	200	\$60.00	Prepare notices of deposition for Hagood, S. Johnson, J. Johnson, Erlebach and Gustaveson
10/28/2015	RCB	148246	0.2	200	\$40.00	Work on Deposition Notices. Emails re the same.
10/30/2015	RCB	148246	2.1	200	\$420.00	Receipt of Plaintiff's discovery requests to Petebilt. Begin draft of responses and objections
11/2/2015	RCB	149559	1.3	200	\$260.00	Receipt of Order to File Stipulated Trial Dates. Confer with Atty Jackson re the same. Work on responses to discovery requests submitted by Johnson Thermal
11/3/2015	RCB	149559	2.7	200	\$540.00	Work on responses to discovery requests submitted by Johnson Thermal
11/6/2015	RCB	149559	0.2	200	\$40.00	Communication to counsel for Johnson Thermal re trial dates and court's order re the same
11/9/2015	RCB	149559	0.2	200	\$40.00	Emails re trial dates
11/11/2015	RCB	149559	0.2	200	\$40.00	Emails re trial dates and stipulated motion to court
11/12/2015	RCB	149559	1.7	200	\$340.00	Many emails re trial dates. Draft Stipulated Response to Court's order re trial dates. Begin preparations for upcoming depositions (drafting outlines and reviewing supporting documents, emails)
11/13/2015	RCB	149559	6.8	200	\$1,360.00	Continue deposition preparation work (review of emails and documents, draft depo outlines of Sherri Johnson, Jeff Johnson, Lincoln Hagood)
11/16/2015	RCB	149559	6.3	200	\$1,260.00	Continue work on deposition preparation. Draft outlines for Gus Gustaveson and Dave Erlebach
11/17/2015	RCB	149559	8.3	200	\$1,660.00	Travel to Boise. Attend and participate in depositions of Lincoln Hagood, Sheri Johnson, and Jeff Johnson
11/18/2015	RCB	149559	8.8	200	\$1,760.00	Attend and participate in deposition of Gus Gustaveson and Dave Erlebach. Return to SLC from Boise

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
11/20/2015	RCB	149559	1.8	200	\$360.00	Draft letter to Peterbilt re depositoins and discovery requests. Begin work on draft discovery responses.
11/23/2015	RCB	149559	0.3	200	\$60.00	Receipt of Trial Date and Scheduling Order from Court. Analysis of the same
11/25/2015	RCB	149559	1.9	200	\$380.00	Work on discovery responses. Email to Ms. Dunn re scheudling order and proposed dates/deadlines
11/30/2015	RCB	149559	0.2	200	\$40.00	Emails with Ms. Dunn re discovery responses and case management order
11/30/2015	GPJ	149559	0.1	285	\$28.50	Email exchange with Mr. Jackson re evidence.
12/1/2015	RCB	150122	0.6	200	\$120.00	Receipt of many emails re discovery responses. Brief review of documents provided by Peterbilt
12/2/2015	RCB	150122	0.5	200	\$100.00	Communicatios with counsel for JT re scheduling order. Review of proposed order.
12/3/2015	RCB	150122	0.2	200	\$40.00	Emails re scheduling order
12/4/2015	RCB	150122	0.5	200	\$100.00	Communications re case managment order. Review of the same
12/8/2015	RCB	150122	1.1	200	\$220.00	Work on responses to JT's discovery requests. Emails re the same.
12/10/2015	RCB	150122	6.1	200	\$1,220.00	Complete first draft of responses and objections to Johnson Thermal's discovery requests to Peterbilt. Review and analysis of documents to be produced in connection with the same. Email to Atty Jackson re confirmation of resposnes.
12/11/2015	RCB	150122	3.9	200	\$780.00	Continue work on discovery responses and objections. Call with Mr. Adams re the same. Analyze and prepare documents to be produced with discovery responses.
1/4/2016	RCB	151375	0.2	205	\$41.00	Emails with Ms. Rainey re deposition dates and depo verifications
1/7/2016	GPJ	151375	0.1	285	\$28.50	Email exchange with Mr. Jackson re status.
1/7/2016	RCB	151375	0.1	205	\$20.50	Call to counsel for Ms. Gilbert re deposition availability
1/13/2016	RCB	151375	0.2	205	\$41.00	Emails with counsel for Ms. Gilbert re depositions dates
1/14/2016	RCB	151375	0.3	205	\$61.50	Communications re deposition of Arlene Gilbert
1/15/2016	RCB	151375	0.2	205	\$41.00	Emails re deposition of Arlene Gilbert
1/19/2016	RCB	151375	0.1	205	\$20.50	Emails re Ms. Gilbert's deposition
1/19/2016	GPJ	151375	0.1	285	\$28.50	Email exchange with Mr. Jackson re deposition.
1/27/2016	RCB	151375	0.1	205	\$20.50	Email re Gilbert deposition
1/29/2016	RCB	151375	0.2	205	\$41.00	Emails re deposition of Ms. Gilbert
2/1/2016	RCB	152375	0.2	205	\$41.00	Communications re deposition of Ms. Gilbert
2/2/2016	RCB	152375	0.2	205	\$41.00	Communications with Johnson Thermal re deposition of Arlene Gilbert
2/3/2016	RCB	152375	1.5	205	\$307.50	Emails re deposition of Ms. Gilbert. Prepare Notice of Deposition, Subpoena and Acceptance of Service. Confer with Atty Jackson re strategy. Work on depo preparation.
2/4/2016	RCB	152375	0.7	205	\$143.50	Communications re deposition of Arlene Gilbert. Work on preparation of the same
2/5/2016	RCB	152375	1.4	205	\$287.00	Work on deposition preparations for Ms. Gilbert
2/8/2016	GPJ	152375	0.3	225	\$67.50	Forward letter to Mr. Jackson and exchange emails re Collier's involvement.
2/8/2016	RCB	152375	5.9	205	\$1,209.50	Prepare for deposition of Arlene Gilbert (Draft outline and prepare/review exhibits and emails); Call to counsel for Ms. Gilbert re deposition. Confer with Atty Jackson re the same and developments with Colliers.

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2/9/2016	RCB	152375	11.8	205	\$2,419.00	Travel to and from St. George for Deposition of Arlene Gilbert. Attend and participate in deposition of Ms. Gilbert. Confer with Atty Jackson re the same
2/11/2016	GPJ	152375	0.4	225	\$90.00	Telephone call with Mr. Jackson and receive and process Amended Scheduling Order.
2/15/2016	GPJ	152375	1	225	\$225.00	Receive and briefly analyze Motion, Memo, Affidavit and Notice of Hearing for partial Summary Judgment. Letter to Mr. Jackson enclosing pleadings.
2/16/2016	GPJ	152375	0.6	225	\$135.00	Begin review of depositions in response to Motion.
2/18/2016	RCB	152375	0.4	205	\$82.00	Confer with Atty Jackson re response to Motion for Partial Summary Judgment. Outline the same. Brief review of memo
2/22/2016	RCB	152375	0.3	205	\$61.50	Receipt and brief analysis of motion to add third-party and file third-party complaint against Colliers
2/23/2016	RCB	152375	0.3	205	\$61.50	Work on hearing related issues for summary judgment motions.
2/24/2016	GPJ	152375	0.8	225	\$180.00	Receive Motion and Memo to add 3rd Party. Letter to Blake enclosing pleadings. Consider response.
2/26/2016	RCB	152375	2.9	205	\$594.50	Begin work on oppsition/cross motion for summary judgment on lease issues (work on response to facts, begin review of depos etc.).
2/29/2016	RCB	152375	2	205	\$410.00	Continue work on Opposition/Cross Motion for Summary Judgment re lease extension
2/29/2016	GPJ	152375	0.1	225	\$22.50	Letter to Blake enclosing depositions.
3/2/2016	GPJ	153601	0.4	285	\$114.00	Telephone call with Blake re strategy and next steps to prepare for trial.
3/3/2016	RCB	153601	1.1	205	\$225.50	Work on opposition to motion for summary judgment and cross-motion
3/4/2016	RCB	153601	2.8	205	\$574.00	Review deposition testimony and prepare responses to Johnson Thermal's statement of facts. Continue work on opposition to motion for summary judgment and cross-motion
3/8/2016	RCB	153601	2.2	205	\$451.00	Continue work on motion for summary judgment and cross motion
3/16/2016	RCB	153601	2.9	205	\$594.50	Review depositions for use in motion for summary judgment and opposition memorandum. Work on draft motion.
3/17/2016	RCB	153601	1.1	205	\$225.50	Work on response to Johnson Thermal's statement of facts on summary judgment memo
3/18/2016	RCB	153601	3.3	205	\$676.50	Work on cross-motion for summary judgment. Continued review of depositions.
3/21/2016	RCB	153601	8.1	205	\$1,660.50	Continue work on intial draft of opposition memo and cross-motion (additional statement of facts, argument section, and conclusion). Research on Idaho law re ambiguity, waiver and related issues. Incorporate research into memo as well as deposition
3/22/2016	RCB	153601	4.6	205	\$943.00	Complete draft of opposition memo and cross-motion. Work on exhibits and depo transcrip support. Confer with Atty Jackson re the same
3/22/2016	GPJ	153601	0.5	225	\$112.50	Work on cross motion and opposition and forward to Mr. Jackson for review.
3/23/2016	RCB	153601	2.4	205	\$492.00	Finalize opposition memo and cross-motion. Prepare affidavit of exhibits and exhibits. Draft notice of non-opposition to motion to add-third party. Confer with Atty Jackson re the same.
3/25/2016	GPJ	153601	0.1	225	\$22.50	Status email exchange with Blake.
4/7/2016	RCB	154634	1.5	205	\$307.50	Communications with counsel for Johnson Thermal re motion for summary judgment. Review of emails re the same. Brief review and analysis of reply and opposition memo filed by JTS.
4/8/2016	GPJ	154634	0.3	225	\$67.50	Review Reply and Opposition filed by Johnson Thermal.

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4/11/2016	RCB	154634	0.6	205	\$123.00	Work on reply to motion for summary judgment. Work on outline for pretrial filings
4/12/2016	RCB	154634	2.8	205	\$574.00	Work on draft reply to cross motion for summary judgment. Work on draft of trial witness and exhibit lists. Email to counsel for Johnson Thermal re the same.
4/13/2016	RCB	154634	4.7	205	\$963.50	Complete draft of Reply Memo in support of cross motion for summary judgment. Email the same to Atty Jackson for review and comment. Communications with counsel for JTS re addition of Colliers and impact on Court order re witness and trial exhibits
4/20/2016	GPJ	154634	3.4	225	\$765.00	Prepare for hearing and travel to Boise.
4/21/2016	GPJ	154634	6.3	225	\$1,417.50	Participate in hearing. Travel to Salt Lake. Telephone call with Mr. Jackson re outcome of hearing.
4/21/2016	RCB	154634	0.3	205	\$61.50	Confer with Atty Jackson re SJ hearing and next steps
4/27/2016	GPJ	154634	0.5	225	\$112.50	Receive and analyze third party complaint. Letter to Mr. Jackson enclosing pleading.
5/9/2016	GPJ	155678	0.1	225	\$22.50	Receive Acceptance of Service and Third Party Complaint.
5/12/2016	GPJ	155678	0.1	225	\$22.50	Receive Notice of Hearing.
5/12/2016	RCB	155678	0.2	205	\$41.00	Emails re scheduling and conference call with Court. Receipt of Notice
5/17/2016	GPJ	155678	0.3	225	\$67.50	Telephone call with and email from Attorney Dunn re mediation.
5/23/2016	GPJ	155678	0.3	225	\$67.50	Email to and telephone call with Blake re mediation. Email to Attorney Dunn re mediation.
5/26/2016	GPJ	155678	0.2	225	\$45.00	Participate in pre-trial hearing with court.
5/26/2016	RCB	155678	0.4	205	\$82.00	Calls with Court re vacating trial and scheduling
6/6/2016	GPJ	156553	0.1	225	\$22.50	Receive and analyze three-day intent to default on Colliers.
6/6/2016	RCB	156553	0.3	205	\$61.50	Receipt of Intent to take default on Colliers. Emails re trial dates
6/7/2016	RCB	156553	0.7	205	\$143.50	Many communications with counsel for Colliers and JTS re trial dates and availability
6/7/2016	GPJ	156553	0.1	225	\$22.50	Receive Collier's Answer.
6/8/2016	RCB	156553	0.4	205	\$82.00	Communications with counsel re trial dates. Call to Court re the same
6/27/2016	RCB	156553	0.4	205	\$82.00	Review proposed amended case management report. Emails re the same.
7/5/2016	GPJ	165370	0.4	290	\$116.00	Email exchange with Mr. Jackson re status. Telephone call with and email exchanged with Attorney Dunn re status.
11/16/2016	GPJ	165369	0.2	290	\$58.00	Email from court and letter to court re: new trial date.
11/30/2016	GPJ	165369	0.3	290	\$87.00	Telephone calls with Attorney Rainey re: Stipulation and Mr. Jackson re: status. Review Stipulation on discovery dates.
12/6/2016	GPJ	165369	0.2	290	\$58.00	Letter to counsel enclosing settlement discussion letter.
1/19/2017	GPJ	165370	0.4	290	\$116.00	Telephone call with Attorney Fisher and email letter to Attorney Fisher re settlement.
1/27/2017	GPJ	165369	0.3	290	\$87.00	Telephone call with Attorney Fisher re mediator.
1/30/2017	GPJ	165370	0.1	290	\$29.00	Emails re possible mediators.
2/4/2017	GPJ	165370	0.6	290	\$174.00	Receive and review Summary Judgment Motion, Affidavit and Notice of Hearing from Colliers.
2/6/2017	GPJ	165370	0.6	290	\$174.00	Email exchange with Mr. Jackson re mediation. Telephone calls with Mr. Jackson and Attorney Fisher re mediation.
2/7/2017	GPJ	165370	0.1	290	\$29.00	Emails exchanged with Attorneys Fisher and Shirley re mediation.



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2/8/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/9/2017	GPJ	165370	0.1	290	\$29.00	Receive Notice of Hearing.
2/10/2017	GPJ	165370	0.1	290	\$29.00	Emails re mediation.
2/13/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/14/2017	GPJ	165370	0.2	290	\$58.00	Emails re mediation.
2/20/2017	GPJ	165370	0.1	290	\$29.00	Emails re mediation.
2/28/2017	RCB	165369	1.4	215	\$301.00	Outline issues and begin draft of mediation brief.
3/1/2017	RCB	166796	2	215	\$430.00	Continue work on draft of mediation brief. Analysis of deposition testimony and other documents for use in brief.
3/3/2017	RCB	166796	1.7	215	\$365.50	Continue work on draft mediation brief (statement of facts, analysis of lease language, discussion section) Analysis of damages and fees claim for use in brief.
3/6/2017	RCB	166796	5.2	215	\$1,118.00	Complete first draft of mediation brief (facts, lease language, discussion, damages)
3/7/2017	RCB	166796	2	215	\$430.00	Revise and edit mediation brief and incorporate additional damages claims. Email to GPJ for review and comment
3/7/2017	GPJ	166796	0.3	290	\$87.00	Emails from and to Bryan re mediation brief and damages.
3/8/2017	GPJ	166796	0.2	290	\$58.00	Letter from mediator with agreement.
3/9/2017	GPJ	166796	0.3	290	\$87.00	Receive Notice to Vacate hearing. Telephone call with Mr. Jackson re status.
3/10/2017	GPJ	166796	0.1	290	\$29.00	Email from and to Mr. Jackson re status.
3/13/2017	GPJ	166796	0.3	290	\$87.00	Make updates to damages section of mediation letter.
3/14/2017	GPJ	166796	0.1	290	\$29.00	Forward mediation brief to Bryan and Blake for review.
3/15/2017	GPJ	166796	0.2	290	\$58.00	Finalized mediation letter and email to Blake.
3/15/2017	RCB	166796	0.2	215	\$43.00	Confer with GPJ re edits to mediation brief. Prepare exhibits.
3/21/2017	GPJ	166796	0.7	290	\$203.00	Telephone call with Attorney Squires and email documents he requested.
3/22/2017	GPJ	166796	10	290	\$2,900.00	Travel to and from and participate in mediation.
3/23/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with mediator Squires re next steps.
3/27/2017	GPJ	166796	0.3	290	\$87.00	Telephone call with Mr. Jackson re settlement status.
3/28/2017	GPJ	166796	0.3	290	\$87.00	Telephone call with Mr. Jackson re status of communications.
3/29/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with Mr. Jackson re status.
3/30/2017	GPJ	166796	0.2	290	\$58.00	Telephone call with Blake and email re communication [REDACTED]
3/31/2017	GPJ	166796	0.1	290	\$29.00	Telephone call with Blake re status.
4/3/2017	RCB	167743	0.8	215	\$172.00	Confer with GPJ re settlement issues. Draft letter re trial deadlines.
4/6/2017	GPJ	167743	0.2	290	\$58.00	Receive and review dismissal documents with Colliers and Johnson Thermal.
4/10/2017	GPJ	167743	0.4	290	\$116.00	Email exchange with Blake re Erhbach not settling. Forward Collier dismissal documents to Blake.
4/12/2017	RCB	167743	0.7	215	\$150.50	Receipt and analysis of letter re discovery deficiencies. Review and analysis of second set of discovery requests from JTS

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4/13/2017	RCB	167743	2	215	\$430.00	Begin work on responses to second set of discovery requests for JTS. Receipt of supplemental damages info from Peterbilt. Review and analysis of subpoenas submitted by JTS
4/13/2017	GPJ	167743	1.3	290	\$377.00	Receive and review three subpoenas. Letter to Mr. Jackson re discovery issues. Telephone call with Mr. Jackson re follow-up from letter
4/17/2017	RCB	167743	1.2	215	\$258.00	Continue work on draft responses to discovery requests. Draft supplement to initial disclosures.
4/18/2017	RCB	167743	1.8	215	\$387.00	Confer with GPJ re timeline of events and supporting damages. Review and analysis of additional documentation provided by Peterbilt for use in timeline. Analysis of other documentation for use in timeline of events and damages support
4/18/2017	GPJ	167743	1.8	290	\$522.00	Meet with Mr. Jackson and discuss outstanding issues. Outline timeline. Several telephone calls and emails re approach to settle.
4/19/2017	GPJ	167743	0.6	290	\$174.00	Telephone calls and emails with Mr. Jackson re various expenses and strategy.
4/19/2017	RCB	167743	3.8	215	\$817.00	Complete draft of Timeline of Events and Damages support with exhibits. Email to GPJ for review and comment.
4/20/2017	RCB	167743	2.3	215	\$494.50	Confer with GPJ timeline of events. Analysis of additional emails and communications between the parties. Implement email into timeline of events
4/20/2017	GPJ	167743	1	290	\$290.00	Work on summary timeline and telephone call with mediator Squires re settlement.
4/21/2017	RCB	167743	0.8	215	\$172.00	Revise and edit timeline of events. Prepare additional exhibits. Email to GPJ for review and comment.
5/1/2017	GPJ	168831	0.3	290	\$87.00	Telephone call with Mr. Jackson re power issue. Text exchange re discovery.
5/2/2017	RCB	168831	2.5	215	\$537.50	Complete draft of responses to JTS's second set of discovery requests. Gather and prepare documents responsive to requests for production
5/8/2017	RCB	168831	1.2	215	\$258.00	Revise and edit discover responses. Gather additional documents for production in response to discovery requests
5/8/2017	GPJ	168831	0.5	290	\$145.00	Telephone message for electric representative. Telephone call with Mr. Jackson re next steps. Email from Attorney Squires re futility in further discussion
5/10/2017	RCB	168831	1.2	215	\$258.00	Emails with counsel for JTS re discovery requests and extension to respond to the same. Continue work on draft responses interrogatories re mitigation.
5/12/2017	RCB	168831	2.7	215	\$580.50	Receipt and analysis of documents received by subpoena. Confer with GPJ re next steps and strategy. Begin work outlining trial strateav and binder outlining defenes claims and evidence
5/15/2017	RCB	168831	1.5	215	\$322.50	Continue work on trial strategy and binder, outlining defenes, claims and evidence.
5/16/2017	GPJ	168831	0.4	290	\$116.00	Email from and to Blake re power company issue. Telephone message and calls re power company documents.
5/17/2017	GPJ	168831	0.5	290	\$145.00	Emails re subpoena information. Email exchange with Attorney Vaughn re disqualification. Look at local rules.
5/17/2017	RCB	168831	4.7	215	\$1,010.50	Continue work on comprehensive letter to client outling case, strenghts and weaknesses, discovery, etc. Receipt of subpoena on Idaho Power from JTS. Draft subpoena on Idaho Power. Confer with GPJ re strateav and cases issues including disqualification of
5/18/2017	RCB	168831	2.1	215	\$451.50	Complete comprehensive letter to client. Work on responses to discovery requests and productino of documents. Email to GPJ re the same. Finalize subpoena to Idaho Power
5/18/2017	GPJ	168831	0.4	290	\$116.00	Email exchange with Vaughn re deposition and emails to and from Blake and Bryan re discovery.
5/22/2017	GPJ	168831	0.5	290	\$145.00	Email exchange with Bryan re discovery responses. Finalize and send with letter to Mr. Jackson. Telephone call with Attorney Fisher re status of settlement and my deposition. Telephone call with Mr. Jackson re status
5/22/2017	RCB	168831	1	215	\$215.00	Revise and edit letter to Blake. Confer with GPJ re the same. Emails to counsel for JTS re discovery reponses and document production
5/23/2017	RCB	168831	1	215	\$215.00	Emails re subpoenas and discovery responses. Finalized subpoena on Idaho Power. Work on responsees to discovery requests.
5/24/2017	RCB	168831	0.7	215	\$150.50	Emails with counsel re subpoenas and extension of time on discovery responses. Confer with GPJ re document production and discovery responses. Receipt and analysis of subpoena on Stubblefield Construction
5/24/2017	GPJ	168831	0.1	290	\$29.00	Email exchange with Bryan and Blake re discovery.
5/25/2017	GPJ	168831	0.7	290	\$203.00	Telephone call with Blake re Stubblefield subpoena. Review Stubblefield subpoena. Receive documents from Bryan to complete discovery responses
5/25/2017	RCB	168831	1.6	215	\$344.00	Work on revisions and edits to discovery requests. Confer with GPJ re the same. Work on subpoenas to be issued.
5/26/2017	RCB	168831	2.1	215	\$451.50	Revise and edit discovery responses. Confer with GPJ re the same. Prepare documents for production. Receipt and analysis of Notice of Inspection from Johnson Thermal
5/26/2017	GPJ	168831	1	290	\$290.00	Telephone call with Attorney Fisher re settlement issues. Receive subpoena to Platinum Remodel. Receive Notice of Inspection.

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5/30/2017	GPJ	168831	0.6	290	\$174.00	Receive production of remodel documents. Telephone call with Blake and email with Attorney Fisher re inspection and status.
5/30/2017	RCB	168831	0.8	215	\$172.00	Communications with counsel re discovery responses, trial issues and subpoena. Confer with GPJ re the same
5/30/2017	WBI	168831	0.6	260	\$156.00	Confer with Atty Jackson re: facts of case, defense of deposition, and trial preparation. Begin review of summary judgment motions re: same
5/31/2017	RCB	168831	2	215	\$430.00	Confer with GPJ re pre-trial. Call to Court re the same. Begin work on pre-trial brief and theory of recovery
5/31/2017	GPJ	168831	0.1	290	\$29.00	Email exchange with Attorney Fisher re deposition.
6/1/2017	WBI	169978	0.4	260	\$104.00	Review of docket and filings for deposition preparation.
6/1/2017	RCB	169978	2.4	215	\$516.00	Work on issues related to pre-trial hearing. Confer with GPJ re pre trial briefing. Work on pre-trial brief outlining statment of damages, witnesses, exhibits, etc.
6/1/2017	GPJ	169978	0.6	290	\$174.00	Telephone call with Blake re depo. Emails re Stubblefield. Emails re inspections. Email re bench trial. Letter from counsel re discovery deficiencies.
6/2/2017	GPJ	169978	0.5	290	\$145.00	Telephone call with Blake re status. Pictures of work done on other locations. Email re bench trial.
6/2/2017	RCB	169978	1.9	215	\$408.50	Receipt and analysis of Rule 37 letter from counsel for JTS on discovery response. Outline response. Confer with GPJ re the same. Work on pre-trial brief and supporting documents
6/5/2017	RCB	169978	3.9	215	\$838.50	Work on identifying exhibits and other documents for pretrial disclosures. Confer with GPJ re strategy on supplemental production. Analysis of photos sent by client. Work on response to Rule 37 letter from JTS
6/5/2017	GPJ	169978	0.4	290	\$116.00	Photographs from Mr. Jackson. Telephone call with court re bench trial.
6/6/2017	GPJ	169978	0.6	290	\$174.00	Telephone call with Blake re those present at inspections. Receive 30b6 depo notice. Email exchange with Blake re depo notice.
6/6/2017	RCB	169978	2.9	215	\$623.50	Continue work identifying documents and information for pretrial disclosures. Work on response to Rule 37 letter and email to GPJ re the same.
6/7/2017	RCB	169978	2.6	215	\$559.00	Work on pretrial disclosures and supplemental document production. Confer with GPJ re the same. Receipt of Notice of 30b6 depo.
6/9/2017	RCB	169978	0.2	215	\$43.00	Emails re supplemental discovery and additoinal witnesses
6/9/2017	GPJ	169978	0.5	290	\$145.00	Receive deposition notice. Letter to Blake and Bryan re discovery.
6/12/2017	GPJ	169978	0.3	290	\$87.00	Emails from and telephone call with Mr. Jackson re status.
6/12/2017	RCB	169978	3.7	215	\$795.50	Continue work on pre-trial brief and identification of relevant exhibits. Confer with GPJ re the same. Call to Idaho Power re subpoena.
6/13/2017	RCB	169978	5.7	215	\$1,225.50	Continue work on pre-trial breifing and preparation of trial binder. Work on draft supplemental responses to discovery requests. Review of additional documentation provided by client. Analysis of subpoenaed records from Idaho Power and Stubblefield. Draft letter to Mr Jackson re the same. Confer with GPJ re strategy and next steps.
6/13/2017	GPJ	169978	0.3	290	\$87.00	Receive and analyze subpoena responses from Stubblefield and Idaho Power.
6/14/2017	GPJ	169978	0.3	290	\$87.00	Work on stipulation documents. Email exchanges with Blake and Bryan re production.
6/14/2017	RCB	169978	6.6	215	\$1,419.00	Continue work on pre-trial brief and identification of exhibits. Call with counsel for Idaho Power re subpoena requests. Confer with GPJ re the same, strategy and discovery responses. Continue work on supplemental discovery requests and production of supplemental documents. Email to counsel re discovery responses.

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6/15/2017	RCB	169978	4.6	215	\$989.00	Revise and edit PreTrial brief pre input from WCI and GPJ. Work on pretrail preparation and exhibits. Confer with GPJ re strategy. Call with counsel for JTS re pretrial briefing and jury trial issues. Receipt and analysis of JTS' pretrial brief. Finalize and file pre-trial brief.
6/15/2017	WBI	169978	3.4	260	\$884.00	Prepare for deposition of Atty Jackson and trial preparation (complete review of all pleadings and summary judgment filings, begin review of deposition transcripts, outline claims, arguments, and relevant facts). Confer with Attys Jackson and Bullock re: same and pretrial brief. Review and edit same. Emails re: edits. Beg outline trial strategy document for conflicting notices.
6/15/2017	GPJ	169978	0.7	290	\$203.00	Telephone call with Blake re inspection, work on pre-trial disclosure and review defendant's pre trial brief.
6/16/2017	GPJ	169978	4	290	\$1,160.00	Prepare for and participate in deposition. Telephone call with and email exchanged re outcome of deposition.
6/16/2017	WBI	169978	6.1	260	\$1,586.00	Final preparation for deposition of Atty Jackson and for trial preparation (continued review of deposition transcripts and exhibits, review correspondence between counsel). Pre-deposition meeting with Atty Jackson re: strategy for deposition and trial. Appear and defend deposition. Post-deposition meeting with Attys Jackson and Bullock re: trial strategy and preparation for same.
6/16/2017	RCB	169978	2.2	215	\$473.00	Confer with WBI post depo of GPJ re issues and next steps. Receipt of supplemental disclosures from counsel for JTS. Communicatoin with Idaho Power re transformer. Outline research on constructive eviction in Idaho.
6/19/2017	RCB	169978	2	215	\$430.00	Communications re deposition of Blake Jackson. Research re timing of 30b6 depo and constructive eviction. Work on supplemental document production and review of supplemental production by JTS. Communicatinos with Idaho Power re subpoenas
6/19/2017	WBI	169978	2.1	260	\$546.00	Call with Atty Jackson re: 30(b)(6) deposition preparation. Call with Atty Bullock re: pretrial deadlines. Continued review and summary of deposition transcripts and exhibits for trial preparation.
6/19/2017	GPJ	169978	0.1	290	\$29.00	Emails from and to Blake re 30b6 deposition.
6/20/2017	GPJ	169978	3	290	\$870.00	Travel to and from and meet with Blake, Bruce and Gary to prepare for 30b6 deposition.
6/20/2017	WBI	169978	6.4	260	\$1,664.00	Complete review and summary of deposition transcripts for trial preparation. Prepare timeline of notice dates for trial presentation. Review 30(b)(6) deposition notice and exhibits for preparation to meet with client re: same. Meeting with client and Atty Jackson re: deposition preparation and trial strategy. Call and emails with Atty Bullock re: subpoenas and supplemental discovery
6/20/2017	RCB	169978	1.4	215	\$301.00	Confer with WBI re disclosures and subpoenaed records from Idaho Power. Emails to Idaho Power re documents. Review and analysis of documents received by Subpoena from Idaho Power. Outline supplemental resposes to prepare
6/21/2017	RCB	169978	2.6	215	\$559.00	Call with Idaho Power re documents and 30b6 depo. Confer with WBI and GPJ re strategy on the same. Work on supplemental discovery responses and witnesses. Begin work on lay witness disclosures.
6/21/2017	WBI	169978	1.6	260	\$416.00	Call with Atty Bullock re: supplemental disclosures and witness designations. Call with Idaho Power re: witness for transformer removal. Receive emails from client re: supplemental disclosures. Review emails produced by Colliers for trial exhibits.
6/21/2017	GPJ	169978	1.2	290	\$348.00	Telephone call with Blake re various matters. Text exchange re Idaho Power. Emails re update on exhibits. Emails exchanged with Vaughn re depositions.
6/22/2017	GPJ	169978	0.9	290	\$261.00	Participate in pre trial hearing. Work on Supplemental responses. Deal with Idaho Power subpoena. Emails re 7/6 travel.
6/22/2017	WBI	169978	3	260	\$780.00	Draft subpoena, acceptance of service and cover letter for Idaho Power deposition. Emails with Attys Jackson and Bullock re: same. Review and edit supplemental witness and document disclosures. Review communications from Colliers re: timeline of notice and exhibits for trial. Pretrial conference with court re: bench trial and schedule. Call with Atty Jackson re: same.
6/22/2017	RCB	169978	6.2	215	\$1,333.00	Confer with GPJ re witness lists, pre-trial hearing, and supplemental discovery. Participate in pre-trial conference with Court. Call to A-1 Heating re heater issues. Draft second supplemental discovery responses. Draft lay witness disclosures. Draft 30(b)(6) notice to Idaho Power. Confer with WBI re the same. Identify additional documents for use at trial.

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6/23/2017	RCB	169978	2.4	215	\$516.00	Receipt and analysis of first supplemental discovery responses from JTS. Review and analysis of documents produced with the same. Finalize and file Second Supplemental Responses to Discovery. Draft Verification. Analysis of Defendant's Witness List. Calls with A-1 Heating re service of heaters and invoice. Confer with WBI re the same.
6/23/2017	WBI	169978	0.3	260	\$78.00	Review disclosures by Defendants. Confer with Atty Bullock re: same and Idaho Power subpoena.
6/23/2017	GPJ	169978	0.3	290	\$87.00	Telephone call with Blake re Idaho Power. Emails re travel. Forward and receive verification signature.
6/26/2017	GPJ	169978	0.2	290	\$58.00	Letter and email exchange with Attorney Fisher re 30b6 topics.
6/26/2017	WBI	169978	0.1	260	\$26.00	Confer with Atty Bullock re: acceptance of service of subpoena by Idaho Power.
6/26/2017	RCB	169978	0.5	215	\$107.50	Calls with Idaho Power re deposition notice and acceptance of service. Emails re the same. Confer with WBI re response.
6/27/2017	RCB	169978	0.3	215	\$64.50	Confer with WBI re Idaho Power deposition. Emails re the same.
6/27/2017	WBI	169978	0.3	260	\$78.00	Call with Atty Jackson re: Idaho Power deposition. Confer with Atty Bullock re: scheduling same. Review motion for pro hac vice admission.
6/27/2017	GPJ	169978	0.1	290	\$29.00	Text exchange with Mr. Jackson re evidence.
6/28/2017	GPJ	169978	0.7	290	\$203.00	Receive and begin review of deposition transcript. Letter to Mr. Jackson enclosing transcript. Email from Mr. Jackson re additional documents. Telephone call with Mr. Jackson re reaction to transcript.
6/28/2017	WBI	169978	0.3	260	\$78.00	Calls with Idaho Power and Attys Jackson and Bullock re: scheduling deposition dates. Emails re: same.
6/28/2017	RCB	169978	1.8	215	\$387.00	Call to counsel of Idaho Power re 30b6 deposition. Confer with WBI re the same. Draft amended notice of deposition and acceptance of service. Emails with counsel re subpoenaed records from Idaho Power. Work on document supplementation
6/29/2017	RCB	169978	1.3	215	\$279.50	Receipt and analysis of letter from JTS re alleged discovery deficiencies. Emails re the same. Analysis of GPJ depo. Work on trial exhibits
6/29/2017	WBI	169978	0.3	260	\$78.00	Emails re: Idaho Power deposition date. Call re: same. Receive and review Defendant's witness disclosure. Complete and sign pro hac vice admission form for filing.
6/29/2017	GPJ	169978	0.8	290	\$232.00	Finalize review of depo and send letter to reporter. Letter re discovery from counsel. Forward letter to Bryan.
6/30/2017	GPJ	169978	0.2	290	\$58.00	Telephone call with Blake re discovery response.
6/30/2017	RCB	169978	1	215	\$215.00	Work on trial binder and exhibit lists. Confer with GPJ re the same. Emails re document production and response to JTS's letter.
7/3/2017	GPJ	171065	0.2	290	\$58.00	Emails exchanged with Bryan re discovery responses.
7/3/2017	RCB	171065	0.5	215	\$107.50	Review of additional damages support (income and expense report). Emails with GPJ re the same.
7/5/2017	RCB	171065	5.3	215	\$1,139.50	Work on supplemental discovery requests and preparation of trial binder and 30b6 deposition. Respond to JTS request for additional documents. Prepare and produced additional documents related to damages and lost income analysis.
7/5/2017	GPJ	171065	2.4	290	\$696.00	Work through pictures disclosed. Travel to and from and meet with Blake re depositions. Emails re financials.

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7/5/2017	WBI	171065	0.2	260	\$52.00	Emails re: supplemental disclosure and pro hac vice admission.
7/6/2017	WBI	171065	0.3	260	\$78.00	Emails and call with Attys Jackson and Bullock re: deposition [REDACTED]
7/6/2017	RCB	171065	2.4	215	\$516.00	Text messages and emails with GPJ re damages. Work on supplemental production and drafting of supplemental discovery responses. [REDACTED]
7/6/2017	GPJ	171065	10	290	\$2,900.00	Travel to and from and participate in 30b6 depositions. Work on assignment research.
7/7/2017	RCB	171065	6	215	\$1,290.00	Receipt and analysis of JTS's second supplemental discovery responses. Confer with WBI and GPJ re issues related to damages [REDACTED] [REDACTED] Begin trial research re law of case including mitigation, constructive
7/7/2017	GPJ	171065	0.6	290	\$174.00	Telephone call with Blake re strategy. Review lease and work on strategy.
7/7/2017	WBI	171065	0.8	260	\$208.00	[REDACTED]
7/8/2017	GPJ	171065	0.2	290	\$58.00	Telephone call with Blake re strategy.
7/10/2017	GPJ	171065	0.2	290	\$58.00	Text exchange with Blake re status and review letter.
7/10/2017	RCB	171065	4.8	215	\$1,032.00	Complete draft of supplemental discovery responses. Review and analysis of Lease Agreement and confer with WBI and GPJ re strategy [REDACTED] Emails with counsel re discovery responses. Prepare supplemental document production. Edit of letter to accompany lease and discovery supplements.
7/10/2017	WBI	171065	1.2	260	\$312.00	Review lease agreement forwarded by client. Emails with Atty Jackson and Bullock re: same and supplemental disclosures [REDACTED] Draft letter re: same. Emails with Atty Jackson and Bullock re: review of supplemental discovery disclosures.
7/11/2017	WBI	171065	0.1	260	\$26.00	Email with opposing counsel re: supplemental disclosures and lease agreement.
7/11/2017	RCB	171065	3.4	215	\$731.00	Analysis and outline of Idaho Case law on causes of action and defenses in preparation for trial and use in trial binder. Email from counsel re lease agreement. Finalized and produced supplemental discovery.
7/12/2017	RCB	171065	1	215	\$215.00	Emails with counsel re lease agreement. Confer with GPJ re the same. Work on trial binder and exhibit list
7/12/2017	WBI	171065	0.2	260	\$52.00	Emails re: lease agreement. Confer with Atty Bullock re: same.
7/14/2017	RCB	171065	0.2	215	\$43.00	Emails re stipulated exhibit lists
7/16/2017	GPJ	171065	0.1	290	\$29.00	Emails exchanged with Attorney Perkins re Exhibit Exchanges.
7/17/2017	RCB	171065	1.8	215	\$387.00	Confer with GPJ re next steps, Idaho Power deposition, and exhibit lists. Work on exhibit binder. Communications with Idaho Power and opposing counsel re deposition. Draft amended notice of depo and acceptance of service. Prepare for filing with Court.
7/17/2017	WBI	171065	0.2	260	\$52.00	Confer with Atty Jackson re: status and preparation for Idaho Power deposition.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
7/18/2017	WBI	171065	3.6	260	\$936.00	Draft deposition outline for Idaho Power (draft questions, review documents for exhibits, confer with Atty Bullock re: same). Forward to Atty Jackson with analysis. Receive and begin review of Defendant's motion in limine to exclude damages evidence. Confer with Atty Bullock re: response date. Review Idaho Rule re: same.
7/18/2017	RCB	171065	1.8	215	\$387.00	Receipt and brief analysis of motion in limine re damages. Confer with WBI re the same and deadlines. Work on exhibit list and trial binder.
7/19/2017	RCB	171065	1.8	215	\$387.00	Analysis of Motion on Limine re lease. Emails re the same. Outline response and timing of the same. Work on trial binder and identification of exhibits. Work on Idaho Power depo prep.
7/19/2017	WBI	171065	0.3	260	\$78.00	Emails re: preparation for trial.
7/19/2017	GPJ	171065	0.8	290	\$232.00	Receive and review Motion in Limine and forward to Blake. Book flights for trial. Telephone calls with Blake re Motion.
7/20/2017	WBI	171065	6.3	260	\$1,638.00	Calls with Atty Jackson and client re: facts for memorandum in opposition to motion in limine. Emails re: same. [REDACTED] Begin draft memorandum in opposition to motion in limine. Review produced documents and deposition summaries for case background. Calls with Atty Bullock re: same and
7/20/2017	RCB	171065	4.9	215	\$1,053.50	Conduct research and analysis of Idaho case law re damages for breach of contract, unlawful detainer, and injury to property for use in opposition to motion in limine. Conduct research and analysis of Idaho case law to support claims and for use in defense of counterclaims for trial. Work on depo preparation for Idaho Power Depo. Emails re the same. Review of depositions of Bruce Adams and
7/20/2017	GPJ	171065	2.2	290	\$638.00	Telephone call with Blake and email [REDACTED] Receive and begin review of transcripts. Prepare for deposition. Telephone calls with Blake re deposition.
7/21/2017	GPJ	171065	8.5	290	\$2,465.00	Travel to and from and participate in Idaho Power deposition. Provide phone report to Mr. Jackson.
7/21/2017	RCB	171065	7.9	215	\$1,698.50	Additional research of Idaho Case law to support damages claims for breach of contract, unlawful detainer, injury to property and good faith and fair dealing. Draft research outline. Confer with WBI re opposition memo to motion in limine. Revise and edit memo based on research. Draft declaration of Blake Jackson to support opposition memo. Confer with WBI and GPJ re Idaho Power
7/21/2017	WBI	171065	8.6	260	\$2,236.00	Continued draft memorandum in opposition to motion in limine (complete background and facts, citations to depositions and exhibits, Arg. I - no avoidance of lease agreement, Arg. II - alternative minimum damages). Emails with Attys Jackson and Bullock, and client re: same. Calls and emails with Atty Bullock re: legal research and draft declaration. Review and edit same. Calls with
7/22/2017	WBI	171065	0.3	260	\$78.00	Review and incorporate client edits to declaration. Emails re: same.
7/24/2017	WBI	171065	0.6	260	\$156.00	Review and edit Jackson declaration per emails with Atty Jackson. Emails and call with Atty Jackson re: same. Emails re: supplemental disclosure.
7/24/2017	RCB	171065	2.2	215	\$473.00	Draft supplemental discovery responses and work on Declaration of Blake for use with opposition memo. Emails re the same. Prepare documents for production. Send supplemental responses to counsel. Receipt and analysis of supplemental responses from Johnston Thermal and documents produced with the same.
7/24/2017	GPJ	171065	1	290	\$290.00	Telephone call with and email exchanged with Mr. Jackson re declaration. Email exchange with Blair re Response to Motion in Limine. Work to finalize Supplemental Response.
7/25/2017	RCB	171065	4.9	215	\$1,053.50	Confer with WBI and GPJ re strategy and next steps. Call to counsel re appearing telephonically at hearing. Draft motion and order re the same. Work on opposition to motion in limine. Research and analysis of Idaho law for use in memo and trial.
7/25/2017	WBI	171065	7.1	260	\$1,846.00	Conference call with Attys Jackson and Bullock re: strategy for brief and trial. Review revised declaration for Blake Jackson and incorporate changes into memorandum in opposition to motion in limine. Research Idaho authorities re: special damages on unlawful detainer, consequential damages on breach of contract, malicious injury to property, and mitigation. Incorporate same into
7/26/2017	WBI	171065	0.8	260	\$208.00	Continued draft pretrial brief (review of exhibits). Confer with Atty Bullock re: same. Draft final edits to memorandum in opposition to motion in limine.

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7/26/2017	GPJ	171065	1	290	\$290.00	Email exchange with Blake re memo, declaration. Telephone call with Blake and work through changes.
7/26/2017	RCB	171065	7	215	\$1,505.00	Revise and edit memo opposing motion in limine. Additional research of ID law re damages for use in memo. Confer with WBI and GPJ re the same. Prepare exhibits to memo. Finalize and file motion to appear telephonically. Instruct staff on filing of memo.
7/27/2017	RCB	171065	2.8	215	\$602.00	Work on pre-trial disclosures and prepare documents supporting damages calculation. Confer with WBI re the same. Call to Court re telephonic appearance order.
7/28/2017	RCB	171065	3	215	\$645.00	Work on pretrial exhibit list and identification of documents for use in the same. Work on damages support documentation. Confer with WBI re exhibit list. Research of Idaho law re JTS's causes of action
7/31/2017	RCB	171065	2.8	215	\$602.00	Continue work on exhibit list. Receipt and analysis of exhibit list from JTS and Reply in support of Motion in Limine. Emails with counsel re exhibit lists. Confer with GPJ re the same. Work on trial law summary
7/31/2017	GPJ	171065	0.4	290	\$116.00	Receive exhibit list and email to Mr. Jackson. Telephone call with Mr. Jackson re lease agreement.
8/1/2017	RCB	172053	4.2	215	\$903.00	Analysis of JTS's trial exhibit list. Receipt and analysis of Deposition of Idaho Power. Communications with counsel re exhibit lists and Colliers documents. Cross check colliers documents with our exhibit list. Confer with WBI re the same. Analysis of Idaho case law re damages and constructive eviction
8/1/2017	WBI	172053	0.5	260	\$130.00	Confer with Atty Jackson re: preparation for hearing on motion in limine and trial strategy. Emails from client re: same. Receive and review Defendant's reply memorandum.
8/1/2017	GPJ	172053	0.7	290	\$203.00	Work on document list and Reply. Forward both to Blake for review. Also forward depo transcript of Idaho Power.
8/2/2017	GPJ	172053	2.3	290	\$667.00	Participate and prepare for hearing. Telephone call with Bruce and Blake re outcome of hearing. Discuss strategy. Work on amended witness disclosure.
8/2/2017	WBI	172053	2.5	260	\$650.00	Prepare for motion in limine hearing (review briefing and outline oral argument). Pre-hearing meeting with Atty Jackson re: same and trial strategy. Appear and argue motion.
8/2/2017	RCB	172053	2.2	215	\$473.00	Confer with GPJ and WBI re limine hearing and strategy. Participate in hearing call. Work on trial subpoenas for witnesses and trial exhibits. Receipt of amended lay witness filing from Defendant. Emails re the same.
8/3/2017	RCB	172053	2.9	215	\$623.50	Communications with counsel re stipulated exhibits. Additional review of exhibits and documents identified by JTS. Continue work on research of supporting law for causes of action and defenses
8/4/2017	RCB	172053	2	215	\$430.00	Continued review and analysis of JTS's trial exhibits and documents. Emails re the same. Continue work on trial subpoenas.
8/7/2017	RCB	172053	4.4	215	\$946.00	Receipt of trial subpoena from JTS. Complete draft of trial subpoenas for Hagood, Schoonover, the Johnsons and Gustaveson. Draft Acceptance of Service. Emails to counsel re acceptance of service. Analysis of email from Black re trial points. Confer with WBI re trial exhibits and preparation. Work on trial law outline re unlawful detainer and mitigation of damages
8/7/2017	WBI	172053	6.5	260	\$1,690.00	Trial preparation (draft trial examination outlines for Sheri Johnson and Gus Gustaveson, review exhibits for same). Review and edit trial subpoenas. Confer with Atty Bullock re: same. Emails and calls with Atty Jackson re: trial preparation.
8/7/2017	GPJ	172053	0.3	290	\$87.00	Email exchange with Blake re ideas. Review subpoenas for trial.
8/8/2017	WBI	172053	10.8	260	\$2,808.00	Continued draft trial examination outlines (Gus Gustaveson, Jeff Johnson, and Lincoln Hagood, draft edits to Sheri Johnson, review and incorporation deposition transcripts and exhibits re: same). Review client suggestions. Review and edit pretrial disclosures. Forward to Atty Jackson with assessment. Emails with Atty Bullock re: service of trial subpoenas. Confer re: same and research for



Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
8/8/2017	RCB	172053	4	215	\$860.00	Continue work on draft trial subpoenas for Hagood and Gustaveson. Emails with counsel re the same. Conduct westlaw search for updated address of Gustaveson. Confer with WBI re trial subpoenas and trial prep. Continue work on trial law outline re unlawful detainer and mitigation of damages. Emails with counsel re exhibit lists and acceptance of service of trial subpoenas. Receipt of
8/9/2017	RCB	172053	4.4	215	\$946.00	Continue work on trial exhibit lists and identification of exhibits. Call with the counsel for JTS re the same. Confer with WBI re strategy and documents. Work on trial law binder and research of ID law re mitigation of damages and constructive eviction
8/9/2017	WBI	172053	4.3	260	\$1,118.00	Continued trial preparation (confer with Atty Jackson re: examination outlines). Review and edit pretrial disclosures. Confer with Atty Bullock re: same and attorney fee procedure. Call with opposing counsel re: stipulated exhibits and potential settlement. Emails re: same.
8/9/2017	GPJ	172053	0.4	290	\$116.00	Work through witness outlines and exhibit lists.
8/10/2017	WBI	172053	3	260	\$780.00	Appear for scheduling conference with court and opposing counsel. Meeting with Atty Jackson re: trial preparation. Emails re: acceptance of service of Gustaveson subpoena. Continued draft trial examination outlines (review Idaho Power deposition, edits to Gustaveson and Hagood outlines per meeting). Emails re: case.
8/10/2017	RCB	172053	5.4	215	\$1,161.00	Conduct additional research re ID law on unlawful detainer, attorney fees, eviction and mitigation. Draft memo and email to WBI for review. Analysis and comparison of exhibit list prepared by Caldwell. Emails re the same.
8/11/2017	RCB	172053	1.1	215	\$236.50	Receipt of deposition notices for Bixler and Hagood from JTS. Emails re exhibit lists. Confer with WBI re the same. Begin draft cross-exam questions re constructive eviction
8/11/2017	WBI	172053	1	260	\$260.00	Continued trial preparation (edit Gustaveson trial exam outline per additional documents and themes from Atty Jackson and client). Emails with opposing counsel re: exhibit list.
8/14/2017	WBI	172053	6.2	260	\$1,612.00	Continued trial preparation (draft trial examination outline for Blake Jackson, review Bruce Adams deposition for same, edits to other outlines per additional documents and deposition review). Email with opposing counsel re: trial exhibits.
8/14/2017	RCB	172053	0.4	215	\$86.00	Receipt of Affidavit of Service of Trial Subpoena on Lincoln. Get filed with Court. Emails re the same.
8/15/2017	RCB	172053	0.4	215	\$86.00	Work on trial subpoenas and attendance at trial of witnesses. Emails re the same
8/15/2017	WBI	172053	4	260	\$1,040.00	Complete trial examination outlines (complete Blake Jackson and Gary Sommercorn outlines, draft outline for Bruce Adams). Email with Atty Jackson re: same and document review.
8/15/2017	GPJ	172053	0.2	290	\$58.00	Receive deposition notices and telephone call with Mr. Jackson.
8/16/2017	RCB	172053	0.4	215	\$86.00	Receipt and analysis of trial subpoenas of JTS for Bixler, Schoonover, and Hagood. Emails re the same
8/17/2017	GPJ	172053	0.3	290	\$87.00	Email exchanges with Blake re witness questions.
8/17/2017	WBI	172053	1.5	260	\$390.00	Confer with Atty Jackson re: trial preparation. Review client edits re: same and draft edits to trial examination outlines.
8/18/2017	WBI	172053	4.9	260	\$1,274.00	Meeting with Atty Jackson re: trial strategy and edits to trial examination outlines and additional information from client per email review. Review same and documents from Atty Jackson's deposition and incorporate edits and revisions to examination outlines (Sheri Johnson, Gus Gustaveson, Jeff Johnson, and Bruce Adams). Email with opposing counsel re: exhibits.
8/18/2017	GPJ	172053	1.8	290	\$522.00	Telephone call with Blake re trial issues. Prepare for witnesses. Text exchanges with Blake re trial.
8/18/2017	RCB	172053	0.3	215	\$64.50	Confer with WBI re trial prep and discovery responses.
8/21/2017	RCB	172053	1.7	215	\$365.50	Work on trial prep ie case law reaserch, deposition designations, trial exhibits. Emails re the same. Call to counsel in Idaho re exhibits. Confer with WBI re the same.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
8/21/2017	WBI	172053	6.3	260	\$1,638.00	Final preparation for trial (review and edit all trial examination outlines, prepare exhibits, confer with Atty Jackson re: same and strategy meeting with clients for preparation). Calls and emails with opposing counsel re: exhibit lists and deposition designations.
8/22/2017	WBI	172053	8.2	260	\$2,132.00	Final trial preparation (complete edits to all trial examination outlines, prepare exhibits). Emails with opposing counsel re: witness arrangements and exhibit lists. Review deposition designations for Arlene Gilbert. Emails with opposing counsel re: same. Confer with Atty Bullock re: final research and preparation. Confer with Atty Jackson re: same. Client meeting with witnesses Blake Jackson, Bruce Adams, and Gary Sommercorn for examination preparation. Call with Atty Jackson re: same.
8/22/2017	GPJ	172053	3.5	290	\$1,015.00	Meet with Blake, Bruce, Gary and Bill to prepare for trial. Continue trial preparations.
8/22/2017	RCB	172053	2.6	215	\$559.00	Calls to witnesses re trial attendance. Calls to counsel in ID re the same. Review of Gilbert depo for transcript designations. Confer with WBI re trial exhibits and preparation and depositions.
8/23/2017	RCB	172053	0.7	215	\$150.50	Calls to Lincoln re trial attendance. Call and texts with GPJ re the same. Communications with counsel or Schoonover re trial attendance. Confer with WBI re the same
8/23/2017	GPJ	172053	10	290	\$2,900.00	Travel to and participate in trial as well as prepare for day 2.
8/23/2017	WBI	172053	10	260	\$2,600.00	Travel to Caldwell, Idaho for trial. Present Trial Day 1 (witnesses: Sheri Johnson, Gus Gustaveson, Jeff Johnson, Gary Sommercorn). Post-trial meetings with Atty Jackson and client re: examination preparation for Day 2. Review and edit examination outlines for same.
8/24/2017	WBI	172053	10	260	\$2,600.00	Present Trial Day 2 (pretrial meetings with and preparation of witnesses, witnesses: Brian Bixler, Lincoln Hagood, Nick Schoonover, Bruce Adams, and Blake Jackson). Post-trial meetings with clients. Continued preparation for Day 3 (review Erlebach deposition and draft examination outline, prepare for Atty Jackson and opposing counsel examinations, review deposition and emails re: same).
8/24/2017	GPJ	172053	10	290	\$2,900.00	Participate in trial and prepare for day 3.
8/25/2017	GPJ	172053	10	290	\$2,900.00	Participate in trial and travel to Salt Lake.
8/25/2017	WBI	172053	10	260	\$2,600.00	Presentation and defense of counterclaims for Trial Day 3 (pre-trial meeting and preparation with Atty Jackson, witnesses: Blake Jackson, Kristin Dunn, and Dave Erlebach, closing remarks and schedule for closing arguments by brief, confer with opposing counsel re: same). Return travel to Salt Lake City, Utah.
8/28/2017	WBI	172053	0.2	260	\$52.00	Confer with Atty Bullock re: deposition designations to send to court. Prepare files for closing arguments.
8/31/2017	WBI	172053	0.2	260	\$52.00	Confer with Atty Bullock re: post-trial submissions.
8/31/2017	RCB	172053	0.2	215	\$43.00	Confer with WBI re post trial filings and depo designations
9/1/2017	WBI	173029	0.1	260	\$26.00	Emails with opposing counsel and court re: deposition designations.
9/1/2017	RCB	173029	0.3	215	\$64.50	Emails re Gilbert depo designations. Review of designations for approval

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
9/18/2017	WBI	173029	0.1	260	\$26.00	Confer with Atty Bullock re: status of trial transcript.
9/22/2017	WBI	173029	2.6	260	\$676.00	Begin draft closing trial brief (unlawful detainer section). Research Idaho authority re: holdover tenancy.
9/25/2017	WBI	173029	6.2	260	\$1,612.00	Continued draft closing trial brief (completion sections re: unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, research Idaho authorities re: same). Review A. Gilbert deposition designations and exhibits for incorporating facts.
9/26/2017	WBI	173029	5	260	\$1,300.00	Continued draft closing trial brief (edit liability sections, draft law on special and consequential damages, rent due, research Idaho case law re: same). Calls with opposing counsel re: briefing schedule and transcript. Email update to Atty Jackson re: same.
9/27/2017	WBI	173029	6.9	260	\$1,794.00	Continued draft closing trial brief (complete sections re: special and consequential damages, intentional injury, alternative minimum damages, and research Idaho authorities re: same and incorporate exhibits). Emails with opposing counsel re: due date and brief length.
9/28/2017	WBI	173029	6	260	\$1,560.00	Complete closing trial brief (complete sections re: mitigation, treble damages, alternative minimum damages, attorney fees, repair costs, and general edits and revisions to all sections). Emails with Atty Jackson re: review of brief for final incorporation of trial transcript citations and client review.
10/2/2017	WBI	174615	0.1	260	\$26.00	Call to clerk re: trial transcript.
10/3/2017	WBI	174615	0.3	260	\$78.00	Emails with court reporter and client re: trial transcript and closing trial brief.
10/9/2017	WBI	174615	0.8	260	\$208.00	Receive Transcript: Day 1. Begin review for incorporation into closing trial brief.
10/10/2017	WBI	174615	0.8	260	\$208.00	Continued review of Transcript: Day 1.
10/16/2017	WBI	174615	5.7	260	\$1,482.00	Receive Transcript: Day 2. Continued review of transcripts for incorporating individual witness testimony into closing trial brief (S. Johnson, G. Gustaveson, J. Johnson, G. Sommercorn, B. Bixler, L. Hagood, N. Schoonover, and B. Adams). Draft citations into brief and general edits. Email with Atty Jackson re: same.
10/23/2017	WBI	174615	0.2	260	\$52.00	Emails with court reporter re: last day transcript. Forward to Atty Jackson re: same.
11/6/2017	WBI	175873	0.1	260	\$26.00	Receive final transcript. Email with Atty Jackson re: same.
11/7/2017	WBI	175873	4.9	260	\$1,274.00	Complete review of trial transcript to incorporate into closing trial brief (B. Jackson, K. Dunn, D. Ehrlebach). Complete edit of closing trial brief (incorporate citations to testimony, complete research, general edits for content and page limitation). Emails with Atty Jackson re: final brief. Email with opposing counsel re: due date (11/20).
11/20/2017	WBI	175873	0.5	260	\$130.00	Final review and edits to closing trial brief. Prepare and file same.
11/21/2017	WBI	175873	0.3	260	\$78.00	Receive and review Defendant's closing trial brief. Email re: same.
1/8/2018	WBI		0.50	270	\$135.00	Receive and review order from trial court with findings of fact and conclusions of law. Confer with Atty Jackson re: attorney fee motion. Confer with Atty Bullock re: deadlines.
1/11/2018	WBI		3.60	270	\$972.00	Research Idaho Rules of Civil Procedure re: form of judgment and memorandum of attorney fees and costs. Begin draft judgment and memorandum. Confer with Atty Jackson re: same. Request and begin review of billing statements from accounting for summary of fees and draft of supporting attorney declaration.

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
1/12/2018	WBI		2.80	270	\$756.00	Continued draft memorandum of attorney fees and costs and supporting attorney affidavit. Continued review of billing entries for same and redactions of privileged information. Prepare schedule for affidavit. Confer with Atty Bullock re: deadline for submission.
1/15/2018	WBI		1.80	270	\$486.00	Complete supporting attorney affidavit and form of judgment. Review attorney fee schedule. Emails re: same.
1/15/2018	GPJ		0.40	290	\$116.00	Review Affidavit to finalize. Emails from and to Mr. Jackson.
1/15/2018	RCB		0.70	220	\$154.00	Work on draft motion for attorney fees and costs

SUBTOTAL \$185,137.00

**COURT FILING FEES**

1/19/2015	E125	140039			\$166.00	Fee for filing With Canyon County Clerk.
6/10/2015	E126	144390			\$325.00	Pro Hac Vice Admission to Idaho State Bar for Ryan Bullock.
6/18/2015	E112	144390			\$325.00	Pro Hac Vice Admission to Idaho State Bar for Graden Jackson

SUBTOTAL \$816.00

**PROCESS SERVICE FEES**

1/29/2015	E113	140806			\$129.80	Process service by Tri County Process.
3/26/2015	E113	141477			\$133.00	Process service by Tri County Process.
4/23/2015	E113	142740			\$45.00	Process service of Johnson Thermal Systems by Tri-County Process servicing, LLC.
10/6/2015	E113	148245			\$77.00	Process Service on Colliers International by Tri-County Process Serving
10/6/2015	E113	148245			\$89.00	Process service on David E. Kerrick Law Offices by Tri-County Process Serving
11/5/2015	E113	149559			\$77.00	Process service on Lincoln Hagood by Tri-County Process Serving
6/13/2017	E113	169978			\$62.00	Process service of Idaho Power by Tri-County Process Serving
8/18/2017	E113	172053			\$79.00	Process service of Lincoln Hagood by Tri-County Process Serving
9/13/2017	E113	173029			\$15.00	Process service of Darrell "Gus" Gustaveson by Tri-County Process Serving, LLC

SUBTOTAL \$706.80

**WITNESS FEES**

2/10/2016	E114	152375			\$20.00	Witness fee for Arlene Gilbert.
6/23/2017	E114	169978			\$20.30	WBI Witness fee for Idaho Power.
8/8/2017	E114	172053			\$20.91	Witness fee and mileage for Darrell Gustaveson.
8/9/2017	E114	172053			\$43.51	Witness fee and mileage for Lincoln Hagood.
8/21/2017	E114	172053			\$28.13	Witness fee for Nick Schoonover.

SUBTOTAL \$132.85

**TRANSCRIPTS**

12/10/2015	E115	150122			\$1,149.90	Deposition of Jeff and Sheri Johnson, Lincoln Hagood, Gus Gustaveson, Dave Erlebach on November 17 through November 18, 2015 bv. OnA Court Reporting
2/29/2016	E115	152375			\$310.65	Deposition of Arlene Gilbert by Utah Court Reporting and Transcription
6/29/2017	E115	169978			\$263.00	Court reporter fee for the deposition of Graden Jackson by Q&A Court Reporting
11/6/2017	E126				\$1,481.12	Trial Transcript Fee

SUBTOTAL \$3,204.67

**COPYING**

1/14/2015	E101	140039			\$1.00	Legal Photocopies
3/2/2015	E101	141477			\$1.10	Legal Photocopies
3/4/2015	E101	141477			\$2.60	Legal Photocopies
4/28/2015	E101	142740			\$1.80	Legal Photocopies
4/28/2015	E101	142740			\$1.80	Legal Photocopies
4/30/2015	E101	143512			\$12.10	Legal Photocopies
5/15/2015	E101	143512			\$9.80	Legal Photocopies
6/4/2015	E101	144390			\$1.00	Legal Photocopies <sup>701</sup>

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/4/2015	E101	144390			\$0.60	Legal Photocopies
10/28/2015	E101	148246			\$3.20	Legal Photocopies
11/13/2015	E101	149559			\$1.00	Legal Photocopies
11/13/2015	E101	149559			\$1.00	Legal Photocopies
11/16/2015	E102	149559			\$16.00	Color Copies
11/16/2015	E101	149559			\$22.80	Legal Photocopies
11/20/2015	E101	149559			\$1.10	Legal Photocopies
12/11/2015	E101	150122			\$1.40	Legal Photocopies
12/11/2015	E101	150122			\$3.40	Legal Photocopies
2/8/2016	E101	152375			\$11.40	Legal Photocopies
3/18/2016	E101	153601			\$3.70	Legal Photocopies
3/18/2016	E101	153601			\$1.30	Legal Photocopies
3/21/2016	E101	153601			\$4.40	Legal Photocopies
3/21/2016	E101	153601			\$1.50	Legal Photocopies
3/21/2016	E101	153601			\$2.60	Legal Photocopies
3/21/2016	E101	153601			\$1.10	Legal Photocopies
3/22/2016	E101	153601			\$0.10	Legal Photocopies
3/23/2016	E101	153601			\$1.30	Legal Photocopies
3/23/2016	E101	153601			\$13.20	Legal Photocopies
4/7/2016	E101	154634			\$0.20	Legal Photocopies
4/14/2016	E101	154634			\$1.20	Legal Photocopies
6/15/2017	E102	169978			\$38.00	Color Copies
6/15/2017	E101	169978			\$1.00	Legal Photocopies
6/15/2017	E101	169978			\$1.60	Legal Photocopies
6/15/2017	E101	169978			\$2.00	Legal Photocopies
6/16/2017	E102	169978			\$35.00	Color Copies
6/16/2017	E102	169978			\$14.00	Color Copies
6/16/2017	E102	169978			\$31.00	Color Copies
6/16/2017	E102	169978			\$1.00	Color Copies
6/16/2017	E101	169978			\$3.10	Legal Photocopies
6/16/2017	E101	169978			\$1.50	Legal Photocopies
6/16/2017	E101	169978			\$1.50	Legal Photocopies
6/16/2017	E101	169978			\$1.40	Legal Photocopies
6/16/2017	E101	169978			\$1.10	Legal Photocopies
6/16/2017	E101	169978			\$2.60	Legal Photocopies
6/16/2017	E101	169978			\$1.10	Legal Photocopies
6/19/2017	E102	169978			\$69.00	Color Copies
6/19/2017	E101	169978			\$23.70	Legal Photocopies
6/23/2017	E101	169978			\$1.20	Legal Photocopies
7/5/2017	E101	171065			\$5.70	Legal Photocopies
7/5/2017	E101	171065			\$1.80	Legal Photocopies
7/5/2017	E101	171065			\$3.50	Legal Photocopies
7/5/2017	E101	171065			\$3.50	Legal Photocopies
7/10/2017	E101	171065			\$1.40	Legal Photocopies
7/11/2017	E102	171065			\$1.00	Color Copies
7/11/2017	E101	171065			\$1.60	Legal Photocopies
7/11/2017	E101	171065			\$3.00	Legal Photocopies
7/26/2017	E101	171065			\$4.90	Legal Photocopies
7/26/2017	E101	171065			\$1.10	Legal Photocopies702

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
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7/31/2017	E101	171065			\$1.20	Legal Photocopies
SUBTOTAL					\$382.20	

**TRAVEL**

7/30/2015	E110	145375			\$953.20	GPJ Airfare to Idaho for hearing on July 13, 2015.
7/30/2015	E110	145375			\$303.97	GPJ Lodging while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$32.00	GPJ Parking at Salt Lake International Airport while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$76.00	GPJ Taxi while in Idaho for hearing on July 16, 2015.
7/30/2015	E110	145375			\$79.00	GPJ Taxi while in Idaho for hearing on July 16, 2015.
11/11/2015	E110	149559			\$565.70	RCB Airfare for depositions in Boise on November 17, 2015.
11/24/2015	E110	149559			\$14.61	RCB Cab while in Boise for depositions on November 18, 2015.
11/24/2015	E110	149559			\$247.47	RCB Lodging while in Boise for depositions on November 18, 2015.
11/24/2015	E111	149559			\$12.22	RCB Meal while in Boise for depositions on November 17, 2015.
11/24/2015	E111	149559			\$12.34	RCB Meal while in Boise for depositions on November 18, 2015.
11/24/2015	E110	149559			\$18.00	RCB Parking at Salt Lake International Airport while in Boise for depositions on November 18, 2015.
2/16/2016	E111	152375			\$6.43	RCB Meal while in St. George for deposition of Arlene Gilbert on February 9, 2016
2/16/2016	E124	152375			\$313.20	RCB Round trip mileage from Salt Lake City to St. George for deposition of Arlene Gilbert on February 9, 2016 (580 miles round
4/26/2016	E110	154634			\$547.70	GPJ Airfare to Boise for hearing on April 15, 2016.
4/26/2016	E110	154634			\$3.60	GPJ Gas for rental car while in Boise for hearing on April 21, 2016.
4/26/2016	E111	154634			\$7.19	GPJ Meal while in Boise for hearing on April 21, 2016.
4/26/2016	E111	154634			\$10.02	GPJ Meal while in Boise for hearing on April 21, 2016.
4/26/2016	E110	154634			\$32.00	GPJ Parking at Salt Lake International Airport while in Boise for hearing on April 21, 2016.
4/26/2016	E110	154634			\$51.37	GPJ Rental car while in Boise for hearing on April 20, 2016.
7/28/2017	E110	171065			\$93.00	GPJ Airport and tax rides while traveling on July 21, 2017.
7/28/2017	E110	171065			\$803.80	GPJ Round trip airfare to Boise for trial on August 23-25, 2017 for Graden Jackson and William Ingram)
7/28/2017	E110	171065			\$763.90	GPJ Rount trip airfare to Bosie on July 21, 2017 for deposition.
SUBTOTAL					\$4,946.72	

**ONLINE LEGAL RESEARCH**

3/18/2015	E106	141477			\$90.00	Online Research
4/17/2015	E106	142740			\$76.61	Online Research
8/17/2015	E106	146326			\$10.15	Online Research
4/11/2016	E106	154634			\$16.28	Online Research
4/15/2016	E106	154634			\$205.48	Online Research
7/20/2017	E106	171065			\$34.18	Online Research for Westlaw
8/15/2017	E106	172053			\$121.70	Online Research for Westlaw
8/15/2017	E106	172053			\$497.26	Online Research for Westlaw
9/19/2017	E106	173029			\$161.84	Online Research for Westlaw
10/20/2017	E106	174615			\$178.76	Online Research for Westlaw
12/21/2017	E106				\$205.46	Online Research for Westlaw
SUBTOTAL					\$1,597.72	

**LONG DISTANCE PHONE CALLS**

12/30/2014	E105	139151			\$0.10	1(208)459-4574 Long Distance Phone
12/30/2014	E105	139151			\$0.10	1(208)703-7916 Long Distance Phone
3/20/2015	E105	141477			\$1.00	1(208)454-7576 Long Distance Phone
12/4/2015	E105	150122			\$0.60	1(208)345-7000 Long Distance Phone
5/26/2016	E105	155678			\$0.20	1(208)454-7300 Long Distance Phone
6/8/2016	E105	156553			\$0.30	1(208)454-7300 Long Distance Phone
4/20/2017	E105	167743			\$1.60	1(208)383-3911 Long Distance Phone
5/22/2017	E105	168831			\$0.10	1(208)345-7000 Long Distance Phone
5/26/2017	E105	168831			\$1.60	1(208)345-7000 Long Distance Phone

Date	Employee ID	Bill Number	Hours On Bill	Rate On Bill	Amount On Bill	Narrative
6/5/2017	E105	169978			\$0.10	1(208)454-7375 Long Distance Phone

SUBTOTAL \$5.70

**MISCELLANEOUS**

3/9/2015	E107	141477			\$20.02	Federal Express delivery to Clerk of the Court, Third District Court.
3/20/2015	E107	143512			\$15.68	Federal Express delivery to Third District Court.
6/10/2015	E108	144390			\$13.95	Federal Express delivery to Idaho State Bar Association
6/14/2015	E126	144390			\$60.00	GPJ Certificates of Good Standing from the Utah State Bar.
7/9/2015	E108	145375			\$28.24	Federal Express delivery to Third District Court.
6/23/2017	E102	169978			\$20.00	WBI Certificate of Good Standing from Utah State Bar
6/28/2017	E126	169978			\$325.00	WBI- Fee to the Idaho State Bar for admittance Pro Hac Vice.
7/26/2017	E108	172053			\$33.51	Federal Express delivery to Third District Court of ID
8/8/2017	E108	172053			\$15.06	Federal Express delivery to Tri-County Process Serving

SUBTOTAL \$531.46

Total Fees Billed	\$185,137.00
Total discounts	\$8,000.00
Total expense billed	\$24,116.78
 Total on matter	 \$201,253.78





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of January, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

Robert Janicki  
STRONG & HANNI  
102 South, 200 East, Suite 800  
Salt Lake City, Utah 84111

U.S. Mail, postage prepaid  
 Hand-delivered  
 Facsimile (801) 596-1508  
 Email:  
[rjanicki@strongandhanni.com](mailto:rjanicki@strongandhanni.com)

Rebecca Rainey  
FISHER RAINEY HUDSON  
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Kristin Bjorkman Dunn  
BJORKMAN DUNN PLLC  
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Boise, Idaho 83702

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[kbd@bjorkmandunn.com](mailto:kbd@bjorkmandunn.com)

  
\_\_\_\_\_  
Deputy Clerk Signed: 1/24/2018 04:21 PM

Lynnette M. Davis, ISB No. 5263  
William K. Smith, ISB No. 9769  
Austin Strobel, ISB No. 9803  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
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astrobel@hawleytroxell.com

Attorneys for Defendant Johnson  
Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

MOTION TO DISALLOW PLAINTIFF'S  
COSTS AND ATTORNEY FEES  
[I.R.C.P. 54]

Defendant Johnson Thermal Systems, Inc. hereby moves pursuant to Idaho Rules of Civil  
Procedure 54(d)(5) and 54(e)(6) to disallow all or part of the attorney fees and costs claimed by


MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES  
[I.R.C.P. 54] - 1

Plaintiff in this matter. This motion is supported by the memorandum filed concurrently herewith and the record before the Court.

Oral argument is requested.

DATED THIS 31<sup>st</sup> day of January, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By  \_\_\_\_\_  
Austin Strobel, ISB No. 9803  
Attorneys for Defendant Johnson  
Thermal Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2018, I caused to be served a true copy of the foregoing MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES [I.R.C.P. 54] by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson  
William B. Ingram  
STRONG AND HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Tel. (801) 532-7080  
Fax. (801) 596-1508

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Facsimile
- iCourt

  
\_\_\_\_\_  
Austin Strobel

Lynnette M. Davis, ISB No. 5263  
Austin Strobel, ISB No. 9803  
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astrobel@hawleytroxell.com

Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

MEMORANDUM IN SUPPORT OF  
MOTION TO DISALLOW PLAINTIFF'S  
COSTS AND ATTORNEY FEES  
[I.R.C.P. 54]

Defendant Johnson Thermal Systems, Inc., through counsel of record Hawley Troxell Ennis & Hawley LLP, hereby submits its *Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54]*.

MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW PLAINTIFF'S  
COSTS AND ATTORNEY FEES [I.R.C.P. 54] - 1

**I.**  
**INTRODUCTION**

On January 17, 2018, Plaintiff Caldwell Land & Cattle, LLC (“Plaintiff”) filed and served on Defendant Johnson Thermal Systems, Inc. (“Defendant”) a *Memorandum of Attorney Fees and Costs* and the Affidavit of William B. Ingram, which included an attached “Schedule 1” containing a spreadsheet with time entries. Therein, Plaintiff claims entitlement to attorney fees in the amount of \$178,734.72, costs as a matter of right in the amount of \$5,242,52, and discretionary costs in the amount of \$5,483.88. Plaintiff cites two substantive bases for an award of attorney fees: (1) the parties’ contract; and (2) Idaho Code § 6-324. Defendant does not dispute that Plaintiff is the prevailing party pursuant to the Court’s *Findings of Fact and Conclusions of Law* dated January 5, 2018 (“Findings of Fact”). However, because the Court found that the parties’ agreement was not renewed on October 15, 2014, and the tenancy arrangement became a month-to-month tenancy-at-will, the parties’ contract, including its attorney fee shifting provision did not apply after October 15, 2014 and does not apply here. Additionally, any fees awarded pursuant to Idaho Code § 6-324 should be apportioned and only those fees attributable to litigating the unlawful detainer claim awarded. If the fees are deemed unapportionable between claims, no fees should be awarded.

Lastly, even if attorney fees and costs are deemed recoverable, Defendant disputes the reasonableness of the attorney fees and the exceptionalness of the discretionary costs claimed by Plaintiff and now moves to disallow the claimed fees and costs in whole or in part.

## II. LEGAL STANDARD

In any civil action the court may award *reasonable* attorney fees to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Idaho R. Civ. P. 54(e)(1). If a court elects to award fees, the court *must* consider the following factors in determining the amount of reasonable attorney fees: (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 (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case; (L) any other factor which the court deems appropriate in the particular case. Idaho R. Civ. P. 54(e)(3).

Except when otherwise limited by the Idaho Rules of Civil Procedure, certain costs are recoverable as a matter of right to the prevailing party or parties, unless otherwise ordered by the court. Idaho R. Civ. P. 54(d)(1)(A). Specifically-enumerated costs are awarded to the prevailing party as a matter of right unless such costs were incurred unreasonably, for the purpose of harassment, in bad faith, or for the purpose of increasing costs to any other party. Idaho R. Civ. P. 54(d)(1)(C)(i)-(ix). However, any cost not specifically enumerated in Rule 54 is a discretionary cost that “may be allowed on a showing that the costs were necessary and *exceptional* costs, reasonably incurred, and should in the interest of justice be assessed against

the adverse party.” Idaho R. Civ. P. 54(d)(1)(D). Costs may be exceptional under Rule 54(d)(1)(D) “because the nature of the case was itself exceptional.” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (emphasis added). A trial court must make express findings as to why a party's discretionary costs should or should not be allowed. *See State, Dep't of Transp. v. Grathol*, 158 Idaho 38, 52, 343 P.3d 480, 494 (2015).

### **III. ARGUMENT**

The Court should disallow all fees, or in the alternative only allow fees attributable to litigating the unlawful detainer claim prior to Defendant providing possession of the leased premises to Plaintiff because: (1) the parties' contract is not a valid basis for an award of fees since the Court found that the agreement was not renewed and the parties' arrangement became, by operation of law, a month-to-month tenancy at will; and (2) any fees awardable under Idaho Code § 6-324 should be apportioned and only fees incurred litigating the unlawful detainer claim prior to Defendant providing possession of the leased premises to Plaintiff should be awarded. If fees are unapportionable, then no fees should be awarded.

Additionally and/or in the alternative, the Court should disallow all or part of the attorney fees claimed as unreasonable because: (1) the overall fees requested are unreasonable given the lack of complex issues in the case, the amount in controversy, and the damages awarded; (2) Plaintiff's counsel unreasonably billed for multiple attorneys to attend trial and hearings (i.e. duplicative work); (3) Plaintiff's counsel engaged in block-billing, making it all but impossible to determine whether the time spent on each discrete task listed in the block-billing was reasonable; (4) Plaintiff's counsel took an unreasonable amount of time to complete certain tasks; (5) Plaintiff's counsel billed full attorney rates for tasks that could have been completed by



a paralegal; (6) Plaintiff's counsel billed an unreasonable amount of time for intra-firm communication and strategizing. Lastly, the Court should also disallow the discretionary costs claimed (and legal research costs claimed) because they are not exceptional.

**A. The Court should disallow all fees, or in the alternative only allow fees attributable to litigating the unlawful detainer claim.**

Plaintiff asserts two alternative grounds for an award of fees: (1) the parties' contract; and (2) Idaho Code § 6-324. Contrary to Plaintiff's assertion, the parties' contract does not provide a basis for an award of attorney fees based on the Court's findings in its Findings of Fact. The Court found that the parties' agreement was not renewed, and after October 15, 2014, carried on as a month-to-month tenancy-at-will. Findings of Fact at 5 ("Based on a review of the record and applicable law, the Court finds that Defendant did not properly exercise the 6-month option, but carried on as a month-to-month or at-will tenant after October 15, 2014."). The logical outcome of the Court's ruling that an at-will tenancy was created is that after October 15, 2014 the parties' original written agreement and subsequent written amendments – including the attorney fee shifting provision – no longer governed the relationship between Plaintiff and Defendant in any respect. Since Defendant was not in breach of the parties' contract prior to the contract's expiration on October 15, 2014, the contract's fee provision cannot be relied on here.

The Idaho Supreme Court and secondary authority recognizes that a party "having terminated the contract, they cannot later assert the attorney fee clause in it while defending successfully against appellants' action to reinstate the contract." *Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977); *see also* Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1, 63 (2001). While the situation addressed in *Ellis* is not factually identical, the rationale of *Ellis* is instructive. Here, Plaintiff sought a

ruling from the Court that the contract had expired on October 15, 2014 (i.e. had not been renewed for a new 6-month term), treated the new arrangement as a tenancy-at-will, and pursued remedies under Idaho's unlawful detainer statute. Am. Compl. at ¶ 23, 58 (filed March 9, 2015). Defendant took the position that the lease had been renewed for a new 6-month term and no unlawful detainer had occurred. Plaintiff was successful in establishing that the lease was *not* renewed and that defendant was unlawfully present on the leased property between January 31, 2015 and February 15, 2015 after receiving notice to vacate from the prior owner of the leased property. In other words, the Court held in this case that the contract was *not* extended and no longer governed the parties' relationship after October 15, 2014. As in *Ellis*, Plaintiff should not be permitted to rely on a contract it successfully argued was not renewed (and no longer governed the parties' relationship after October 15, 2014) for an award of attorney fees. This is a classic judicial estoppel situation and should not be condoned by the Court.

Additionally, Idaho Code § 6-324, by its plain terms applies to claims pursued under Idaho's unlawful detainer statute. Idaho Code Ann. § 6-324 (*"In any action brought under the provisions of this chapter, except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees."*). The Court found that Defendant's continued possession of the property violated Idaho Code § 6-303(1) (*"A tenant of real property, for a term less than life, is guilty of an unlawful detainer...When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord...but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the civil code."*). Fees incurred after Defendant vacated the premises on February 15, 2015 were not incurred to regain

possession of the property from Defendant, and thus, were not incurred to *regain possession* from a hold-over tenant pursuant to Idaho Code § 6-303(1), but instead, to recover damages.<sup>1</sup> To the extent allowed, only fees incurred between January 31, 2015 and February 12, 2015 (the period of Defendant's unlawful detainer) should be deemed recoverable under Idaho Code § 6-324. At most, fees recoverable under Idaho Code § 6-324 should be cut off by March 9, 2015, the date of the filing of an Amended Complaint judicially admitting that Defendant had vacated the premises in mid-February 2015. Am. Compl. at ¶ 58 (noting that Defendant vacated the property on February 12, 2015).

Even if the Court is not persuaded that Plaintiff's right to fees pursuant to Idaho Code § 6-324 is cut off at an earlier point in the action, Idaho law indicates fees must be apportioned between recoverable and non-recoverable fees. *See Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002); *Atwood v. W. Const., Inc.*, 129 Idaho 234, 241, 923 P.2d 479, 486 (Ct. App. 1996). Here, under § 6-324, Plaintiff is only entitled to recover fees attributable to work on the unlawful detainer claim, not the three other claims asserted. As proponent of the fees, the burden is on Plaintiff to properly document its fees. *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) "[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation[.]"). Presumably, this includes appropriately apportioning between

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<sup>1</sup> Notably, Plaintiff prematurely filed its unlawful detainer claim on January 22, 2015 (prior to the expiration of the notice period on January 31, 2015). Pursuant to Idaho statute, an unlawful detainer claim is not ripe until the statutory notice period has expired. Idaho Code § 6-303(1) (discussing unlawful detainer and noting that "in case of a tenancy at will, it must first be terminated by notice, as prescribed in the civil code."). In light of this premature filing, any award of attorney fees should be denied or significantly reduced on equitable grounds.

recoverable and non-recoverable fees. Only fees attributable to the unlawful detainer claim should be deemed recoverable. If the fees are unapportionable between fees attributable to the unlawful detainer claim and the other causes of action asserted by a Plaintiff, the entirety of the fees should be disallowed. *See Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996) (affirming the denial of the requested attorneys' fees where the non-recoverable fees could not be isolated from the recoverable fees). Accordingly, because the fees claimed by Plaintiff in this matter are unapportionable between the fees attributable to the unlawful detainer claim and the three other causes of action asserted by Plaintiff (breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and malicious injury to property), the entirety of the fees should be disallowed.

**B. The Court should disallow all or part of the attorney fees claimed because they are unreasonable.**

As indicated above, Rule 54 expressly limits awards of attorney fees to attorney fees *reasonably* incurred in prosecuting or defending an action. Idaho R. Civ. P. 54(e)(1). While the Idaho Supreme Court has recognized that the standard of "reasonableness" is "ever-elusive," the Idaho Rules of Civil Procedure provide multiple factors for a trial court to consider in determining reasonableness. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005); Idaho R. Civ. P. 54(e)(3). For the reasons asserted below – considering the factors in Idaho R. Civ. P. 54(e)(3), Idaho case law, and the standard of reasonableness – the fees sought by Plaintiff are unreasonable.

- i. The overall fees requested are unreasonable given the lack of complex issues in this case, the amount in controversy, and the damages awarded.**

As part of its January 17, 2018 filings, Plaintiff provided the Court with a spreadsheet of the time its counsel spent on the case and – rather conclusorily – asserts that all attorney fees claimed “were reasonably incurred in this action[.]” Memorandum at 2; Affidavit of William B. Ingram at ¶¶ 24-25 (filed 1/17/18) (hereinafter “Ingram Aff.”). While the time and labor expended by counsel is certainly a factor to consider, it is to be considered under a standard of reasonableness, with consideration given to the “legal firepower” actually needed in the case. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005). In addition to time expended, Idaho R. Civ. P. 54(e)(3) also requires (among other factors) that the Court consider “the novelty and difficulty of the questions,” “the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law” and “the amount involved and the results obtained.” Idaho R. Civ. P. 54(e)(3)(B), (C), (G).

Here, considering factors (B), (C), and (G) in conjunction with one another reveals that the claimed attorney fees are unreasonable and should be disallowed or reduced. This case did not involve the resolution of “novel” and “difficult” questions that required specialized skill or experience. While the case certainly presented interesting and hotly contested issues, there was no legal issue in this case that was not of the type covered in a 1L contract or property course. Indeed, there were only a total of seven claims (four from Plaintiff and three from Defendant) for adjudication, and of those seven, six of those claims turned on a single issue: whether the parties had entered into an additional six-month extension. Thus, there were only two straightforward legal issues in play: (1) whether the parties had agreed to an additional six-month extension and (2) whether Defendants maliciously injured the property. Similarly, the pertinent underlying facts needed to resolve those legal issues were also relatively straightforward: (1) there was an

amendment to the lease that provided two options; (2) Defendant paid the amount commensurate with the option to extend the lease for six months and claimed it had extended the lease for six months based on its conduct; and (3) Plaintiff disagreed, and claimed that based on the language of the agreement, a written extension was required. Given the straightforward nature of the case, no experts were retained by either party, as all that was required of the fact-finder to determine the outcome of the case was to assess the language of the lease agreement and look to the parties' conduct.

Also, the amount in controversy and the result obtained were disproportionate to the fees claimed. Indeed, Plaintiff's claimed fees alone (without even including Plaintiff's claimed costs) are more than double the amount of damages the Court awarded to Plaintiff (\$177,137.00 in claimed fees versus a damage award of \$86,389.26).

**ii. Plaintiff's counsel billed for duplicative work and for time when counsel was functioning as a witness at a deposition, not providing legal services.**

The Idaho Supreme Court has upheld trial court determinations reducing awards of attorney fees where duplicative work is claimed. *See Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706–07, 701 P.2d 324, 326–27 (Ct. App. 1985) (upholding district court determination that defendant should not be responsible for fees attributable to duplication of effort). As demonstrated in the spreadsheet attached as Schedule 1 to the Affidavit of William B. Ingram, Plaintiff's counsel sent multiple attorneys to cover trial and hearings when only one attorney would have sufficed and/or only one attorney actually actively participated in the trial or hearing. The most egregious example is Plaintiff seeking recovery for attorney Graden P. Jackson's full fees (which were billed at a higher hourly rate than Mr. Ingram), for the entire day, at all three days of trial. Mr. Jackson, a partner at Strong & Hanni, was not an active participant

in the trial and did not handle a single witness. Considering the relative simplicity of the issues presented in this case, it is entirely unreasonable to bill the full time (and full rates) of two senior, partner-level attorneys for the entire duration of a three-day trial, particularly where only one of the two senior attorneys was actively engaged in the trial.

In addition to the trial, there are other examples in the spreadsheet attached as Schedule 1 of more than one Strong & Hanni attorney appearing on a call or hearing when one attorney would have been sufficient. Plaintiff also seeks to recover the time spent by Graden P. Jackson at his own deposition (at his full rate) *and* for the time spent by the Strong & Hanni attorney who defended the deposition.<sup>2</sup> The table, attached hereto as Appendix 1, demonstrates the entries for duplicative work and Mr. Jackson's entry for time spent as a deponent (i.e. not for providing legal services). As demonstrated in Appendix 1, there were numerous duplicative entries and Plaintiff's award of attorney fees, if any, should be reduced by disallowing or reducing those duplicative entries where, among other things, (1) multiple attorneys appeared in court or on a call where one would have been sufficient; (2) only one attorney actively participated in the trial/hearing; and (3) where only one attorney was actually providing legal services (Jackson deposition).

**iii. Plaintiff's counsel engaged in block-billing.**

While the Idaho Supreme Court does not appear to have directly ruled on the issue of block-billing, other jurisdictions including the Ninth Circuit have held that the practice of block-

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<sup>2</sup> Attorney Jackson, as any other fact witness, should be limited to the fact witness fee of \$20.00 per day. Idaho R. Civ. P. 54(d)(1)(C)(iii).

billing<sup>3</sup>, while not a basis to deny fees outright, is a valid basis to *reduce* an attorney fee award. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 892 (9th Cir. 2011) (noting that attorney fee awards may be reduced if “supported only by block-billing statements of the relevant activity.”); *Mendez v. Cty. of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008), *overruled on other grounds by Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (noting that block-billing practices are “legitimate grounds for reducing or eliminating certain claimed hours, but not for denying all fees.”); *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (courts have discretion to reduce block-billed hours); *Rosekrans v. Class Harbor Ass’n, Inc.*, 228 Or. App. 621, 641, 209 P.3d 411, 424 (2009) (upholding trial court’s five percent reduction to fee award based on block-billing).

In *Welch*, the Ninth Circuit recognized that a reduction based on block-billing is appropriate, because “[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and...because block billing makes it more difficult to determine how much time was spent on particular activities.” *Welch*, 480 F.3d at 948. As recognized by the D.C. Circuit Court of Appeals, block-billing “lump[s] together multiple tasks, making it impossible to evaluate their reasonableness.” *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004).

Plaintiff’s Schedule 1 is filled with numerous entries employing block-billing. Further complicating this issue is the fact that many of the block-billed entries cut-off mid-sentence or

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<sup>3</sup> Block-billing is the practice of billing for a large chunk of time performing multiple tasks without indicating the time spent per task.



phrase so that it is impossible to determine what services were purportedly provided. A table including every example of block-billing found in Schedule 1 would require a reproduction of very large portions of Schedule 1. The table, attached hereto as Appendix 2, includes just some of the examples of block-billing found in Schedule 1. Given Plaintiff's extensive use of block-billing, it is difficult (if not impossible) for the Court to evaluate the reasonableness of the fees incurred for each discrete task. As a result of Plaintiff's block-billing, the Court should significantly reduce any fee award granted to Plaintiff.

**iv. Plaintiff's counsel took an unreasonable amount of time to complete certain tasks.**

Again, while the time actually expended is certainly a factor in determining an appropriate fee award, it is to be considered under a standard of reasonableness. *Lettunich*, 141 Idaho at 435, 111 P.3d at 120. Idaho courts have unambiguously concluded that an attorney cannot take "an inordinate amount of time" in the preparation of motions and documents, nor can an attorney "'spend' his [or her] time extravagantly and expect to be compensated by the party who loses at trial." *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985) (citing *In re the Marriage of Jayne*, 200 N.W.2d 532 (Iowa 1972)). A careful reading of the spreadsheet attached to Schedule 1 reveals that Plaintiff's counsel took an excessive amount of time: (1) to research the process for filing and drafting the Amended Complaint (a fairly simple process) (*see* Schedule 1 at pp. 2-3 (entries re: amended complaint)); and (2) draft the written closing argument. In particular, the time spent drafting and preparing the written closing statement exceeded the time actually spent at trial, clocking in at 40.1 hours. *See* Schedule 1 at p. 20 (re: amended complaint). In light of the excessive amount of time it took to

complete these tasks, these entries, and consequently, any award of attorney fees, should be reduced accordingly.

**v. Plaintiff's counsel billed full attorney rates for administrative or clerical tasks and/or paralegal tasks.**

Idaho law suggests that attorney fees are not recoverable for administrative or clerical tasks. *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Tr.*, 144 Idaho 233, 239, 159 P.3d 870, 876 (2007) (noting that “fees may only be awarded for costs associated with attorney and paralegal work, distinguishing such costs from those incurred for clerical work.”); *see also In re Greater Boise Auditorium Dist.*, 2015 WL 9583107 (Idaho Dist.), 5, *vacated on other grounds by In re Greater Boise Auditorium Dist.*, 2015 WL 9583092 (Idaho Dist.), 1 (noting that “there is caselaw to support the argument that it is unreasonable to award fees for clerical or duplicative work.”). Plaintiff’s time entries, many of which are block-billed, contain numerous examples of Strong & Hanni attorneys apparently billing full attorney rates (and in most cases partner rates) for administrative or clerical tasks, such as copying, drafting cover letters, booking airline flights for other attorneys, putting together binders, creating timelines, preparing exhibits, filing papers with the Court, and merely “receiving” a served document. *See Appendix 3*. At best, these are paralegal tasks that should be billed at paralegal rates, at worst, some items in these entries represent unrecoverable administrative or clerical work. The objectionable portions of these entries should be disallowed as containing administrative or clerical tasks, or appropriately apportioned and reduced to reflect paralegal rates. In the case of the block-billed entries, the Court should apportion and reduce the entries containing clerical or paralegal work. If the Court finds that the entries are unapportionable between legal work and administrative or clerical work, the entirety of these entries should be disallowed. *See Brooks v. Gigray Ranches*,

*Inc.*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996) (affirming the denial of the requested attorneys' fees where the non-recoverable fees could not be isolated from the recoverable fees).

**vi. Plaintiff's counsel billed an unreasonable amount of time for intra-firm communication and strategizing.**

Plaintiff also claims attorney fees for an unreasonable amount of intra-firm communications and strategy sessions. As noted, Idaho courts have unambiguously concluded that “[a]n attorney cannot ‘spend’ his time extravagantly and expect to be compensated by the party who loses at trial.” *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985). Excessive intra-office discussion about issues is precisely the type of extravagant use of time that the Court, in its discretion, can reduce to more appropriately reflect a reasonable fee. The entries listed in Appendix 4, many of which, again, are block-billed, include discussion about “go forward” strategy and “next steps” and other ill-defined intra-office communications. In many instances, multiple attorneys have billed for the same conversation of the same issue(s). In light of the excessive billing for intra-firm communication and strategy discussions, these entries should be disallowed or, if possible to apportion with the information provided, appropriately reduced.

**vii. Plaintiff's counsel's requested fees should be disallowed or reduced to reflect new counsel coming up to speed on the case.**

The Idaho Supreme Court has upheld trial court determinations reducing awards of attorney fees where duplicative work is claimed. *See Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706–07, 701 P.2d 324, 326–27 (Ct. App. 1985) (upholding district court determination that defendant should not be responsible for fees attributable to duplication of effort). Here, Schedule 1 reveals that attorney Ryan C. Bullock (RCB) appears to have assumed

the junior attorney role from Roman R. Groesbeck (ZRRG) around April of 2015. It appears there was some duplication of effort or time spent coming up to speed that would not have been needed had that baton not been passed. *See* Schedule 1 at 4 (particularly, the entries for ZRRG and RCB on April 28, 2015). Additionally, in May of 2017 when attorney William B. Ingram (WBI) became involved in the case, there are entries reflecting time spent for Mr. Ingram to come up to speed on the facts of the case for deposition and trial preparation that arguably would have been unnecessary or reduced had one of the attorneys already familiar with the case, say attorney Graden P. Jackson (GPJ) who had been involved in the case since the beginning and was, in fact, present at trial, taken the depositions or tried the case. *See* Schedule 1 (particularly, WBI entries for 5/30/17, 6/1/17, 6/15/17, 6/16/17, 6/19/17, 6/20/17, 6/21/17, 6/22/17).

**viii. Other objections to fees.**

Defendant also objects to the reasonableness of fees claimed on the following grounds: (1) one entry has no description whatsoever (GPJ entry for 10/19/15); (2) some entries are redacted so that it is impossible to tell if the fees were reasonably incurred (Schedule 1 at p. 1, 2, 4, 10, 15, 16); (3) some entries appear to “cut-off” abruptly without including a complete description of the tasks performed, making it impossible to tell if fees were reasonably incurred (WBI entries for 7/20/17, 7/21/17, 7/25/17, 8/8/17; RCB entries for 4/29/15, 4/30/15, 3/21/16, 7/20/17, 7/21/17, 8/8/17; ZRRG entries for 1/14/15, 2/27/15, 3/2/15, 3/4/15, 4/30/15); (4) Plaintiff seeks the recovery of fees incurred in seeking fees (i.e. for preparation of the January 17, 2018 filings)(*see* Schedule 1 at 20-21, particularly entries on and after 1/8/2018); (5) attorney Graden P. Jackson (GPJ) charged variable rates (fluctuating between \$225 and \$290 dollars) without any explanation for why variable rates were used. To the extent fees are awarded, Plaintiff should be

limited to recover the lower of the rates billed by Mr. Jackson (\$225) in light of the lack of any apparent reason for the use of variable rates (*see* Ingram Aff. at ¶ 13); and (6) Plaintiff does not ever assert that the amount of fees sought was ever actually billed to or paid by their client, justifying a reduction in any fee award. For these reasons, all of these claimed fees should be disallowed or reduced.

**C. The Court should disallow all of the discretionary costs claimed because they are not exceptional.**

Plaintiff claims discretionary costs in the amount of \$5,483.88, which includes costs incurred for travel, long distance telephone charges, and other miscellaneous costs (cost of FedEx shipping and *pro hac vice* admission fees). Plaintiff also inaccurately lists additional costs for legal research in the amount of \$1,597.22 as attorney fees rather than discretionary costs.<sup>4</sup> As indicated above, discretionary costs must be shown to be necessary and *exceptional* in order to be recovered. Idaho R. Civ. P. 54(d)(1)(D) (noting that discretionary costs “may be allowed on a showing that the costs were necessary and *exceptional* costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party.”) Whether discretionary costs are “exceptional” depends on whether “the nature of the case was itself exceptional.” *Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214, 1229 (2016), *reh'g denied* (Mar. 31, 2016); *see also Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d

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<sup>4</sup> Costs associated with legal research are not attorney fees incurred for professional services rendered and are not specifically-enumerated costs recoverable as of right. Therefore, legal research costs are appropriately analyzed as discretionary costs.

161, 168 (2005) (emphasis added). The Idaho Supreme Court has identified what does, and does not, make a case exceptional for purposes of awarding discretionary costs:

[N]umerous complaints, depositions, and expert testimony does not render a case in and of itself exceptional. Rather, courts should assess the *context and nature of a case as a whole along with multiple circumstances*. The mere fact numerous experts were retained or numerous amendments were filed does not standing alone render a case exceptional.

*Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) (emphasis added) (internal citation omitted). Additionally, in *Hoagland*, the Idaho Supreme Court set forth factors a district court should consider when determining whether costs are exceptional: “whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary cost that could have been easily avoided.” *Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214, 1229 (2016), *reh'g denied* (Mar. 31, 2016) (overturning trial court award of discretionary costs as abuse of discretion) (citing *Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013)).

Here, nothing about this case makes it exceptional – it is a fairly standard breach of contract/unlawful detainer matter. Very little discovery and only light motion practice took place prior to trial. Neither party retained or relied on expert witnesses at trial. The legal and factual issues presented – while hotly contested – were fairly straightforward. This matter was not defended frivolously, nor did Defendant’s actions cause unnecessary costs or waste of time. Additionally, Defendant did not engage in any deliberate misconduct “which required [Plaintiff] to duplicate [its] proof.” *See e.g., Ballard v. Kerr*, 160 Idaho 674, 719, 378 P.3d 464, 509 (2016) (upholding trial court’s award of discretionary costs, noting that “[t]he Court specifically found that these costs were necessary and exceptional because the first trial was rendered a nullity as a

result of deliberate misconduct by the defense's witness, which required Charles to duplicate his proof"). Since this is not an exceptional case, Plaintiff cannot recover its claimed discretionary costs (including legal research costs).

In any event, even if this case (or the costs alleged) were exceptional (it is not and they are not), Plaintiff has made no *showing* that the requested discretionary costs were exceptional. In the recently decided case *Bright Harvest Sweet Potato Co., Inc. v. H.J. Heinz Co., L.P.*, No. 1:13-CV-00296-BLW, 2017 WL 1042063, at \*5 (D. Idaho Mar. 17, 2017), Chief Judge B. Lynn Winmill refused to award discretionary costs pursuant to Idaho R. Civ. P. 54(d)(1)(D) where the requesting party "did not even make an argument the costs were exceptional." *Id.* Here, the Affidavit of William B. Ingram submitted in support of Plaintiff's request for an award of costs asserts only that such costs were "reasonably and necessary incurred," not that they were exceptional. Ingram Aff. at ¶ 32 (filed 1/17/18). Thus, even if the costs were exceptional (they are not), they should not be awarded because Plaintiff has not even attempted to demonstrate that the case or costs are exceptional.

#### **IV. CONCLUSION**

Based on the foregoing, and pursuant to Idaho Rules of Civil Procedure 54(d)(5), 54(e)(3), and 54(e)(6), Defendant respectfully requests that the Court disallow all or part of the attorney fees and costs claimed by Plaintiff.

DATED THIS 31<sup>st</sup> day of January, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Austin Strobel, ISB No 9803  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31<sup>st</sup> day of January, 2018, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES [I.R.C.P. 54] by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson  
William B. Ingram  
STRONG AND HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Tel. (801) 532-7080  
Fax. (801) 596-1508

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Facsimile
- iCourt



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Austin Strobel

# APPENDIX 1

**EXAMPLES OF DUPLICATIVE WORK OR WITNESS-RELATED SERVICES.**

Date	Billing Att'y	Hours	Total	Description
5/12/15	ZRRG	0.3	\$60.00	Participate in telephonic scheduling conference with Atty Bullock, opposing counsel and court.
5/12/15	RCB	0.3	\$60.00	Participate in telephonic scheduling conference with court. Confer with Atty Jackson re the same.
6/16/17	GPJ	4	\$1,160.00	Prepare for and participate in deposition. Telephone call with and email exchanged re outcome of deposition.
6/16/17	WBI	6.1	\$1,586.00	Final preparation for deposition of Atty Jackson and for trial preparation (continued review of deposition transcripts and exhibits, review correspondence between counsel). Pre-deposition meeting with Atty Jackson re: strategy for deposition and trial. Appear and defend deposition. Post-deposition meeting with Attys Jackson and Bullock re: trial strategy and preparation for same.
6/28/17	WBI	0.3	\$78.00	Calls with Idaho Power and Attys Jackson and Bullock re: scheduling deposition dates. Emails re: same.
6/28/17	RCB	1.8	\$387.00	Call to counsel of Idaho Power re 30b6 deposition. Confer with WBI re the same. Draft amended notice of deposition and acceptance of service. Emails with counsel re subpoenaed records from Idaho Power. Work on document supplementation.
8/2/17	GPJ	2.3	\$667.00	Participate and prepare for hearing. Telephone call with Bruce and Blake re outcome of hearing. Discuss strategy. Work on amended witness disclosure.

Date	Billing Att'y	Hours	Total	Description
8/2/17	WBI	2.5	\$650.00	Prepare for motion in limine hearing (review briefing and outline oral argument). Pre-hearing meeting with Atty Jackson re: same and trial strategy. Appear and argue motion.
8/2/17	RCB	2.2	\$473.00	Confer with GPJ and WBI re limine hearing and strategy. Participate in hearing call. Work on trial subpoenas for witnesses and trial exhibits. Receipt of amended lay witness filing from Defendant. Emails re the same.
8/23/17	GPJ	10	\$2,900.00	Travel to and participate in trial as well as prepare for day 2.
8/23/17	WBI	10	\$2,600.00	Travel to Caldwell, Idaho for trial. Present Trial Day 1 (witnesses: Sheri Johnson, Gus Gustaveson, Jeff Johnson, Gary Sommercorn). Post-trial meetings with Atty Jackson and client re: examination preparation for Day 2. Review and edit examination outlines for same.
8/24/17	WBI	10	\$2,600.00	Present Trial Day 2 (pretrial meetings with and preparation of witnesses, witnesses: Brian Bixler, Lincoln Hagood, Nick Schoonover, Bruce Adams, and Blake Jackson). Post-trial meetings with clients. Continued preparation for Day 3 (review Erlebach deposition and draft examination outline, prepare for Atty Jackson and opposing counsel examinations, review deposition and emails re: same).
8/24/17	GPJ	10	\$2,900.00	Participate in trial and prepare for day 3.
8/25/17	GPJ	10	\$2,900.00	Participate in trial and travel to Salt Lake.

Date	Billing Att'y	Hours	Total	Description
8/25/17	WBI	10	\$2,600.00	Presentation and defense of counterclaims for Trial Day 3 (pre-trial meeting and preparation with Atty Jackson, witnesses: Blake Jackson, Kristin Dunn, and Dave Erlebach, closing remarks and schedule for closing arguments by brief, confer with opposing counsel re: same). Return travel to Salt Lake City, Utah.
Totals		79.8	\$21,621.00	

# APPENDIX 2

**EXAMPLES OF BLOCK-BILLING**

Date	Billing Att'y	Hours	Total	Description
12/29/14	ZRRG	2.9	\$565.00	Interoffice conference with Atty. G. Jackson re: current facts of dispute, preparation of response letter to Tenant's counsel; receive and analyze many e-mails between Tenant and real estate agent re: timing to vacate property, lease negotiations, and related items; outline and draft response letter; e-mail same to Atty. G. Jackson for review and revision.
1/14/15	ZRRG	4.7	\$940.00	Voicemail from Atty. G. Jackson re: preparing complaint; review and analyze lease amendments, notice of termination, and property purchase closing documents; conduct additional research re: pleading requirements; outline and draft complaint; copy of complaint [sic]
2/27/15	ZRRG	5.4	\$1,080.00	Finish researching non-posessory causes of action for amended complaint; interoffice conference with Atty. G. Jackson re: go-forward strategy research Idaho Rule of Civ Procedure re: procedure to amend complaint; outline and begin to draft amended [sic]
3/4/15	ZRRG	2.8	\$560.00	Telephone call with Atty. G. Jackson re: additional events and action taken by defendants to building, modification of verified amended complaint to incorporate same; interoffice conference with Atty. Bullock re: same, strategy for additional causes of action.

Date	Billing Att'y	Hours	Total	Description
4/8/15	ZRRG	4.9	\$980.00	Research Idaho Rules of Civil Procedure 26, 33, 34, and 36 re: discovery practice; work on preparing initial draft of interrogatories, requests for production and requests for admission.
4/28/15	ZRRG	2.7	\$540.00	Finish preparing reply to counterclaim; revise draft first set of discovery responses; e-mail same to Atty. G. Jackson for review and comment; confer with Atty. Bullock re: initial arguments for partial summary judgment.
4/30/15	ZRRG	2.5	\$500.00	Review and revise draft memorandum for partial summary judgment; finalize reply to counterclaim and first set of discovery requests; e-mails with Atty. G. Jackson re: verification issue; prepare verification and e-mail same to Atty. G. Jackson for provision [sic]
4/30/15	RCB	2.9	\$580.00	Revised and edit Motion and Memo in Support of Motion for Partial Summary Judgment per input from Attys Jackson and Groesbeck; Confer with Atty Jackson and Groesbeck re filing of Reply, and Discovery; Analysis of Idaho Rules of Civil Procedure re
7/6/15	RCB	3.6	\$720.00	Review and analyze opposition to motion for summary judgment and affidavit in support filed by Johnson Thermal. Outline response. Begin draft of reply memorandum. Confer with Atty Jackson re the same.
7/7/15	RCB	4.9	\$980.00	Continue work on draft of Reply Memo in support of Motion for Summary Judgment; Analyze responses to discovery requests and review documents produced by Johnson



Date	Billing Att'y	Hours	Total	Description
				Thermal for incorporation into memo.
12/10/15	RCB	6.1	\$1,220.00	Complete first draft of responses and objections to Johnson Thermal's discovery requests to Peterbilt. Review and analysis of documents to be produced in connection with the same. Email to Atty Jackson re confirmation of responses.
12/11/15	RCB	3.9	\$780.00	Continue work on discovery responses and objections. Call with Mr. Adams re the same. Analyze and prepare documents to be produced with discovery responses.
2/8/16	RCB	5.9	\$1,209.50	Prepare for deposition of Arlene Gilbert (Draft outline and prepare/review exhibits and emails); Call to counsel for Ms. Gilbert re deposition. Confer with Atty Jackson re the same and developments with Colliers.
2/9/16	RCB	11.8	\$2,419.00	Travel to and from St. George for Deposition of Arlene Gilbert. Attend and participate in deposition of Ms. Gilbert. Confer with Atty Jackson re the same.
3/21/16	RCB	8.1	\$1,660.50	Continue work on initial draft of opposition memo and cross-motion (additional statement of facts, argument section, and conclusion). Research on Idaho law re ambiguity, waiver and related issues. Incorporate research into memo as well as deposition.
3/22/16	RCB	4.6	\$943.00	Complete draft of opposition memo and cross-motion. Work on exhibits and depo transcript support. Confer with Atty Jackson re the same [sic]
4/13/16	RCB	4.7	\$963.50	Complete draft of Reply Memo in support of cross motion for summary

Date	Billing Att'y	Hours	Total	Description
				judgment. Email the same to Atty Jackson for review and comment. Communications with counsel for JTS re addition of Colliers and impact on Court order re witness and trial exhibits.
5/17/17	RCB	4.7	\$1,010.50	Continue work on comprehensive letter to client outlining case, strengths and weaknesses, discovery, etc. Receipt of subpoena on Idaho Power from JTS Draft subpoena on Idaho Power Confer with GPJ re strategy and cases issues including disqualification of [sic]
6/13/17	RCB	5.7	\$1,225.50	Continue work on pre-trial briefing [sic] and preparation of trial binder. Work on draft supplemental responses to discovery requests. Review of additional documentation provided by client. Analysis of subpoenaed records from Idaho Power and Stubblefield. Draft letter to Mr Jackson re the same. Confer with GPJ re strategy and next steps.
6/14/17	RCB	6.6	\$1,419.00	Continue work on pre-trial brief and identification of exhibits. Call with counsel for Idaho Power re subpoena requests. Confer with GPJ re the same, strategy and discovery responses. Continue work on supplemental discovery requests and production of supplemental documents. Email to counsel re discovery responses.
6/15/17	RCB	4.6	\$989.00	Revise and edit PreTrial brief pre input from WCI and GPJ. Work on pretrial preparation and exhibits. Confer with GPJ re strategy. Call with counsel for JTS re pretrial briefing and jury trial

Date	Billing Att'y	Hours	Total	Description
				issues. Receipt and analysis of JTS' pretrial brief. Finalize and file pre-trial brief.
6/15/17	WBI	3.4	\$884.00	Prepare for deposition of Atty Jackson and trial preparation (complete review of all pleadings and summary judgment filings, begin review of deposition transcripts, outline claims, arguments, and relevant facts). Confer with Attys Jackson and Bullock re: same and pretrial brief. Review and edit same. Emails re: edits. Beg outline trial strategy document for conflicting notices.
6/16/17	WBI	6.1	\$1,586.00	Final preparation for deposition of Atty Jackson and for trial preparation (continued review of deposition transcripts and exhibits, review correspondence between counsel). Pre-deposition meeting with Atty Jackson re: strategy for deposition and trial. Appear and defend deposition. Post-deposition meeting with Attys Jackson and Bullock re: trial strategy and preparation for same.
6/20/17	WBI	6.4	\$1,664.00	Complete review and summary of deposition transcripts for trial preparation. Prepare timeline of notice dates for trial presentation. Review 30(b)(6) deposition notice and exhibits for preparation to meet with client re: same. Meeting with client and Atty Jackson re: deposition preparation and trial strategy. Call and emails with Atty Bullock re: subpoenas and supplemental discovery [sic]
6/22/17	RCB	6.2	\$1,333.00	Confer with GPJ re witness lists, pre-trial hearing, and supplemental

Date	Billing Att'y	Hours	Total	Description
				discovery. Participate in pre-trial conference with Court. Call to A-1 Hearing re heater issues. Draft second supplemental discovery responses. Draft lay witness disclosures. Draft 30(b)(6) notice to Idaho Power. Confer with WBI re the same. Identify additional documents for use at trial [sic]
7/5/17	RCB	5.3	\$1,139.50	Work on supplemental discovery requests and preparation of trial binder and 30b6 deposition. Respond to JTS request for additional documents. Prepare and produced additional documetns related to damages and lost income analysis.
7/10/17	RCB	4.8	\$1,032.00	Complete draft of supplemental discovery responses. Review and analysis of Lease Agreement and confer with WBI and GPJ re strategy [redacted] Emails with counsel re discovery responses. Prepare supplemental document production. Edit of letter to accompany lease and discovery supplements.
7/11/17	RCB	3.4	\$731.00	Analysis and outline of Idaho Case law on causes of action and defenses in preparation for trial and use in trial binder. Email from counsel re lease agreement. Finalized and produced supplemental discovery.
7/18/17	WBI	3.6	\$936.00	Draft deposition outline for Idaho Power (draft questions, review documents for exhibits, confer with Atty Bullock re: same). Forward to Atty Jackson with analysis. Receive and begin review of Defendant's motion in limine to exclude damages evidence.

Date	Billing Att'y	Hours	Total	Description
				Confer with Atty Bullock re: response date. Review Idaho Rule re: same.
7/20/17	WBI	6.3	\$1,638.00	Calls with Atty Jackson and client re: facts for memorandum in opposition to motion in limine. Emails re: same. [redacted] Begin draft memorandum in opposition to motion in limine. Review produced documents and deposition summaries for case background. Calls with Atty Bullock re: same and [sic]
7/20/17	RCB	4.9	\$1,053.00	Conduct research and analysis of Idaho case law re damages for breach of contract, unlawful detainer, and injury to property for use in opposition to motion in limine. Conduct research and analysis of Idaho case law to support claims and for use in defense of counterclaims for trial. Work on depo preparation for Idaho Power Depo. Emails re the same. Review of depos of Bruce Adams and [sic]
7/21/17	RCB	7.9	\$1,698.50	Additional research of Idaho Case law to support damages claims for breach of contract, unlawful detainer, injury to property and good faith and fair dealing. Draft research outline. Confer with WBI re opposition memo to motion in limine. Revise and edit memo based on research. Draft declaration of Blake Jackson to support opposition memo. Confer with WBI and GPJ re Idaho Power [sic]
7/21/17	WBI	8.6	\$2,236.00	Continued draft memorandum in opposition to motion in limine (complete background and facts, citations to depositions and exhibits, Arg. I - no avoidance of lease agreement, Arg. II -

Date	Billing Att'y	Hours	Total	Description
				alternative minimum damages). Emails with Attys Jackson and Bullock, and client re: same. Calls and emails with Atty Bullock re: legal research and draft declaration. Review and edit same. Calls with [sic]
7/25/17	RCB	4.9	\$1,053.50	Confer with WBI and GPJ re strategy and next steps. Call to counsel re appearing telephonically at hearing. Draft motion and order re the same. Work on opposition to motion in limine. Research and analysis of Idaho law for use in memo and trial.
7/25/17	WBI	7.1	\$1,846.00	Conference call with Attys Jackson and Bullock re: strategy for brief and trial. Review revised declaration for Black Jackson and incorporate changes into memorandum in opposition to motion in limine. Research Idaho authorities re: special damages on unlawful detainer, consequential damages on breach of contract, malicious injury to property, and mitigation. Incorporate same into [sic]
7/26/17	RCB	7.0	\$1,505.00	Revise and edit memo opposing motion in limine. Additional research of ID law re damages for use in memo. Confer with WBI and GPJ re the same. Prepare exhibits to memo. Finalize and file motion to appear telephonically. Instruct staff on filing of memo.
8/1/17	RCB	4.2	\$903.00	Analysis of JTS's trial exhibit list. Receipt and analysis of Deposition of Idaho Power. Communications with counsel re exhibit lists and Colliers documents. Cross check colliers documents with our exhibit list. Confer with WBI re the same. Analysis of

Date	Billing Att'y	Hours	Total	Description
				Idaho case law re damages and constructive eviction.
8/7/17	RCB	4.4	\$946.00	Receipt of trial subpoena from JTS. Complete draft of trial subpoenas for Hagood, Schoonover, the Johnsons and Gustaveson. Draft Acceptance of Service. Emails to counsel re acceptance of service. Analysis of email from Black re trial points. Confer with WBI re trial exhibits and preparation. Work on trial law outline re unlawful detainer and mitigation of damages.
8/7/17	WBI	6.5	\$1,690.00	Trial preparation (draft trial examination outlines for Sheri Johnson and Gus Gustaveson, review exhibits for same). Review and edit trial subpoenas. Confer with Atty Bullock re: same. Emails and calls with Atty Jackson re: trial preparation.
8/8/17	WBI	10.8	\$2,808.00	Continued draft trial examination outlines (Gus Gustaveson, Jeff Jonson, and Lincoln Hagood, draft edits to Sheri Johnson, review and incorporation deposition transcript and exhibits reL same). Review client suggestions. Review and edit pretrial disclosures. Forward to Atty Jackson with assessment. Emails with Atty Bullock re: service of trial subpoenas. Confer re: same and research for [sic]
8/8/17	RCB	4.0	\$860.00	Continue work on draft trial subpoenas for Hagood and Gustaveson. Emails with counsel re the same. Conduct westlaw search for updated address of Gustaveson. Confer with WBI re trial subpoenas and trial prep. Continue work on trial law outline re unlawful detainer and mitigation of damages.

Date	Billing Att'y	Hours	Total	Description
				Emails with counsel re exhibit lists and acceptance of service of trial subpoenas. Receipt of [sic]
8/9/17	RCB	4.4	\$946.00	Continue work on trial exhibit lists and identification of exhibits. Call with counsel for JTS re the same. Confer with WBI re strategy and documents. Work on trial law binder and research of ID law re mitigation of damages and constructive eviction.
8/9/17	WBI	4.3	\$1,118.00	Continued trial preparation (confer with Atty Jackson re: examination outlines). Review and edit pretrial disclosures. Confer with Atty Bullock re: same and attorney fee procedure. Call with opposing counsel re: stipulated exhibits and potential settlement. Emails re: same.
8/10/17	RCB	5.4	\$1,161.00	Conduct additional research re ID law on unlawful detainer, attorney fees, eviction and mitigation. Draft memo and email to WBI for review. Analysis and comparison of exhibit list prepared by Caldwell. Emails re the same.
8/14/17	WBI	6.2	\$1,612.00	Continued trial preparation (draft trial examination outline for Black Jackson, review Bruce Adams deposition for same, edits to other outlines per additional documents and deposition review). Email with opposing counsel re: trial exhibits [sic]
8/18/17	WBI	4.9	\$1,274.00	Meeting with Atty Jackson re: trial strategy and edits to trial examination outlines and additional information from client per email review. Review same and documents from Atty Jackson's deposition and incorporate edits and revisions to examination outlines (Sheri



Date	Billing Att'y	Hours	Total	Description
				Johnson, Gus Gustaveson, Jeff Johnson, and Bruce Adams). Email with opposing counsel re: exhibits.
8/21/17	WBI	6.3	\$1,638.00	Final preparation for trial (review and edit all trial examination outlines, prepare exhibits, confer with Atty Jackson re: same and strategy meeting with clients for preparation). Calls and emails with opposing counsel re: exhibit lists and deposition designations.
8/22/17	WBI	8.2	\$2,132.00	Final trial preparation (complete edits to all trial examination outlines, prepare exhibits). Emails with opposing counsel re: witness arrangements and exhibit lists. Review deposition designations for Arlene Gilbert. Emails with opposing counsel re: same. Confer with Atty Bullock re: final research and preparation. Confer with Atty Jackson re: same. Client meeting with witnesses Blake Jackson, Bruce Adams, and Gary Sommercorn for examination preparation. Call with Atty Jackson re: same.
8/22/17	RCB	2.6	\$559.00	Calls to witnesses re trial attendance. Calls to counsel in ID re the same. Review of Gilbert depo for transcript designations. Confer with WBI re trial exhibits and preparation and depositions.
9/25/17	WBI	6.2	\$1,612.00	Continued draft closing trial brief (completion sections re: unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, research Idaho authorities re: same). Review A. Gilbert deposition designations and exhibits for incorporating facts.

Date	Billing Att'y	Hours	Total	Description
9/27/17	WBI	6.9	\$1,794.00	Continued draft closing trial brief (complete sections re: special and consequential damages, intentional injury, alternative minimum damages, and research Idaho authorities re: same and incorporate exhibits). Emails with opposing counsel re: due date and brief length.
10/16/17	WBI	5.7	\$1,482.00	Receive Transcript: Day 2. Continued review of transcripts for incorporating individual witness testimony into closing trial brief (S. Johnson, G. Gustaveson, J. Johnson, G. Sommercorn, B. Bixler, L. Hagood, N. Schoonover, and B. Adams). Draft citations into brief and general edits. Email with Atty Jackson re: same.
11/7/17	WBI	4.9	\$1,274.00	Complete review of trial transcript to incorporate into closing trial brief (B. Jackson, K. Dunn, D. Ehrlebach). Complete edit of closing trial brief (incorporate citations to testimony, complete research, general edits for content and page limitation). Emails with Atty Jackson re: final brief. Email with opposing counsel re: due date (11/20).
1/11/18	WBI	3.6	\$972.00	Research Idaho Rules of Civil Procedure re: form of judgment and memorandum of attorney fees and costs. Begin draft judgment and memorandum. Confer with Atty Jackson re: same. Request and begin review of billing statements from accounting for summary of fees and draft of supporting attorney declaration.
1/12/18	WBI	2.8	\$756.00	Continued draft memorandum of attorney fees and costs and supporting

Date	Billing Att'y	Hours	Total	Description
				attorney affidavit. Continued review of billing entries for same and redactions of privileged information. Prepare schedule for affidavit. Confer with Atty Bullock re: deadline for submission.
Totals		292.2	\$67,157.00	

# APPENDIX 3

**EXAMPLES OF UNRECOVERABLE ADMINISTRATIVE OR CLERICAL WORK**

(NOTE: only objectionable portions of entries have been reproduced):

Date	Att'y Initials	Hours	Bill Amount	Narrative
1/14/15	ZRRG	4.7	\$940.00	...outline and draft complaint; <b>copy of complaint.</b>
1/16/15	ZRRG	0.5	\$100.00	Finalize complaint for unlawful detainer; <b>prepare correspondence and send same for filing with Court.</b>
3/2/15	ZRRG	2.3	\$460.00	Finish drafting initial draft of verified amended complaint; <b>prepare exhibits for same...</b>
3/20/15	ZRRG	1.6	\$320.00	...prepare revised amended complaint for filing with court; <b>send for filing.</b>
3/26/15	ZRRG	0.3	\$60.00	Work on service of amended complaint issues; prepare summons and amended complaint and <b>send for service.</b>
5/4/15	ZRRG	0.1	\$20.00	<b>Receive and briefly</b>

Date	Att'y Initials	Hours	Bill Amount	Narrative
				<b>review new scheduling order.</b>
5/4/15	RCB	0.1	\$20.00	<b>Receipt of Order from Court re scheduling conference</b>
5/7/15	GPJ	0.1	\$28.50	<b>Receive Notice of Address Change.</b>
7/9/15	RCB	2.6	\$520.00	Revise and edit portions of reply memo, per input from Atty Jackson. <b>Prepare exhibits and memo for filing.</b>
9/22/15	GPJ	0.4	\$360.00	Complete draft of Subpoenas to Gilbert's attorney and Colliers Intenational. <b>Prepare for service</b>
2/29/16	GPJ	0.1	\$22.50	Letter to Blake enclosing depositions.
3/23/16	RCB	2.4	\$492.00	<b>... Prepare affidavit of exhibits and exhibits...</b>
5/9/16	GPJ	0.1	\$22.50	<b>Receive Acceptance of Service and Third Party Complaint.</b>
6/7/16	GPJ	0.1	\$22.50	<b>Receive Collier's Answer.</b>

Date	Att'y Initials	Hours	Bill Amount	Narrative
3/15/17	RCB	0.2	\$43.00	...Prepare exhibits.
4/18/17	RCB	1.8	\$387.00	<b>Confer with GPJ re timeline of events and supporting damages...</b>
4/18/17	GPJ	1.8	\$522.00	<b>...Outline timeline...</b>
4/19/17	RCB	3.8	\$817.00	<b>...Complete draft of Timeline of Events and Damages support with exhibits...</b>
4/20/17	RCB	2.3	\$494.50	<b>Confer with GPJ timeline of events...Implement email into timeline of events</b>
4/20/17	GPJ	1.0	\$290.00	<b>Work on summary timeline...</b>
4/21/17	RCB	0.8	\$172.00	<b>Revise and edit timeline of events. Prepare additional exhibits.</b>
5/12/17	RCB	2.7	\$580.50	...Begin work outlining trial strategy <b>and binder</b> outlining defenses claims and evidence

Date	Att'y Initials	Hours	Bill Amount	Narrative
5/15/17	RCB	1.5	\$322.50	Continue work on trial strategy <b>and binder</b> , outlining defenses, claims and evidence.
6/13/17	RCB	5.7	\$1,225.50	<b>...preparation of trial binder...</b>
6/20/17	WBI	6.7	\$1,664.00	<b>...Prepare timeline of notice dates for trial presentation...</b>
6/30/17	RCB	1.0	\$215.00	<b>Work on trial binder...</b>
7/5/17	RCB	5.3	\$1,139.50	<b>...preparation of trial binder...</b>
7/12/17	RCB	1.0	\$215.00	<b>...Work on trial binder...</b>
7/17/17	RCB	1.8	\$387.00	<b>...Work on exhibit binder... Draft amended notice of depo and acceptance of service. Prepare for filing with Court.</b>
7/18/17	RCB	1.8	\$387.00	<b>...Work on exhibit list and trial binder.</b>
7/18/17	RCB	1.8	\$387.00	<b>...Work on trial binder and identification of exhibits...</b>
7/19/17	GPJ	0.8	\$232.00	<b><u>...Book flights for trial...</u></b>



Date	Att'y Initials	Hours	Bill Amount	Narrative
7/26/17	RCB	7.0	\$1,505.00	...Prepare exhibits to memo. Finalize and file motion to appear telephonically. Instruct staff on filing of memo.
8/9/17	RCB	4.4	\$946.00	...Work on trial law binder and research of ID law re mitigation of damages and constructive eviction
8/14/17	RCB	0.4	\$86.00	...Get filed with Court.
8/21/17	RCB	1.7	\$365.50	Work on trial prep ie case law reaserch, deposition designations, trial exhibits...
8/21/17	WBI	6.3	\$1,638.00	Final preparation for trial (review and edit all trial examination outlines, prepare exhibits...
8/22/17	WBI	8.2	\$2,132.00	Final trial preparation (complete edits to all trial examination outlines, prepare exhibits)...

Date	Att'y Initials	Hours	Bill Amount	Narrative
11/20/17	WBI	0.5	\$130.00	Final review and edits to closing trial brief. Prepare and <b>file same.</b>
Totals		85.7	\$19,671.00	

# APPENDIX 4

**EXAMPLES OF EXCESSIVE INTRA-FIRM COMMUNICATIONS**

(NOTE: only objectionable portions of entries have been reproduced):

Date	Att’y Initials	Hours	Amount Billed	Narrative
12/29/14	ZRRG	2.9	\$565.50	Interoffice conference with Atty. G. Jackson re: current facts of dispute...
2/26/15	ZRRG	1.9	\$380.00	Telephone call with Atty. G. Jackson re: motion to strike filed by defendants, strategy...
2/27/15	ZRRG	5.4	\$1,080.0	...interoffice conference with Atty. G. Jackson re: go-forward strategy...
3/3/15	ZRRG	0.4	\$80.00	Confer with Atty. G. Jackson re: strategy, communications with opposing counsel.
3/4/15	ZRRG	2.8	\$560.00	Telephone call with Atty. G. Jackson re: additional events and actions taken by defendants to building, modification of verified amended complaint to incorporate same; <b>interoffice conference with Atty. Bullock re: same</b> , strategy for

Date	Att'y Initials	Hours	Amount Billed	Narrative
				additional causes of action;
3/4/15	RCB	0.8	\$160.00	<b>Confer with Atty Groesbeck re potential causes of action (bad faith, malicious destructino of property)...</b>
3/9/15	ZRRG	0.4	\$80.00	E-mails with Atty. G. Jackson re: stipulation, next steps; instructions to assistant re: communications with opposing counsel.
3/20/15	ZRRG	1.6	\$320.00	E-mails with Atty. G. Jackson re: filing issues with amended complaint...
4/1/15	ZRRG	1.6	\$320.00	<b>Interoffice meeting with Atty. Bullock re: go-forward strategy</b> , including procedural issues, dispositive motion timing, discovery, and related items...
4/1/15	RCB	1.3	\$260.00	<b>Confer with Attys Groesbeck and Turner re procedural steps</b> on motion for summary judgment, diclosures and timing. Confer with Atty Groesbeck re

Date	Att'y Initials	Hours	Amount Billed	Narrative
				strategy and next steps....
4/8/15	RCB	1.6	\$320.00	...Confer with Atty Groesbeck re status and strategy
4/10/15	ZRRG	0.4	\$80.00	...confer with Atty. Bullock re: MSJ strategy.
4/28/15	ZRRG	2.7	\$540.00	...confer with Atty. Bullock re: initial arguments for partial summary judgment motion.
4/25/15	RCB	1.8	\$360.00	Confer with Atty Groesbeck re Reply to Counterclaim, Motion for Summary Judgment and discovery requests....
4/29/15	RCB	4.6	\$920.00	...Confer with Atty...
4/30/15	RCB	2.9	\$580.00	...Confer with Atty Jackson and Groesbeck re filing of Reply, and Discovery...
5/7/15	RCB	0.3	\$60.00	Confer with Atty Groesbeck re status conference.
5/11/15	ZRRG	0.5	\$100.00	Confer with Atty. G. Jackson re: scheduling hearing items, strategy...
5/12/15	RCB	0.3	\$60.00	...Confer with Atty Jackson re the same.

Date	Att'y Initials	Hours	Amount Billed	Narrative
5/26/15	ZRRG	0.2	\$40.00	Confer with Atty. G. Jackson re: status of matter; confer with Atty. Bullock re: preparing motion to set hearing date for motion for partial summary judgment.
7/6/15	RCB	3.6	\$720.00	...Confer with Atty Jackson re the same.
7/8/15	RCB	3.7	\$740.00	...Confer with Atty Jackson re the same.
9/9/15	RCB	1.9	\$380.00	Confer with Atty Jackson re strategy/next steps...
9/16/15	RCB	1.4	\$280.00	Confer with Atty Jackson re next steps and strategy...
10/8/15	RCB	0.3	\$60.00	...Confer with Atty Jackson re the same.
10/21/15	RCB	0.3	\$60.00	Confer with Atty Jackson re depositions.
11/2/15	RCB	1.3	\$260.00	...Confer with Atty Jackson re the same.
2/3/16	RCB	1.5	\$307.50	...Confer with Atty Jackson re strategy.
2/8/16	RCB	5.9	\$1,209.00	...Confer with Atty Jackson re the same and developments with Colliers.
2/9/16	RCB	11.8	\$2,419.00	...Confer with Atty Jackson re the same
2/18/16	RCB	0.4	\$82.00	Confer with Atty

Date	Att'y Initials	Hours	Amount Billed	Narrative
				Jackson re response to Motion for Partial Summary Judgment...
3/22/16	RCB	4.6	\$943.00	...Confer with Atty Jackson re the same
3/23/16	RCB	2.4	\$492.00	...Confer with Atty Jackson re the same.
4/21/16	RCB	0.3	\$61.50	Confer with Atty Jackson re SJ hearing and next steps
3/15/17	RCB	0.2	\$43.00	Confer with GPJ re edits to mediation brief.
4/3/17	RCB	0.8	\$172.00	Confer with GPJ re settlement issues.
4/18/17	RCB	1.8	\$387.00	Confer with GPJ re timeline of events and supporting damages....
4/20/17	RCB	2.3	\$494.50	Confer with GPJ timeline of events...
5/12/17	RCB	2.7	\$580.50	...Confer with GPJ re next steps and strategy...
5/17/17	RCB	4.7	\$1,010.50	...Confer with GPJ re strategy and cases issues including disqualification of...
5/22/17	RCB	1.0	\$215.00	...Confer with GPJ re the same.
5/24/17	RCB	0.7	\$150.50	...Confer with GPJ re document production and



Date	Att'y Initials	Hours	Amount Billed	Narrative
				discovery responses...
5/25/17	RCB	1.6	\$344.00	...Confer with GPJ re the same...
5/26/17	RCB	2.1	\$451.50	...Confer with GPJ re the same....
5/30/17	RCB	0.8	\$172.00	...Confer with GPJ re the same...
5/30/17	WBI	0.6	\$156.00	Confer with Atty Jackson re: facts of case, defense of deposition, and trial preparation...
5/31/17	RCB	2.0	\$430.00	Confer with GPJ re pre-trial...
6/1/17	RCB	2.4	\$516.00	...Confer with GPJ re pre trial briefing...
6/2/17	RCB	1.9	\$408.50	...Confer with GPJ re the same.
6/5/17	RCB	3.9	\$838.50	Confer with GPJ re strategy on supplemental production...
6/7/17	RCB	2.6	\$559.00	...Confer with GPJ re the same...
6/12/17	RCB	3.7	\$795.50	...Confer with GPJ re the same...
6/13/17	RCB	5.7	\$1,225.50	...Confer with GPJ re strategy and next steps.
6/14/17	RCB	6.6	\$1,419.00	...Confer with GPJ re the same, strategy and discovery

Date	Att'y Initials	Hours	Amount Billed	Narrative
				responses...
6/15/17	RCB	4.6	\$989.00	...Confer with GPJ re strategy...
6/15/17	WBI	3.4	\$884.00	...Confer with Attys Jackson and Bullock re: same and pretrial brief...
6/16/17	WBI	6.1	\$1,586.00	...Post-deposition meeting with Attys Jackson and Bullock re: trial strategy and preparation for same.
6/16/17	RCB	2.2	\$473.00	...Confer with WBI post depo of GPJ re issues and next steps.
6/19/17	WBI	2.1	\$546.00	...Call with Atty Jackson re: 30(b)(6) deposition preparation. Call with Atty Bullock re: pretrial deadlines.
6/20/17	WBI	6.4	\$4,664.00	...Meeting with client and Atty Jackson re: deposition preparation and trial strategy. Call and emails with Atty Bullock re: subpoenas and supplemental discovery

Date	Att'y Initials	Hours	Amount Billed	Narrative
6/21/17	RCB	2.6	\$559.00	...Confer with WBI and GPJ re strategy on the same...
6/21/17	WBI	1.6	\$416.00	Call with Atty Bullock re: supplemental disclosures and witness designations...
6/22/17	WBI	3.0	\$780.00	...Emails with Attys Jackson and Bullock re: same....Call with Atty Jackson re: same....
6/22/17	RCB	6.2	\$1,333.00	Confer with GPJ re witness lists, pre-trial hearing, and supplemental discovery...Confer with WBI re the same....
6/23/17	RCB	2.4	\$516.00	...Confer with WBI re the same.
6/23/17	WBI	0.3	\$78.00	...Confer with Atty Bullock re: same and Idaho Power subpoena.
6/26/17	WBI	0.1	\$26.00	...Confer with Atty Bullock re: acceptance of service of subpoena by Idaho Power.
6/26/17	RCB	0.5	\$107.50	...Confer with WBI re response.
6/27/17	RCB	0.3	\$64.50	Confer with WBI re

Date	Att'y Initials	Hours	Amount Billed	Narrative
				Idaho Power deposition. Emails re the same.
6/27/17	WBI	0.3	\$78.00	Call with Atty Jackson re: Idaho Power deposition. Confer with Atty Bullock re: scheduling same....
6/30/17	RCB	1.0	\$215.00	...Confer with GPJ re the same...
7/3/17	RCB	0.5	\$107.50	...Emails with GPJ re the same.
7/6/17	WBI	0.3	\$78.00	Emails and call with Attys Jackson and Bullock re: deposition.
7/6/17	RCB	2.4	\$516.00	Text messaegs and emails with GPJ re damages...
7/7/17	RCB	6.0	\$1,290.00	<b>... Confer with WBI and GPJ re issues related to damages...</b>
7/7/17	GPJ	0.6	\$290.00	<b>...work on strategy</b>
7/10/17	RCB	4.8	\$1,032.00	...confer with WBI and GPJ re Strategy...
7/10/17	WBI	1.2	\$312.00	<b>...Emails with Atty Jackson and Bullock re: same and supplemental disclosures...Emails with Atty Jackson and Bullock re: review of</b>

Date	Att'y Initials	Hours	Amount Billed	Narrative
				supplemental discovery disclosures.
7/12/17	RCB	1.0	\$215.00	<b>...Confer with GPJ re the same...</b>
7/12/17	WBI	0.2	\$52.00	<b>...Confer with Atty Bullock re: same.</b>
7/17/17	RCB	1.8	\$387.00	Confer with GPJ re next steps, Idaho Power deposition, and exhibit lists...
7/17/17	WBI	0.2	\$52.00	Confer with Atty Jackson re: status and preparation for Idaho Power deposition.
7/18/17	WBI	3.6	\$936.00	<b>...confer with Atty Bullock re: same).</b> Forward to Atty Jackson with analysis... <b>Confer with Atty Bullock re: response date.</b>
7/18/17	RCB	1.8	\$387.00	...Confer with WBI re the same and deadlines...
7/20/17	WBI	6.3	\$1,638.00	Calls with Atty Jackson and client re: facts for memorandum in opposition to motion in limine. Emails re: same...Calls with Atty Bullock re: same and
7/21/17	RCB	7.9	\$1698.50	...Confer with WBI

Date	Att'y Initials	Hours	Amount Billed	Narrative
				re opposition memo to motion in limine... <b>Confer with WBI and GPJ re Idaho Power.</b>
7/21/17	WBI	8.6	\$2,236.00	...Emails with Attys Jackson and Bullock, and client re: same. <b>Calls and emails with Atty Bullock re: legal research and draft declaration...</b>
7/24/17	WBI	0.6	\$156.00	...Emails and call with Atty Jackson re: same. Emails re: supplemental disclosure.
7/25/17	RCB	4.9	\$1,053.50	<b>Confer with WBI and GPJ re strategy and next steps...</b>
7/25/17	WBI	7.1	\$1,846.00	<b>Conference call with Attys Jackson and Bullock re: strategy for brief and trial...</b>
7/26/17	WBI	0.8	\$208.00	<b>...Confer with Atty Bullock re: same...</b>
7/26/17	RCB	7.0	\$1,505.00	<b>...Confer with WBI and GPJ re the same...</b>
7/28/17	RCB	3.0	\$645.00	...Confer with WBI re exhibit list...
7/31/17	RCB	2.8	\$602.00	...Confer with GPJ re the same...

Date	Att'y Initials	Hours	Amount Billed	Narrative
8/1/17	RCB	4.2	\$903.00	...Confer with WBI re the same...
8/1/17	WBI	0.5	\$130.00	Confer with Atty Jackson re: preparation for hearing on motion in limine and trial strategy...
8/2/17	WBI	2.5	\$650.00	...Pre-hearing meeting with Atty Jackson re: same and trial strategy...
8/2/17	RCB	2.2	\$473.00	Confer with GPJ and WBI re limine hearing and strategy...
8/7/17	RCB	4.4	\$946.00	...Confer with WBI re trial exhibits and preparation...
8/7/17	WBI	6.5	\$1,690.00	...Confer with Atty Bullock re: same. Emails and calls with Atty Jackson re: trial preparation.
8/8/17	WBI	10.8	\$2,808.00	... Emails with Atty Bullock re: service of trial subpoenas. Confer re: same and research for
8/8/17	RCB	4.0	\$860.00	...Confer with WBI re trial subpoenas and trial prep...
8/9/17	RCB	4.4	\$946.00	Confer with WBI re strategy and documents...
8/9/17	WBI	4.3	\$1,118.00	...confer with Atty

Date	Att'y Initials	Hours	Amount Billed	Narrative
				Jackson re: examination outlines... Confer with Atty Bullock re: same and attorney fee procedure...
8/10/17	WBI	3.0	\$780.00	Meeting with Atty Jackson re: trial preparation.
8/11/17	RCB	1.1	\$236.50	...Confer with WBI re the same...
8/15/17	WBI	4.0	\$1,040.00	...Email with Atty Jackson re: same and document review.
8/17/17	WBI	1.5	\$390.00	Confer with Atty Jackson re: trial preparation...
8/18/17	WBI	4.9	\$1,274.00	<b>Meeting with Atty Jackson re: trial strategy and edits to trial examination outlines and additional information from client per email review...</b>
8/18/17	RCB	0.3	\$64.50	Confer with WBI re trial prep and discovery responses.
8/21/17	RCB	1.7	\$365.50	...Confer with WBI re the same.
8/21/17	WBI	6.3	\$1,638.00	...confer with Atty Jackson re: same and strategy meeting



Date	Att'y Initials	Hours	Amount Billed	Narrative
				with clients for preparation)...
8/22/17	WBI	8.2	\$2,132.00	...Confer with Atty Bullock re: final research and preparation. Confer with Atty Jackson re: same.... Call with Atty Jackson re: same.
8/22/17	RCB	2.6	\$559.00	...Confer with WBI re trial exhibits and preparation and depositions.
8/23/17	RCB	0.7	\$150.50	...Call and texts with GPJ re the same...Confer with WBI re the same
8/28/17	WBI	0.2	\$52.00	Confer with Atty Bullock re: deposition designations to send to court...
8/31/17	WBI	0.2	\$52.00	Confer with Atty Bullock re: post-trial submissions.
8/31/17	RCB	0.2	\$43.00	Confer with WBI re post trial filings and depositions
9/18/17	WBI	0.1	\$26.00	Confer with Atty Bullock re: status of trial transcript.
9/26/17	WBI	5.0	\$1,300.00	... Email update to Atty Jackson re: same.

Date	Att'y Initials	Hours	Amount Billed	Narrative
9/28/17	WBI	6.0	\$1,560.00	...Emails with Atty Jackson re: review of brief for final incorporation of trial transcript citations and client review.
10/16/17	WBI	5.7	\$1,482.00	...Email with Atty Jackson re: same.
10/23/17	WBI	0.2	\$52.00	...Forward to Atty Jackson re: same.
11/6/17	WBI	0.1	\$26.00	...Email with Atty Jackson re: same.
11/7/17	WBI	4.9	\$1,274.00	...Emails with Atty Jackson re: final brief...
1/8/18	WBI	0.5	\$135.00	...Confer with Atty Jackson re: attorney fee motion. Confer with Atty Bullock re: deadlines.
1/11/18	WBI	3.6	\$972.00	...Confer with Atty Jackson re: same...
1/12/18	WBI	2.8	\$756.00	...Confer with Atty Bullock re: deadline for submission.
Total		346	\$82,689.50	

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**REPLY BRIEF IN  
SUPPORT OF MEMORANDUM OF  
ATTORNEY FEES AND COSTS**

Case No. CV15-587

Judge Chris Nye

---

Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this reply brief in response to the *Motion to Disallow Plaintiff’s Costs and Attorney Fees* filed by Defendant Johnson Thermal Systems, Inc. (“JTS”). For the reasons discussed more fully below, CLC respectfully requests that the Court reject JTS’s arguments and award CLC its attorney fees’ and costs as set forth in the *Affidavit of William B. Ingram*.

**INTRODUCTION**

In its motion, JTS concedes that CLC is the prevailing party pursuant to the Court’s

*Findings of Fact and Conclusions of Law* dated January 5, 2018 (the “Findings of Fact”), but argues that the parties’ lease agreement (the “Lease Agreement”) was not renewed on October 15, 2014, and therefore the fee shifting provision of the Lease Agreement does not apply to CLC’s request for attorney fees. JTS’s other arguments only attempt to reduce any attorneys’ fees awarded by the Court. Specifically, JTS argues that, even if fees are awarded, they should be apportioned only to those incurred litigating the unlawful detainer claim pursuant to Idaho Code § 6-324 and that the fees incurred by CLC were not reasonable and should therefore be reduced.

The Court should not be persuaded by these arguments. First, there is no legal support for JTS’s argument that because the Lease Agreement was not renewed after October 15, 2014, the fee provision does not apply. Second, both the Lease Agreement and Idaho Code § 6-324 require that the Court award attorney fees. Finally, JTS’s arguments regarding reasonableness are without merit. It is ironic that despite arguing this case did not present “novel” or “difficult” questions of law and that the amount in controversy and result obtained were disproportionate, JTS itself has actively employed at least five different attorneys throughout this litigation. In nearly every deposition and court appearance, JTS had at least two attorneys present. At mediation, JTS had three attorneys present. So, while claiming that the case was not “novel” or “difficult,” JTS itself has shown that the attorneys’ fees incurred by CLC have been reasonable. Therefore, JTS’s motion should be denied.

## **ARGUMENT**

### **A. The Fee Provision of the Lease Agreement is Applicable.**

JTS relies on *Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977), for its argument that the Court should disallow fees because the Lease Agreement was not renewed after

October 15, 2014. *Ellis* is inapplicable and distinguished from this case, which is conceded by JTS in its motion (“[w]hile the situation in *Ellis* is not factually identical, the rationale of *Ellis* is instructive.”) *JTS Motion* at 5. *Ellis* held that a party who has terminated a contract cannot later assert the attorney fee clause in it while defending against an action to reinstate the contract. *Ellis*, 98 Idaho at 650. Here, CLC never claimed to have “terminated” the Lease Agreement before it expired and before the notice to vacate, and JTS never asked to “reinstate” the contract. Rather, CLC argued, and the Court found, that JTS did not properly exercise the 6-month option to renew and carried on as a month-to-month tenant or at-will tenant after October 15, 2014. *Findings of Fact* at 5. By holding over after October 15, 2014, JTS continued to be bound by the terms and covenants of the Lease Agreement, including the fee provision. *See Lewiston Pre-Mix Concrete, Inc. v. Rhode*, 110 Idaho 640, 645, 718 P.2d 551, 556 (Idaho Ct. App. 1985) (“The terms of the original lease are usually carried over into the new tenancy” (citations omitted)); *See also Pearson v. Harper*, 87 Idaho 245, 255, 392 P.2d 687, 692 (1964) (the possession of a tenant, holding over after expiration of his lease, “was no more than a continuance of the original term”). The Court further determined that JTS had not exercised the 6-month option because the Lease Agreement required all modifications to be in writing and signed by the parties, and that JTS did not execute a written agreement to renew the Lease Agreement, and there was no evidence presented at trial that the writing requirement was waived. *Id.* at 6.

More importantly, the Court found that “[t]here is no dispute that the parties had a contract” and that JTS breached the contract “because it failed to vacate the Property after its term expired . . .” *Id.* at 8 (emphasis added). JTS’s attempt to now argue that there was no contract, and if there were, that it is no longer valid or binding is contrary to the Court’s Findings of Fact. Courts have

held that even when a contract is unenforceable, a court may award attorney fees under that contract. *See Bauchman-Kingston P'ship, LP v. Haroldson*, 149 Idaho 87, 94, 233 P.3d 18, 25 (2008) (holding that a provision granting attorney fees in a land contract that did not comply with the statute of frauds was enforceable). In this case, the Court found that there was an agreement, which JTS breached when it failed to vacate the property within the timeframe set forth in the notice to vacate. *Findings of Fact* at 7. Trying to rationalize JTS's argument would require this Court to find that there was no agreement at all between the parties and deny CLC the benefit of its bargain.<sup>1</sup> Accordingly, JTS's argument that attorneys' fee provision of the Lease Agreement is not applicable should be rejected.

**B. Idaho Code § 6-324 and the Lease Agreement require that the Court award attorneys' fees.**

Idaho Code § 6-324 provides that “[i]n any action brought under the provisions of this chapter . . . the prevailing party shall be entitled to an award of attorney fees.” Additionally, an award of attorney fees is mandatory under the terms of the Lease Agreement. *See, Lease Agreement* at 5. Notwithstanding, JTS argues that that fees incurred between January 31 and February 12, 2015 (the period of JTS's unlawful detainer) should be the only fees deemed recoverable or at best until March 9, 2015 (the date of the filing of the Amended Complaint). Such an argument is contrary to the terms of the Lease Agreement and well settled law.

The Lease Agreement provides as follows:

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the

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<sup>1</sup> Notably, the Court found that other provisions of the Lease Agreement continued to apply, namely the indemnification provision. *Findings of Fact* at 9. JTS makes no argument why these provisions continue to apply, but the attorneys' fee provision may not.

terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

*Lease Agreement* at 5.

With respect to contractual fee provisions, Idaho Courts have held that contractual terms which provide for the recovery of attorney fees arising from actions to enforce the contract demonstrate that the contracting parties chose to place the risk of litigation expenses on the unsuccessful party. *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595, 598 (Idaho Ct. App. 1994). So, while JTS appears to argue that Section 6-324 would only allow CLC to recover fees that were incurred to regain possession of the property, the fee provision of the Lease Agreement governs the relationship between the parties. Idaho law provides that where there may be a conflict between a statute and a parties' contractual provision, the contractual provision will prevail. *Zenner v. Holcomb*, 210 P.3d 553, 560, 147 Idaho 444, 452 (2009). Idaho courts give great deference to the bargained-for terms of an agreement between contracting parties. *Id.*

In *Zenner*, the Idaho Supreme Court explained that where the terms of a contract conflict with a statute, the terms of a contract will govern. The Court stated that “[t]his standard also promotes the freedom to contract, which is a ‘fundamental concept underlying the law of contracts and is an essential element to the free enterprise system.’ When faced with an action that could implicate both a contract and a statute, the contract will be the governing source of an attorney fee award.” *Id.*

This rule applies here. Because the Lease Agreement does not limit attorneys' fees to only the amount necessary to “regain possession,” and because JTS provides no support for this novel

argument<sup>2</sup>, the Court should award all fees.

**C. The Attorneys' Fees Sought by CLC are Reasonable.**

Pointedly absent from JTS's motion, is any argument that the rates charged by CLC's attorneys are unreasonable or that the work they performed was unnecessary. Rather, JTS merely asserts a collection of arguments in attempt to persuade the Court to reduce some of the fees.

For example, JTS avers that CLC's counsel has billed for duplicative work and sent multiple attorneys to cover trial and hearings when only one attorney would have sufficed. This assertion is ironic considering that JTS has itself employed at least five different attorneys throughout this action, and had two or more attorneys at nearly all depositions and court appearances. In particular, JTS was initially represented in this matter by Kristin Bjorkman Dunn of the law firm Bjorkman Dunn. Soon after her appearance, and when it appeared that litigation would be imminent, JTS retained the law firm of Fisher Rainey Hudson for additional representation. Representing JTS from that law firm were Rebecca Rainey, Angie Perkins and Vaughn Fisher. JTS had two attorneys present for 10 of the 13 depositions taken in this matter. *See Deposition Cover Sheets* attached hereto as **Exhibit A**. In contrast, CLC only had one attorney present for each of the depositions. *Id.* In addition, JTS also had two attorneys present at court appearances (i.e., summary judgment arguments, pre-trial conference, etc.) and sent three attorneys to mediation. CLC only had one attorney present, Graden P. Jackson, for all of these proceedings.

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<sup>2</sup> Significantly, JTS cites no authority for its interpretation of Idaho Code §§ 6-303(1) and 6-324, that their language only allows for recovery of attorneys' fees related to regaining possession. *JTS Motion* at 6-7. Conveniently, JTS omits reference to Idaho Code § 6-316, under which the Court awarded CLC damages. *Findings of Fact* at 7. It is nonsensical to argue that Section 6-234 is limited only to fees incurred in regaining possession, where "the *provisions of [the] chapter*" expressly allowed CLC to assert a claim for damages in which it has prevailed. Idaho Code § 6-324 (emphasis added).



Furthermore, as it relates to trial, JTS argues that Graden Jackson was present at trial but did not actively participate and did not handle a single witness. However, JTS fails to mention that it also had two attorneys present at trial (Rebecca Rainey and Angie Perkins) and, more significantly, that JTS intended to call Mr. Jackson as a witness! *See, Defendant's Amended Disclosure of Lay Witness* attached hereto as **Exhibit B**.

Addressing JTS' block billing argument, block billing would only be an issue if JTS were arguing that some of the fees incurred were recoverable and others were not. Here, there is no distinction between recoverable and non-recoverable fees as all fees incurred by CLC are recoverable pursuant to the express terms of the Lease Agreement ( "[JTS]" shall pay [CLC] . . . a reasonable attorney's fee to be fixed by [the] court, in addition to the costs allowed by law"). *Lease Agreement* at 5.

Furthermore, JTS does not provide any context to their claim that CLC's counsel spent an unreasonable amount of time completing tasks. JTS's counsel did not provide any comparisons on how long it took its own attorneys to prepare or complete tasks; for example, their closing statement or the total amount of fees they incurred in defending against CLC's claim and prosecuting JTS's affirmative counterclaims. Without this context, there is no support for JTS to assert that the time spent by CLC's counsel working this case was unreasonable. Moreover, CLC's attorneys wrote off time for trial (hence only 10 hours for each day of trial) and preparing the closing statement required review of trial transcripts and testimony to prepare the statement. This has been a factually complex case as evidenced by the number of attorneys engaged by the parties,

the number of exhibits prepared and offered at trial,<sup>3</sup> and the several trial witnesses.

Finally, and very significantly, JTS also fails to mention that CLC was the prevailing party on both its own claims and on JTS's counterclaims. JTS sought recovery of its attorneys' fees as part of its counterclaims and, in fact, had a specific claim under the very same statute, rule, and contractual provision, which it now argues against; specifically, JTS sought recovery of "all reasonable attorney fees, costs, and disbursements herein, pursuant to Idaho Code §§ 12-120(3), 12-121, 6-324, Idaho Rule of Civil Procedure 54, and the express terms of the Lease at page 5 "Enforcement Expenses." See *Answer to Amended Complaint and Counterclaim* at ¶ 47 (emphasis added). The Lease Agreement expressly provides the prevailing party shall be awarded attorneys' fees, and CLC has prevailed on both its affirmative claims and on JTS's counterclaims.

Therefore, the Court should reject JTS's arguments and award CLC all of its attorneys' fees.

### **CONCLUSION**

For the reasons set forth above, and those stated in its principal memorandum, CLC should be awarded attorneys' fees in the amount of \$178,734.72 and costs in the amount of \$10,726.40

DATED this 8th day of February, 2018.

STRONG & HANNI

*/s/ William B. Ingram*

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Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

---

<sup>3</sup> JTS alone identified 89 exhibits for trial.

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **REPLY BRIEF IN SUPPORT OF MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 8th day of February, 2018.

Lynnette M. Davis  
Austin Strobel  
William K. Smith  
HAWLEY TROXELL ENNIS &  
HAWLEY, LLP  
877 Main Street, Suite 1000  
Boise, ID 83701

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[wsmith@hawleytroxell.com](mailto:wsmith@hawleytroxell.com)

*/s/ William B. Ingram*

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DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

\_\_\_\_\_

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
 ) Civil Action No.  
Plaintiff, ) CV15-587  
 )  
vs. )  
 )  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

DEPOSITION OF LINCOLN HAGOOD

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 12:00 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.

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DEPOSITION OF LINCOLN HAGOOD (11.17.2015)

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**A P P E A R A N C E S**

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**a n d**

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**Email: kbd@bjorkmandunn.com**

**ALSO PRESENT:**

**Mr. Darrell "Gus" Gustaveson**  
**Johnson Thermal Systems, Inc.**

**Mr. George Iliff**  
**Colliers International**

**DEPOSITION OF LINCOLN HAGOOD (11.17.2015)**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

\_\_\_\_\_ )  
CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
 ) Civil Action No.  
Plaintiff, ) CV15-587  
 )  
vs. )  
 )  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

DEPOSITION OF SHERI JOHNSON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 2:10 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

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DEPOSITION OF SHERI JOHNSON (11.17.2015)

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**A P P E A R A N C E S**

**FOR THE PLAINTIFF:**

**Mr. Ryan C. Bullock**  
**Attorney at Law**  
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**a n d**

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**Boise, Idaho 83702**  
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**Fax: 208.330.3700**  
**Email: kbd@bjorkmandunn.com**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

\_\_\_\_\_ )  
CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
 ) Civil Action No.  
Plaintiff, ) CV15-587  
 )  
vs. )  
 )  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

DEPOSITION OF JEFF JOHNSON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Tuesday, November 17, 2015  
Beginning at 3:03 p.m.

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Lori A. Pulsifer, RDR, CRR, Idaho CSR

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DEPOSITION OF JEFF JOHNSON (11.17.2015)



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**A P P E A R A N C E S**

**FOR THE PLAINTIFF:**

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**FOR THE DEFENDANT:**

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**a n d**

**Ms. Kristin Bjorkman Dunn**  
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**Fax: 208.330.3700**  
**Email: kbd@bjorkmandunn.com**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

\_\_\_\_\_ )  
CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.

Plaintiff, ) CV15-587

)  
vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)  
Defendant. )  
\_\_\_\_\_ )

DEPOSITION OF DAVE ERLEBACH

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Wednesday, November 18, 2015  
Beginning at 12:30 p.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

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**A P P E A R A N C E S**

**FOR THE PLAINTIFF:**

**Mr. Ryan C. Bullock**  
**Attorney at Law**  
**STRONG & HANNI**  
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**Fax: 801.596.1508**  
**Email: rebullock@strongandhanni.com**

**FOR THE DEFENDANT:**

**Ms. Rebecca Rainey**  
**Attorney at Law**  
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**Suite 630**  
**Boise, Idaho 83702**  
**Phone: 208.345.7000**  
**Fax: 208.514.1900**  
**Email: rar@frhtriallawyers.com**  
**a n d**

**Ms. Kristin Bjorkman Dunn**  
**Attorney at Law**  
**BJORKMAN DUNN PLLC**  
**225 North Ninth Street**  
**Suite 810**  
**Boise, Idaho 83702**  
**Phone: 208.639.1458**  
**Fax: 208.330.3700**  
**Email: kbd@bjorkmandunn.com**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company, )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

) Civil Action No.

Plaintiff, ) CV15-587

vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)  
Defendant. )

DEPOSITION OF DARRELL "GUS" GUSTAVESON

Bjorkman Dunn PLLC  
225 North Ninth Street, Suite 810  
Boise, Idaho

Wednesday, November 18, 2015  
Beginning at 9:00 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

P.O. Box 1058, Eagle, Idaho 83616-1058  
realtimeQnA@msn.com . QnAcourtreporting.

com

(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)  
DEPOSITION OF DARRELL "GUS" GUSTAVESON (11.18.2015)

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**A P P E A R A N C E S**

**FOR THE PLAINTIFF:**

**Mr. Ryan C. Bullock**  
**Attorney at Law**  
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**a n d**

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**Fax: 208.330.3700**  
**Email: kbd@bjorkmandunn.com**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
 Idaho limited liability company )  
 a/k/a CALDWELL LAND & CATTLE )  
 COMPANY, LLC, )  
 )  
 Plaintiff/Counter-Defendant, )Case No. CV 15-587  
 )  
 vs. )  
 )  
 JOHNSON THERMAL SYSTEMS, INC., an )  
 Idaho corporation, )  
 )  
 Defendant/Counterclaimant )  
 Third-Party Plaintiff, )  
 )  
 vs. )  
 )  
 COLLIERS PARAGON, LLC, an Idaho )  
 limited liability company, )  
 )  
 Third-Party Defendant. )  
 \_\_\_\_\_ )

DEPOSITION OF BLAKE JACKSON  
 RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
 Fisher Rainey Hudson  
 950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
 Beginning at 9:34 a.m.

QnA COURT REPORTING, LLC  
 Lori A. Pulsifer, RDR, CRR, Idaho CSR  
 P.O. Box 1058, Eagle, Idaho 83616-1058  
 realtimeQnA@msn.com . QnAcourtreporting.

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(ELECTRONIC COPY) 208.484.6309 . 208.286.7426 (fax)

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**A P P E A R A N C E S**

**FOR THE PLAINTIFF/COUNTERDEFENDANT:**

**Mr. Graden P. Jackson**  
**Attorney at Law**  
**STRONG & HANNI**  
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**Sandy, Utah 84070**  
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**FOR THE DEFENDANT/COUNTERCLAIMANT:**

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**Attorney at Law**  
**a n d**  
**Ms. Angie Perkins**  
**Attorney at Law**  
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**Fax: 208.514.1900**  
**Email: rar@frhtriallawyers.com**  
**angie@frhtriallawyers.com**  
**vaughn@frhtriallawyers.com**

**ALSO PRESENT:**

**Mr. Zach Erlebach**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

)  
Plaintiff/Counter-Defendant, )Case No. CV 15-587

)  
vs. )

)  
JOHNSON THERMAL SYSTEMS, INC., an )  
Idaho corporation, )

)  
Defendant/Counterclaimant )  
Third-Party Plaintiff, )

)  
vs. )

)  
COLLIERS PARAGON, LLC, an Idaho )  
limited liability company, )

)  
Third-Party Defendant. )  
\_\_\_\_\_)

DEPOSITION OF GARY D. SOMMERCORN  
RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
Fisher Rainey Hudson  
950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
Beginning at 9:34 a.m.

QnA COURT REPORTING, LLC  
Lori A. Pulsifer, RDR, CRR, Idaho CSR

354

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**A P P E A R A N C E S**

**FOR THE PLAINTIFF/COUNTER-DEFENDANT:**

**Mr. Graden P. Jackson**  
**Attorney at Law**  
**STRONG & HANNI**  
**9350 South 150 East**  
**Suite 820**  
**Sandy, Utah 84070**  
**Phone: 801.532.7080**  
**Fax: 801.596.1508**  
**Email: gjackson@strongandhanni.com**

**FOR THE DEFENDANT/COUNTERCLAIMANT:**

**Ms. Rebecca A. Rainey**  
**Attorney at Law**  
**a n d**  
**Ms. Angie Perkins**  
**Attorney at Law**  
**FISHER RAINEY HUDSON**  
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**Suite 630**  
**Boise, Idaho 83702**  
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**Email: rar@frhtriallawyers.com**  
**angie@frhtriallawyers.com**  
**vaughn@frhtriallawyers.com**

**ALSO PRESENT:**

**Mr. Zach Erlebach**  
**Mr. Blake Jackson**  
**Mr. Bruce Adams**

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an )  
 Idaho limited liability company )  
 a/k/a CALDWELL LAND & CATTLE )  
 COMPANY, LLC, )  
 )  
 Plaintiff/Counter-Defendant, )Case No. CV 15-587  
 )  
 vs. )  
 )  
 JOHNSON THERMAL SYSTEMS, INC., an )  
 Idaho corporation, )  
 )  
 Defendant/Counterclaimant )  
 Third-Party Plaintiff, )  
 )  
 vs. )  
 )  
 COLLIERS PARAGON, LLC, an Idaho )  
 limited liability company, )  
 )  
 Third-Party Defendant. )  
 \_\_\_\_\_ )

DEPOSITION OF BRUCE ADAMS  
 RULE 30(b)(6) DEPOSITION OF CALDWELL LAND & CATTLE, LLC  
 Fisher Rainey Hudson  
 950 West Bannock Street, Suite 630, Boise, Idaho

Thursday, July 6, 2017  
 Beginning at 10:03 a.m.

QnA COURT REPORTING, LLC  
 Lori A. Pulsifer, RDR, CRR, Idaho CSR  
 P.O. Box 1058, Eagle, Idaho 83616-1058  
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**A P P E A R A N C E S**

**FOR THE PLAINTIFF/COUNTER-DEFENDANT:**

**Mr. Graden P. Jackson**  
**Attorney at Law**  
**STRONG & HANNI**  
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**Phone: 801.532.7080**  
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**FOR THE DEFENDANT/COUNTERCLAIMANT:**

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**a n d**  
**Ms. Angie Perkins**  
**Attorney at Law**  
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**Email: rar@frhtriallawyers.com**  
**angie@frhtriallawyers.com**  
**vaughn@frhtriallawyers.com**

**ALSO PRESENT:**

**Mr. Zach Erlebach**

**Mr. Blake Jackson**

**Mr. Gary Sommercorn**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

---

CALDWELL LAND & CATTLE,	)	
LLC, an Idaho limited	)	
liability company a/k/a	)	
CALDWELL LAND & CATTLE	)	
COMPANY, LLC,	)	Case No. CV 15-587
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHNSON THERMAL SYSTEMS,	)	
INC., an Idaho	)	
corporation,	)	
	)	
Defendant.	)	

---

DEPOSITION OF: GRADEN PAUL JACKSON

JUNE 16, 2017

8:29 A.M. TO 11:34 A.M.

Location: LAW OFFICES OF STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah

Reporter: Scott M. Knight, RPR  
Notary Public in and for the State of Utah

Page 3

I N D E X

1 WITNESS: GRADEN PAUL JACKSON

2

3 EXAMINATIONS PAGE

4 MR. FISHER 5

5

E X H I B I T S

6 NO. DESCRIPTION PAGE

7 1 Email chain headed with email from 34  
Kristin Dunn to Graden Jackson, February  
17, 2015 (KBD135-140)

8 2 Email chain headed with email from 41  
Graden Jackson to Kristin Dunn, February  
18, 2015 (KBD170-172)

9 3 Letter from Graden Jackson to Kristin 50  
Bjorkman Dunn, December 30, 2014  
(KBD352-354)

10 4 Email chain headed with email from 50  
Graden Jackson to Kristin Dunn, January  
9, 2015 (KBD026-031)

11 5 Letter from Kristin Dunn to Graden 57  
Jackson, January 12, 2015 (KBD355-356)

12 6 Email chain headed with email from 60  
Graden Jackson to Kristin Dunn, January  
15, 2015 (KBD056-061)

13 7 Email chain headed with email from 61  
Kristin Dunn to Graden Jackson, January  
29, 2015 (KBD119-121)

14 8 Email chain headed with email from 69  
Graden Jackson to Kristin Dunn, January  
21, 2015 (KBD079-083)

15 9 Email chain headed with email from 71  
Kristin Dunn to Graden Jackson, January  
23, 2015 (KBD108-111)

16 10 Email chain headed with email from 72  
Kristin Dunn to Graden Jackson, February  
23, 2015 (KBD252-259)

17 11 Email chain headed with email from 77  
Kristin Dunn to Graden Jackson, March 2,  
2015 (KBD275-277)

18 12 Email from Graden Jackson to Kristin 83  
Dunn, March 3, 2015 (KBD278)

19 13 Summary of damages, costs and expenses 89  
for Caldwell

20

21

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23

24

25

Page 2

A P P E A R A N C E S

1

2 FOR THE PLAINTIFF:

3 William B. Ingram

4 STRONG & HANNI

5 102 South 200 East, Suite 800

6 Salt Lake City, Utah 84111

7 801.532.7080

8 wingram@strongandhanni.com

9

10 FOR THE DEFENDANT:

11 Vaughn Fisher

12 FISHER RAINEY HUDSON

13 950 West Bannock Street, Suite 630

14 Boise, Idaho 83702

15 208.345.7000

16 vaughn@frhtriallawyers.com

17

18

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QUESTIONS INSTRUCTED NOT TO ANSWER

	LINE	PAGE
1	18	27
2	22	36
3	14	46
4	13	49
5	22	49
6	1	50
7	14	57

I T E M S R E Q U E S T E D

None

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR CANYON COUNTY, STATE OF IDAHO

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company)  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
) Case No. CV15-587  
Plaintiff, ) Judge Meyer  
) vs. )  
) JOHNSON THERMAL SYSTEMS, INC., )  
an Idaho corporation, )  
) Defendant. )

DEPOSITION OF ARLENE GILBERT

Taken at the offices of:  
SNOW, CHRISTENSEN & MARTINEAU  
555 South Bluff St., Ste. 301  
St. George, Utah 84770  
On Tuesday, February 09, 2016  
At 11:00 a.m.

Reported by: Russel D. Morgan, CSR

1 A P P E A R A N C E S  
2  
3 For the Plaintiff:  
4 Ryan C. Bullock  
5 STRONG & HANNI  
6 3 TRIAD CENTER  
7 Suite 500  
8 Salt Lake City, Utah 84180  
9 801.532.7080 - Fax 801.596.1508  
10 For the Defendant:  
11 Rebecca A. Rainey  
12 FISHER RAINEY HUDSON  
13 950 West Bannock Street, Ste. 630  
14 Boise, Id 83702  
15 208.345.7000 - Fax 208.514.1900  
16 Kristin Bjorkman Dunn (via telephone)  
17 BJORKMAN DUNN PLLC  
18 121 N. 9th Street, Ste. 300  
19 Boise, ID 83702  
20 For the Witness Arlene Gilbert:  
21 Steve Beckstrom  
22 SNOW, CHRISTENSEN & MARTINEAU  
23 555 South Bluff St., Ste. 301  
24 St. George, Utah 84770  
25 435.673.8288 - Fax 435.673.1444

<u>EXAMINATION INDEX</u>	
ARLENE GILBERT	PAGE NO.
By Mr. Bullock	4
By Ms. Rainey	55
By Mr. Bullock	59
<u>EXHIBIT INDEX</u>	
1 Commercial Lease Agreement	13
2 First Amendment	19
3 February 14, 2014 letter on JTS letterhead	22
4 First Amendment	25
5 Third Lease Amendment	30
6 Two-page letter: Notice of Termination	37
7 Two-page email	45
8 One-page email	48
9 Two-page email	51

1 P R O C E E D I N G S  
2 \* \* \*  
3 ARLENE GILBERT  
4 having been first duly sworn to testify to the  
5 truth, the whole truth and nothing but the truth,  
6 was examined and testified as follows:  
7 -o0o-  
8 EXAMINATION  
9 BY MR. BULLOCK:  
10 Q Good morning.  
11 A Good morning.  
12 Q Can you please state your name for the record?  
13 A Arlene Gilbert.  
14 Q Okay. And what is your current address?  
15 A 650 North Highland Parkway, Washington, Utah 8  
16 something. What's the zip around here?  
17 MR. BECKSTROM: 84780.  
18 BY MR. BULLOCK:  
19 Q All right. How long have you lived at that  
20 address?  
21 A One year.  
22 Q And prior to that, where were you living?  
23 A Idaho.  
24 Q And how long did you live in Idaho?  
25 A About 20 years.

Page 2

1 THE 30(b)(6) DEPOSITION OF IDAHO POWER COMPANY,  
 2 TESTIMONY OF NICK SCHOONOVER, was taken on behalf of the  
 3 Plaintiff at the offices of M & M Court Reporting Service,  
 4 U.S. Bank Plaza, 101 South Capitol Boulevard, Suite 200,  
 5 Boise, Idaho, commencing at 10:58 a.m. on Friday, July 21,  
 6 2017, before Maria D. Glodowski, Certified Shorthand  
 7 Reporter and Notary Public within and for the State of  
 8 Idaho, in the above-entitled matter.  
 9  
 10  
 11 APPEARANCES:  
 12 For Plaintiff:  
 13 Strong & Hanni  
 14 BY: Graden P. Jackson  
 15 9350 South 150 East, Suite 820  
 16 Sandy, Utah 84070  
 17 gjackson@strongandhanni.com  
 18  
 19 For Idaho Power Company:  
 20 Idaho Power Legal Department  
 21 BY: Shelli D. Stewart  
 22 1221 West Idaho Street  
 23 Boise, Idaho 83702  
 24 sstewart@idahopower.com  
 25

Page 3

1 APPEARANCES (Continued):  
 2 For Defendant:  
 3 Fisher Rainey Hudson  
 4 BY: Angela D. Perkins  
 5 950 West Bannock Street, Suite 630  
 6 Boise, Idaho 83702  
 7 angie@fhtriallawyers.com  
 8  
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Page 4

INDEX

1	TESTIMONY OF NICK SCHOONOVER	PAGE
2	Examination by Mr. Jackson	5
3	Examination by Ms. Perkins	48
4		
5		
6		
7	DEPOSITION EXHIBIT NO.:	PAGE
8	Exh 1 - Second Amended Subpoena To Take 30(b)(6)	9
9	Deposition Of Idaho Power Company,	
10	dated 07/17/2017	
11	Exh 2 - Service Request, Bates Stamped IPC 0068,	10
12	dated 03/02/2015	
13	Exh 3 - Service Request, Bates Stamped IPC 0064,	24
14	dated 03/03/2015	
15	Exh 4 - Work Order Map, Bates Stamped IPC 0069	29
16	Exh 5 - Email Chain, Bates Stamped IPC 0083,	36
17	dated 04/14/2015	
18	Exh 6 - Service Request, Bates Stamped IPC 0072	57
19	Through IPC 0076, dated 03/05/2015	
20	Exh 7 - Service Request, Bates Stamped IPC 0012	57
21	Through IPC 0016, dated 03/05/2015	
22	Exh 8 - Salvage Credit Worksheet, Bates Stamped	64
23	IPC 0038 And IPC 0040	
24		
25		

Page 5

1 NICK SCHOONOVER,  
 2 first duly sworn to tell the truth relating to said  
 3 cause, testified as follows:  
 4  
 5 EXAMINATION  
 6 BY MR. JACKSON:  
 7 Q. Good morning.  
 8 A. Good morning.  
 9 Q. My name is Graden Jackson. I represent  
 10 Caldwell Land & Cattle in a matter that's been brought  
 11 against a company called Johnson Thermal.  
 12 A. Okay.  
 13 Q. Through the course of this time that we spend  
 14 together, which will be brief, I'll ask you a few  
 15 questions on behalf of Idaho Power.  
 16 What is your name?  
 17 A. Nick Schoonover.  
 18 Q. And your address?  
 19 A. My work or home?  
 20 Q. Work?  
 21 A. 2420 Chacartegui Lane in Nampa.  
 22 Q. And are you employed with Idaho Power?  
 23 A. I am.  
 24 Q. How long have you been employed with Idaho  
 25 Power?

Kristin Bjorkman Dunn, ISB No 4613  
BJORKMAN DUNN PLLC  
121 N. 9<sup>th</sup> Street, Ste. 300  
Boise, ID 83702  
kbd@bjorkmandunn.com  
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Rebecca A. Rainey, ISB No. 7525  
Angie Perkins, ISB No. 10113  
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Email: angie@frhtriallawyers.com  
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Facsimile: (208) 514-1900

*Attorneys for Defendant*

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC.

Plaintiff/Counter-Defendant,

v.

JOHNSON THERMAL SYSTEMS, INC. an  
Idaho corporation,

Defendant/Counterclaimant

**Case No. CV 15-587**

**DEFENDANT'S AMDENDED  
DISCLOSURE OF LAY  
WITNESSES**


Defendant Johnson Thermal Systems, Inc. by and through its attorneys of record,  
and in compliance with the Second Amended Stipulation for Scheduling and Planning, and  
hereby submits this amended disclosure of lay witnesses it may call at trial in this matter

**DEFENDANT'S DISCLOSURE OF LAY WITNESSES - 1**

- 1) Dave Ehrelbach
- 2) Graden Jackson
- 3) Kristin Bjorkmann Dunn
- 4) Sheri Johnson
- 5) Blake Jackson
- 6) Lincoln Hagood
- 7) Jeff Johnson
- 8) Brian Bixler
- 9) Bruce Adams
- 10) Arlene Gilbert (by deposition)
- 11) Darryl "Gus" Gustaveson
- 12) Any person or entity identified by Plaintiff in its disclosure of lay witnesses or pretrial brief.

DATED this 2nd day of August 2017.

FISHER RAINEY HUDSON

  
\_\_\_\_\_  
Angie Perkins  
*Attorney for Defendant*  
Johnson Thermal Systems



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of June, 2017, I caused a true and correct copy of the foregoing **DEFENDANT'S AMENDED DISCLOSURE OF LAY WITNESSES** to be served upon the following individuals in the manner indicated below:

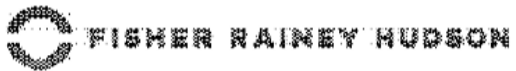
Graden Jackson  
Ryan Bullock  
Bill Ingram  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
Fax: (801) 596-1508

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



---

Angie Perkins  
*Attorney for Defendant*



Fisher Rainey Hudson  
950 W. Bannock St., Suite 630, Boise, ID 83702  
p: (208) 345-7000  
f: (208) 514-1900

**ATTENTION: Canyon County Clerk**

**DATE: 8/2/17**

**SUBJECT: CV-15-587**

**# of PAGES: 4**

**COMMENTS: Dear Clerk, Please file the attached in the above mentioned case.**

**CC: Graden Jackson**

This message contains information which may be confidential and privileged and has been sent solely for the use of the intended recipient. If you are not the intended recipient, you may not use, copy or disclose to anyone, by any means, the message or any information contained in the message. If you have received this message in error, please immediately notify the sender by reply phone call.

Lynnette M. Davis, ISB No. 5263  
William K. Smith, ISB No. 9769  
Austin Strobel, ISB No. 9803  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: 208.344.6000  
Facsimile: 208.954.5213  
Email: ldavis@hawleytroxell.com  
wsmith@hawleytroxell.com  
astrobel@hawleytroxell.com

Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF MOTION TO DISALLOW  
PLAINTIFF'S COSTS AND ATTORNEY  
FEES [I.R.C.P. 54]

Defendant Johnson Thermal Systems, Inc., through counsel of record Hawley Troxell  
Ennis & Hawley LLP, hereby submits its *Supplemental Memorandum in Support of Motion to  
Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54]*.

**I.**  
**INTRODUCTION**

On January 31, 2018, Defendant filed its *Motion to Disallow Plaintiff's Costs and Attorney Fees*[I.R.C.P. 54] and *Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees* [I.R.C.P. 54]. This Supplemental Memorandum addresses an additional jurisdictional issue. For the additional reason discussed below, the Court should disallow Plaintiff's requested costs and attorney fees.

**II.**  
**SUPPLEMENTAL ARGUMENT**

The Court should disallow all costs and fees sought by Plaintiff because Plaintiff's Memorandum of Attorney Fees and Costs filed on January 17, 2018, does not comply with Idaho Rule of Civil Procedure 54(d)(4), which states:

(4) *Memorandum of Costs*. At any time after the verdict of a jury or a decision of the court, but not later than 14 days after entry of judgment, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense. **The memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule.** Failure to timely file a memorandum of costs is a waiver of the right to costs. A memorandum of costs prematurely filed is considered as timely.

Idaho R. Civ. P. 54(d)(4). Under Idaho Rule of Civil Procedure 54(e)(5), attorney fees are considered costs and therefore are governed by Rule 54(d)(4). I.R.C.P. 54(e)(5) (“Attorney fees . . . are costs in an action and [are] processed in the same manner as other costs included in the memorandum of costs.”

Here, neither Plaintiff's Memorandum of Attorney Fees and Costs nor the supporting Affidavit of William B. Ingram "state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule" as Rule 54(d)(4) indicates a "memorandum of costs" **must** do. This certification is mandatory and is absent.<sup>1</sup> In the absence of the mandatory certification language from Rule 54(d)(4), none of Plaintiff's January 17, 2018 filings qualifies as a "memorandum of costs" under Idaho law. Since Plaintiff has not filed a document that complies with Rule 54(d)(4), Plaintiff has failed to meet the jurisdictional requirements of Idaho Rule of Civil Procedure 54 and is not entitled to an award of costs and attorney fees.

## II. CONCLUSION


Based on the foregoing and Defendant's January 31, 2018 filings, and pursuant to Idaho Rules of Civil Procedure 54(d)(5), 54(e)(3), and 54(e)(6), Defendant respectfully requests that the Court disallow all or part of the attorney fees and costs claimed by Plaintiff.

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<sup>1</sup> See *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995) ("When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall'"); *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008) (rules of statutory construction apply to both statutes and rules of civil procedure) (citations omitted).

DATED THIS 9<sup>th</sup> day of February, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
William K. Smith, ISB No. 9769  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of February, 2018, I caused to be served a true copy of the foregoing SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES [I.R.C.P. 54] by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson  
William B. Ingram  
STRONG AND HANNI  
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- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Facsimile
- iCourt



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William K. Smith

Robert L. Janicki, ISB #8911  
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*Attorneys for Plaintiff*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p style="text-align: center;">Defendant.</p>	<p><b>RESPONSE TO DEFENDANT’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISALLOWS PLAINTIFF’S ATTORNEY FEES AND COSTS</b></p> <p>Case No. CV15-587</p> <p>Judge Chris Nye</p>
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Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this response to the *Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Costs and Attorney Fees* (the “Supplemental Memo”) filed by Defendant Johnson Thermal Systems, Inc. (“JTS”). For the reasons discussed below, CLC respectfully requests that the Court reject JTS’s new argument and award it the attorney fees and costs set forth in the *Affidavit of William B. Ingram*.



## **INTRODUCTION**

JTS belatedly raises a new argument, disguised as a “jurisdictional” issue, to assert that CLC’s *Memorandum of Attorney Fees and Costs*, filed on January 17, 2018, does not comply with Idaho Rule of Civil Procedure 54(d)(4) and, therefore, CLC’s request for attorney fees and costs should be precluded. JTS cites zero authority for this new argument, which fails for several reasons. First, JTS’s objection is outside of the 14-day rule under Rule 54(d)(4) and, thus, is untimely. Second, while attorney fees are processed in the same manner as costs, they are separately governed by Rule 54(e), which states that attorney fees are to be supported by an attorney’s affidavit, which CLC has done. Third, the affidavit submitted by CLC complies with Rule 54(d) and (e). Finally, because the affidavit and memorandum are both signed by CLC’s attorney, they are filed with a certification that the statements therein are made “to the best of the person’s knowledge, information and belief” under Rule 11(b).

Accordingly, JTS’s new argument should be denied and CLC should be awarded its attorney fees and costs as requested.

## **ARGUMENT**

### **A. JTS’s New Argument is Untimely.**

Idaho Rule of Civil Procedure 54(d)(5) requires that an objection to a memorandum of costs must be filed within 14 days of service of the memorandum. Idaho R. Civ. P. 54(d)(5). CLC filed its memorandum for attorney fees and costs on January 17, 2018. Any objection by JTS must have been filed by January 31, 2018. While JTS did file an objection on that date, its Supplemental Memo was not filed until February 12, 2018, nearly two weeks late. Consequently, JTS’s untimely filing is a waiver of its new argument. *Id.*

Because the Supplemental Memo is untimely, JTS attempts to disguise its new argument as a “jurisdictional” issue. However, JTS cites no authority for this proposition. This new argument is not a jurisdictional issue, but merely an untimely objection, which the Court should reject.<sup>1</sup>

**B. Attorney Fees are Separately Governed by Rule 54(e).**

JTS’s new argument for disallowing attorney fees and costs is that “Plaintiff’s Memorandum of Attorney Fees and Costs filed on January 17, 2018, does not comply with Rule of Civil Procedure 54(d)(4)” because it does not state “to the best of the party’s knowledge and belief the items are correct and that the costs are claimed in compliance with this rule.” *Supplemental Memo* at 2. This argument attempts to conflate the requirements for costs with the separate requirements for attorney fees. The former is governed by Rule 54(d). The latter is governed by Rule 54(e).

Rule 54(e) provides that a Court may award reasonable attorney fees to the prevailing party when provided for by any statute or contract. Idaho R. Civ. P 54(e)(1). A claim for attorney fees must be “supported by affidavit of the attorney.” *Id.* at (e)(5). CLC has supported its claims for attorney fees by affidavit in compliance with this Rule. *Affidavit of William B. Ingram*. Importantly, unlike true costs (which is what Rule 54(d)(4) addresses), there is no requirement for a request for attorney fees to be made with a statement “to the best of the party’s knowledge and belief [that] the items are correct and that the costs claimed are in compliance with this rule.”

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<sup>1</sup> Notably, JTS’s new argument does not dispute the timely filing and content of CLC’s memorandum, but merely the form. “Failure to timely file a memorandum of costs is a waiver of the right to costs.” Idaho R. Civ. P. 54(d)(4). However, the Rule says nothing that a timely filed memorandum, which does not use the magic words, is similarly a waiver.

*Compare id.* at (d)(4); *with id.* at (e)(5). This is because an attorney has personal knowledge about the amounts of fees that he and his law firm have charged and attests as much in his affidavit under oath.

**C. The Affidavit Complies with Rule 54(d) and (e).**

The *Affidavit of William B. Ingram* complies with both Rule 54(d) and (e). Specifically, it expressly states that it is made “pursuant to Rule 54(e)(5)” and, thus, is “in compliance with this rule [Rule 54].” Idaho R. Civ. P. 54(d) (emphasis added). The Affidavit addresses the factors for reasonableness, which are discussed in Rule 54(e)(3). Furthermore, paragraph 1 of the Affidavit states that it is based on Mr. Ingram’s “personal knowledge” and paragraph 27 states his “belief” of reasonableness and necessity. *Affidavit of William B. Ingram* at ¶¶ 1 and 27. Each of these statements is made under oath.

At best, JTS argues that CLC has not followed the form (i.e. the magic words) for costs, but not for attorney fees. However, even this argument is contradicted by paragraph 32 of Mr. Ingram’s affidavit, which states his “belief,” under oath, that the costs are reasonably and necessarily incurred. *Id.* at ¶32. CLC’s memorandum also states that it is made pursuant to Rule 54 and breaks down by specific rule, statute, and contract provision the bases for its request for attorney fees and costs, and thus represents that it “is in compliance with Rule 54.” Idaho R. Civ. P. 54(d)(4).

**D. CLC’s Filings Have the Appropriate Certification.**

Finally, if there is any legitimate question about whether CLC’s memorandum is filed under the “party’s knowledge and belief”—significantly, not the attorney’s knowledge and belief (which is what an attorney affidavit under Rule 54(e)(5) is for)—then the memorandum is still

signed by the party's attorney, which under Rule 11(b) is made with the following representation to the Court:

By presenting to the court a pleading, writing motion, or other paper, whether by signing, filing, or submitting, or later advocating it, any attorney or unrepresented party, certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support . . .

Idaho R. Civ. P. 11(b) (emphasis added).

Because CLC's memorandum for attorney fees and costs is properly supported and certified, both by affidavit under Rule 54(e) and pursuant to Rule 11, the Court should reject JTS's new argument and award CLC all attorney fees and costs requested.

### **CONCLUSION**

For the reasons set forth above, and those stated in its principal and reply memoranda, the Court should award CLC attorney fees in the amount of \$178,734.72 and costs in the amount of \$10,726.40

DATED this 20th day of February, 2018.

STRONG & HANNI

*/s/ William B. Ingram*

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Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **RESPONSE TO DEFENDANT’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISALLOWS PLAINTIFF’S ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 20th day of February, 2018.

Lynnette M. Davis  
Austin Strobel  
William K. Smith  
HAWLEY TROXELL ENNIS &  
HAWLEY, LLP  
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*/ s / Sariah Runnells, secretary*

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Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

COMBINED MOTIONS FOR  
RECONSIDERATION AND TO ALTER,  
AMEND, OR VACATE JUDGMENT

Defendant Johnson Thermal Systems, Inc. ("JTS") by and through its counsel of record,  
Hawley Troxell Ennis & Hawley LLP, hereby makes two motions to the Court:

First, pursuant to Idaho Rule of Civil Procedure 11.2(b), JTS respectfully moves for  
reconsideration of the Court's Findings of Fact and Conclusions of Law dated November 20,  
2017.


COMBINED MOTIONS FOR RECONSIDERATION AND TO ALTER,  
AMEND, OR VACATE JUDGMENT – PAGE 1 815

Second, pursuant to Idaho Rule of Civil Procedure 59(e), JTS concurrently moves that the Judgment entered by this Court on January 24, 2018, be altered, amended, or vacated, as the Judgment was predicated on the Court's November 20, 2017, Findings of Fact and Conclusions of Law.

These motions are supported by the Court's record, including all prior briefings submitted by the parties, all prior declarations and affidavits, and the trial transcript and exhibits on file with the Court. They are further supported by JTS' Memorandum in Support of Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment, filed concurrently herewith.

DATED THIS 15<sup>th</sup> day of March, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

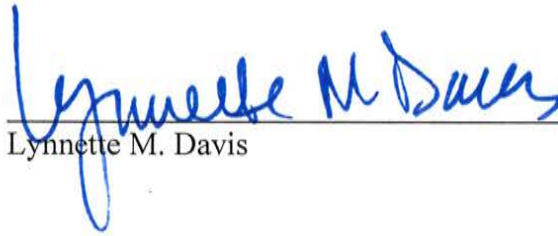
By   
Lynnette M. Davis, ISB No. 5263  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of March, 2018, I caused to be served a true copy of the foregoing COMBINED MOTIONS FOR RECONSIDERATION AND TO ALTER, AMEND, OR VACATE JUDGMENT by the method indicated below, and addressed to each of the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

DEFENDANT JOHNSON THERMAL  
SYSTEMS' MEMORANDUM IN  
SUPPORT OF COMBINED MOTIONS  
FOR RECONSIDERATION AND TO  
ALTER, AMEND, OR VACATE  
JUDGMENT

Defendant Johnson Thermal Systems, Inc. ("JTS") by and through its counsel of record,  
Hawley Troxell Ennis & Hawley LLP, respectfully submits the following Memorandum in  
Support of Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment.

The motions are made in regard to the Court's Findings of Fact and Conclusions of Law entered

by the Court on January 5, 2018, (“**Findings and Conclusions**”) and the Judgment entered by the Court on January 24, 2018, (“**Judgment**”).

The Court’s record, including all prior briefing submitted by the parties, all prior declarations and affidavits, and the trial transcript and exhibits are incorporated by reference.

## **I. INTRODUCTION**

JTS respectfully requests that the Court reconsider its Findings and Conclusions regarding the following issues: (A) JTS properly exercised the six-month renewal option under the Third Lease Amendment; and (B) even if JTS did not exercise the six-month renewal, CLC’s damages should be limited to those damages related to JTS’ alleged failure to timely vacate.

JTS also asks, in light of any reconsideration entered by the Court, that the Judgment be altered, amended, and/or vacated in accordance with any such reconsideration entered by the Court.

## **II. FACTUAL BACKGROUND**

On February 22, 2012, JTS and the Gilbert Family Limited Partnership (“**Gilbert**”) entered into a commercial lease agreement (“**the Lease**”) whereby Gilbert leased real property located at 1505 Industrial Way, Caldwell, Idaho (“**the Property**”) to JTS for a thirteen-month term set to expire April 15, 2013. Ex. 1.

The Lease Agreement contained a renewal option that allowed:

**OPTION TO RENEW:** Upon Lessor’s receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each

commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

Ex. 1, p.2. The Lease Agreement also contained a provision regarding modification that stated:

**MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.”

Ex. 1, p. 5.

On March 28, 2013, only eighteen days before the expiration of the original Lease term, Gilbert signed a document entitled “First Amendment.” [hereinafter “**First Renewal**”]<sup>1</sup> Ex. 2. This document clearly stated that JTS was exercising its first renewal option under the Lease. Ex. 2 (“Tennant desire’s [sic] to exercise its first one (1) year lease renewal option . . .”). As such, the terms of this document did not actually modify or amend the Lease but simply memorialized JTS’ exercise of its first of two options to renew. Specifically, in accordance with the OPTION TO RENEW provision of the Lease, the First Renewal extended the lease term for one year from April 15, 2013, to April 15, 2014, and increased the rent by three percent. *Compare* Ex. 1, p. 2, OPTION TO RENEW, *with* Ex. 2.

On April 18, 2014, three days after the expiration of the first option to renew, Gilbert signed a document entitled “Third Lease Amendment” [hereinafter “**Third Amendment**”]. This document, unlike the First Renewal, modified and amended the terms of the Lease. Rather than a one-year extension, the terms of the Third Amendment only provided for a six-month extension

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<sup>1</sup> Although entitled First Amendment, this was actually the second amendment. The first amendment was executed on March 26, 2012, and changed the occupancy date. Thus, although titled First Amendment, this document will be referred to herein as the “First Renewal.”

from April 15, 2014, to October 15, 2014, and the rent was increased by ten percent (10%), rather than the three percent (3%) required under the OPTION TO RENEW provision of the Lease. Furthermore, the Third Amendment added a new provision that included a new option to extend the lease not found in the original Lease. This new provision provided:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo
- b. Month to Month Term: Base Rent = \$6,250/mo

Ex. 3, ¶3.

The difference in the amounts between the six-month term and the month-to-month option was specifically requested by Gilbert. 2/12/2016 Affidavit of Rebecca A. Rainey in Support of Motion for Partial Summary Judgment (“**Rainey Aff.**”), Ex. D (Hagood Depo. 53:28–54:15). Indeed, it was important to Gilbert that it get more money for the month-to-month option because of the uncertainty involved in a month-to-month lease. *Id.*

In executing both the First Renewal and the Third Lease Amendment, JTS did not provide Gilbert sixty-day written notice of its intent to remain in the Property or extend the Lease. *See Rainey Aff.*, Ex. C (S. Johnson Depo. 16:16–22); *id.*, Ex. C. Ex. C (S. Johnson Depo. 16:16–22) and Ex. G (ColliersDO 00078).

In August 2014, JTS and Gilbert’s agent, Lincoln Hagood (“**Hagood**”), began discussions about extending the Lease beyond October 15, 2014. JTS informed Hagood that while they hoped to move out of the Property by December 2014, it could be as late as February or March 2015. Findings and Conclusions, p. 3; Exs. 5–7. In November 2014, JTS paid Gilbert \$6,000/month, plus triple net, which is the amount called for under the Third Amendment for a

six-month term. *See* Ex. 3, ¶ 3. Gilbert accepted this payment without reservation or comment. Findings and Conclusions, p. 3; Rainey Aff. Ex. I, (Affidavit of Darrell Gustaverson), ¶ 3.

On November 17, 2014, Plaintiff Caldwell Land & Cattle, LLC (“CLC”), made Gilbert an offer for the purchase of the Property (“**Purchase Agreement**”). Tr. 235, 274; Ex. 8. CLC bought the Property with the intention of leasing the Property to Caldwell Peterbilt, Inc. (“**Peterbilt**”). CLC was aware the Property was currently occupied by JTS when it made the offer. Tr. 373:7–13. Indeed, included in its offer to buy the Property, was a requirement that Gilbert provide “copies of any existing tenant leases and amendments or rental agreements. Statement of all current rents, deposits, advance fees, and delinquencies pertaining to the Property.” Ex. 8, Ex. B, ¶ 3. Also included in the offer, was a requirement that Gilbert deliver to the closing agent, “An Assignment and assumption of all leases, warranties, contracts, and guarantees that effect the Premises . . . .” *id.* p. 4, ¶ 12(c), and a requirement that “[a]ny tenant deposits held by Seller shall be credited to Buyer at Closing.” *Id.* p. 4, ¶ 13. The closing date in the Purchase Agreement was set as “no later than” December 31, 2014. *Id.* p. 4, ¶ 11. On November 21, 2014, Gilbert made a counter offer that increased the purchase price and stated “Exhibit B: Due Diligence Materials: Seller will provide only those items listed in the Exhibit B which are in the Seller’s possession.” The closing date was not altered and the counter offer was accepted by CLC. *Id.*

In December 2014, after the Purchase Agreement was finalized, JTS made another \$6,000, plus triple net, payment as called for under the terms of the Third Amendment for a six-month term. *See* Ex. 3, ¶ 3. Again, Gilbert accepted this payment without reservation or

comment. Findings and Conclusions, p. 3; Rainey Aff. Ex. I, (Affidavit of Darrell Gustaverson), ¶ 3.

On December 5, 2014, Gilbert, via Hagood, notified JTS that Gilbert was selling the Property and that the new tenant, CLC, wanted to occupy the Property as soon as possible. Findings and Conclusions, p. 3; Ex. 9. JTS responded to Gilbert, via Hagood, that JTS had exercised the six-month-term option under the Third Amendment, by paying at “the six month extension rate, and not paying the clearly different month by month rate.” Ex. 10.

Prior to CLC’s involvement in the agreement between Gilbert and CLC, there was no question about whether JTS had exercised the six-month renewal option. Indeed, although very concerned about the rent rate, Gilbert had been accepting JTS’ \$6,000 plus triple net payments for the six-month extension for two months before CLC became involved.<sup>2</sup> However, on December 5, 2014, although aware that JTS was a tenant of the Property, CLC stated in an email to Colliers, “I don’t want to be unkind – but we don’t care about their agreement. When we close on Dec 31 – we are taking possession of the building.” *See* Ex. 284, CALD0216; Tr. 464. Further, CLC insisted that Gilbert send JTS a notice of termination as a pre-condition to closing. Ex. 287, Tr. 472 (“[I]n connection with the pending close on [the Property] we insist that the

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<sup>2</sup> That Gilbert was very conscientious of the amount of rent being paid by JTS is reflected in the testimony of Sheri Johnson: “One time . . . [JTS] forgot to put in the 3 percent increase in our rent check and she [Arlene Gilbert] was in like the day she received the check and was very angry.” Tr. 41:12–15. That Hagood, Gilberts’ agent with Colliers, was also very attentive to the rent rate being paid by JTS is reflected in an email from Hagood to JTS in April 2014 reminding JTS to send the additional “\$285.93 to Arlene for the remainder of the rent due [that] month.” *See* Ex. 227.

seller or the seller's agent fill out and serve the attached termination of tenancy notice . . . by the end of the day tomorrow, December 10, 2014." (emphasis added)); Tr. 261, 280–81.

On approximately December 11, 2014, after accepting the December payment from JTS as called for under the terms of the Third Amendment for a six-month term, Gilbert, under direction from CLC, sent a written notice to Defendant terminating the lease and requesting that Defendant vacate and surrender possession of the Property by January 31, 2014, and remove all of its "trade fixtures, fencing, and personal property of any kind, and surrender [the Property] in the same condition, reasonable wear and tear excepted, as [the Property] were in at the beginning of the Lease." Ex. 13.

On January 22, 2015, nine days before the date Gilbert had given JTS to vacate the Property, CLC filed its Verified Amended Complaint, alleging: unlawful detainer; breach of contract; breach of the implied covenant of good faith and fair dealing; and intentional and malicious injury to property. Although JTS maintained that it had exercised the Third Amendment's six-month renewal option by paying the amount required under the Third Amendment for such renewal, JTS, in an effort to avoid litigation, notified CLC's counsel of its intent to vacate the Property on February 6, 2015. Tr. 513; Ex. 258. On February 12, 2015, in an additional email to CLC's counsel, JTS notified CLC that it had vacated the Property. Ex. 258; Tr. 516. In its answer to JTS' counterclaim, CLC admitted that JTS vacated the Property on February 12, 2015. Reply to Counterclaim, ¶ 40. Even though JTS had vacated the Property only twelve days after the date required in the termination notice sent by Gilbert, Peterbilt did not finish moving its operations to the Property until the first part of May 2015.

Representatives from CLC and Peterbilt consistently testified that mid to late April 2015 was the target date for Peterbilt to complete its move to the Property. Tr. 330 (Bruce Adams, President of Peterbilt, testifying that April 15 or 30, 2015, was the target date for completion of the remodel); Tr. 331:16–20 (“So . . . you had April 15 range as that’s when we’re going to . . . get in there and start doing our remodel correct? / Well, move into our remodel, yes.”); Tr. 433:21 (Blake Jackson testifying that April 15, 2015, was when CLC understood that JTS would be out of the building). Indeed, the contractor CLC had hired to perform the remodel was unavailable in February 2015 because he was working on Peterbilt’s Boise store. Tr. 351. Perhaps most telling, the lease agreement between CLC and Peterbilt had an effective date of June 1, 2015. *See* Ex. 21.

After vacating, but before the end of February, Idaho Power, at the request of JTS, came to the Property and removed a temporary 480V transformer that JTS had leased from Idaho Power. Tr. 287–88. Although the Property had alternate sources of power that had satisfied JTS’ needs prior to, JTS had installed the temporary transformer in February 2014 to meet JTS’ additional power needs. Tr. 108. Pursuant to the terms of its agreement with Idaho Power, JTS paid for the removal of the transformer at the same time JTS paid for its installation. Tr. 300; Ex. 221.

CLC maintains that 480V power was critical to their tenant, Peterbilt’s, operations, but there is no evidence that JTS or Gilbert ever represented that the 480V transformer was part of the Property, Tr. 186:7–9 (“[D]id any Johnson Thermal employee make any representation about the 480 power? / No.”), and CLC never inquired as whether the 480V power was part of the Property. Tr. 187–188 (noting that CLC did not verify the status of the 480V power).



Despite filing an action to evict JTS, and despite the fact that JTS had vacated the Property on February 12, 2015, and despite CLC having possession of the Property no later than February 20, 2015, CLC sent an email to JTS at the end of February stating “March rent is due on the 1st.” Ex. 260; Tr. 528.

This matter was tried before the court on August 23 through 25, 2017. On January 5, 2018, the court entered its Findings and Conclusions, finding in favor of Plaintiff. Judgment was entered on January 24, 2018.

### **III. LEGAL STANDARD**

Pursuant to Idaho Rule of Civil Procedure 11.2, the Court is required to entertain a motion for reconsideration. I.R.C.P. 11.2(b)(1); *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012) (“The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B).”). When considering a motion for reconsideration, “the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order.” *Fragnella*, 153 Idaho at 276, 281 P.3d at 113. However, the movant need not provide new evidence or authority to the court, but need only “[draw] the court’s attention to errors of law or fact in the initial decision.” *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006); *see also Fragnella*, 153 Idaho at 276, 281 P.3d at 113 (“However, a motion for reconsideration need not be supported by any new evidence or authority.”). Finally, “[w]hen deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella*, 153 Idaho at 276, 281 P.3d at 113.

#### IV. ARGUMENT

The Court should reconsider its Findings and Conclusions relating to the following issues: (A) JTS properly exercised the six-month renewal option under the Third Lease Amendment; and (B) even if the Court finds that JTS did not exercise the six-month renewal option, CLC was only entitled to damages related to JTS' failure to timely vacate the Property.

##### **A. JTS properly exercised the six-month renewal under the Third Amendment.**

In its Findings and Conclusions, the Court found that because JTS did not “execute a written agreement to renew the lease,” JTS’ tenancy was converted into a month-to-month or at-will tenancy. Findings and Conclusions, pp. 6–7. This finding is not consistent with the clear language of the Third Amendment. Further, even if a writing was required, Gilbert waived such requirement by accepting payment at the six-month extension rate. Finally, even if a writing was required and Gilbert did not waive such a requirement, the doctrine of substantial performance mandates the enforcement of the six-month option to renew provided for in the Third Amendment to the Lease.

1. The clear and plain language of the Lease and the Third Amendment do not require a written extension for JTS to exercise the six-month term option.

“The interpretation of a contract begins with the language of the contract itself. If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words.” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (internal quotation marks and citations omitted). “When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning.” *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho

185, 190, 108 P.3d 332, 337 (2005). In determining whether a contract is ambiguous, “a court looks at the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings.” *Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007).

Here, the Lease and the Third Amendment thereto are unambiguous. The original Lease provided two ways by which JTS and Gilbert could extend the Lease: (1) JTS could exercise its option to renew under the OPTION TO RENEW provision of the Lease; or (2) JTS and Gilbert could execute an amendment under the MODIFICATION provision of the Lease by “a writing signed by all parties hereto.” Ex. 1, pp. 2, 5.

The first time JTS and Gilbert extended the lease they did so utilizing the first manner; that is, JTS exercised its right to renewal as provided under the OPTION TO RENEW provision of the Lease. By doing so, the terms of the Lease were not altered because the terms of the First Renewal were already provided for in the Lease, i.e., the term was extended by one year and the rent increased by three percent (3%). *Compare* Ex. 1, p. 2, OPTION TO RENEW, *with* Ex. 2. Because it did not modify or amend the Original Lease Agreement, “a writing signed by all parties hereto” under the MODIFICATION provision was not required. Rather, since all the terms were already included in the Lease, JTS only needed to comply with the requirements of the OPTION TO RENEW provision to effectuate the renewal. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743, 748 (2007) (noting that the obligation of the optionor is triggered when the optionee exercises “the option in the manner prescribed in the parties’ contract”); *Dennett v. Kuenzli*, 130 Idaho 21, 28–29, 936 P.2d 219, 226–27 (Ct. App. 1997) (holding that an option was complete upon the optionees’ fulfillment of the plain

requirements of the contract); *Dante v. Golas*, 121 Idaho 149, 150–51, 823 P.2d 183, 184–85 (Ct. App. 1992) (holding that an option was exercised when optionee complied with the plain language of the contract). Thus, although JTS and Gilbert chose to memorialize the First Renewal with “a writing signed by all parties hereto,” such was not required by the plain language of the Lease.

The second time JTS and Gilbert extended the lease they did so utilizing the second manner; that is, JTS and Gilbert modified and thereby *amended* the Lease. Unlike the First Renewal, the Third Amendment modified the terms for renewal already in place in the Lease. Rather than a one-year term and a three percent (3%) rate increase as provided in the OPTION TO RENEW provision of the Lease, the Third Amendment changed the terms of renewal from those provided in the Lease and called for a six-month extension and a ten percent (10%) rate increase. *Compare* Ex. 1, p. 2, OPTION TO RENEW (providing for an one-year extension and three percent (3%) rate increase, *with* Ex. 3, ¶ 3 (providing a six-month extension and ten percent (10%) rate increase).

Additionally, and critical here, the Third Amendment also modified how JTS and Gilbert could extend the lease. Specifically, the Third Amendment provided:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000.00/mo
- b. Month to Month Term: Base Rent = \$6,250.00/mo

The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

Ex. 3, ¶3.

As such, the Third Amendment *amended* and modified the Lease and added yet a third way the Lease could be extended. Consequently, unlike the First Renewal, because the Third Amendment *amended* the terms of the Lease, it was required under the MODIFICATION provision to be “a writing signed by all parties hereto.” It is undisputed that the Third Amendment was so signed. *See* Ex. 3 (bearing the signatures of the parties). Therefore, the Third Amendment was binding on JTS and Gilbert. *See Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004) (holding that amendments executed in the manner prescribed in the underlying agreement were binding and enforceable). Thus, the only question for the Court is whether JTS properly exercised its option to extend the lease for six-months “in the manner prescribed in the [Third Amendment].” *See Cristo Viene Pentecostal Church*, 144 Idaho at 309, 160 P.3d at 748.

In *Dante v. Golas*, the Idaho Court of Appeals was asked to determine, among other things, whether the optionees had properly executed their option. 121 Idaho 149, 150, 823 P.2d 183, 184 (Ct. App. 1992). The option in that case involved the option to assume a mortgage and stated:

NOTICE—If lessees wish to assume mortgage prior to 12/31/88, they agree to give owners at least 30 days notice prior to the date they wish to assume. This will enable owners to obtain and complete the proper papers.

1. At the end of this lease, the lessees have the option of assuming the mortgage at the prevailing rate and terms.

*Id.* The optionees did not provide notice thirty days in advance of the date they wanted to assume the mortgage. *Id.* Thus, the optionors argued that the optionees had failed to properly execute the option. The Court of Appeals disagreed holding:

This provision addresses two situations: assumption before the end of the lease on December 31, 1988, and assumption “at the end of the lease.” . . . .

The above-quoted language of the lease-option does not provide that an option to be exercised “at the end of [the] lease” was subject to the thirty-day notice requirement; this requirement was expressly limited to an assumption of the mortgage “prior to” December 31, 1988.

*Id.*

Here, as in *Dante*, there was more than one way in which JTS could have effectuated an extension of the lease. One way was under the MODIFICATION provision, another was under the OPTION TO RENEW provision, and the third way was under the Third Amendment. While the first and second ways to extend the lease both explicitly required some sort of writing, the language in the Third Amendment contained no such provision. Indeed, similar to the “at the end of this lease” language in the *Dante* option, the language in the Third Amendment option states: “At the conclusion of this lease extension [JTS] shall have the option . . . .” Like in *Dante*, the Third Amendment option does not provide that the option to be exercised “[a]t the conclusion of this lease extension,” was subject to any requirement of written notice or was required to be executed by written agreement. Rather, the written requirements are expressly limited to the MODIFICATION and OPTION TO RENEW provisions. *See Dante*, 121 Idaho at 150, 823 P.2d at 184 (“The above-quoted language does not provide that an option to be exercised ‘at the end of [the] lease’ was subject to the thirty-day notice requirement; this requirement was expressly limited to an assumption of the mortgage ‘prior to’ December 31, 1988.” (alteration in original)). The plain language of the Third Amendment simply does not require that any written agreement or notice be given in order to exercise the six-month option to renew. It clearly provides that

“[a]t the conclusion of this lease extension [JTS] *shall* have the option . . . .” Ex. 3, ¶ 3. There is no written agreement or notice requirement and the addition of any such requirement would impermissibly rewrite the Third Amendment. *E.g., Shawver*, 140 Idaho at 362, 93 P.3d at 693 (2004) (“Courts do not possess the roving power to rewrite contracts[.]”).

Thus, under the plain language of the Third Amendment, JTS was not required to “execute a written agreement” or to provide “written notice” to exercise its option to renew the lease for a six-month term. Rather, JTS was only required to comply with the requirements listed in the Third Amendment to effectuate the renewal. Those requirements, are clearly articulated as: (1) “At the conclusion of this lease extension”; (2) “the Tenant shall have the option to extend the lease agreement . . . at the following rate [ ] Six Month Term: Base Rent = \$6,000.00/mo”; and (3) “[t]he Base Rent plus NNN expenses shall be paid monthly[.]” Ex. 3, ¶ 3.

It is undisputed that JTS did all three of these things by: (1) at the conclusion of the lease extension; (2) paying a base rent of \$6,000.00; and (3) paying the base rent plus NNN expenses monthly. Having properly exercised its option to extend the lease for six-months “in the manner prescribed in the [Third Amendment]” there was nothing left for JTS to do and Gilbert, as the optionor, was bound to the six-month extension it had offered. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743, 748 (2007) (noting that the obligation of the optionor is triggered when the optionee exercises “the option in the manner prescribed in the parties’ contract”); *Dennett v. Kuenzli*, 130 Idaho 21, 28–29, 936 P.2d 219, 226–27 (Ct. App. 1997) (holding that an option was complete upon the fulfillment of the plain requirements of the contract); *Dante v. Golas*, 121 Idaho 149, 150–51, 823 P.2d 183, 184–85 (Ct. App. 1992)

(holding that an option was exercised when the optionees complied with the plain language of the contract).

Accordingly, because the Third Amendment modified and amended the Lease to add a third way to renew the lease, and because the plain language of the Third Amendment does not require a written agreement, JTS respectfully requests that the Court reconsider its ruling that JTS “and Gilbert needed to execute a written agreement to renew the lease,” and find that JTS, by complying with the provisions in Third Amendment, properly exercised its option to extend the lease for six-months and Gilbert was therefore bound by such extension.

2. Even if a written requirement could be read into the provisions of the Third Amendment, Gilbert waived the requirement by accepting payment at the six-month extension rate.

In its Findings and Conclusions, the Court stated the rule that “[a] provision in a contract that requires modifications to be in writing can be avoided by the parties to the contract were their words, acts, or conduct amount to a waiver, modification, rescission, or abandonment of that provision, or where the party by his acts or conduct is estopped to rely on it.” Findings and Conclusions, p. 5 (citing *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass’n.*, 133 Idaho 669, 675 (Ct. App. 1999)). However, it is important to note that JTS’ exercise of the option to extend the Lease for six-months found in the Third Amendment was not a modification or amendment to the Lease. Rather, it was the creation of the option to extend that was the modification and amendment to the Lease. That is, the execution of the Third Amendment was the amendment of the Lease because it modified the terms of the Lease by providing an option to renew that was not contained in the Lease, and, therefore, because it modified and amended the terms of the Lease it was required to be in writing. Ex. 1, p. 5, MODIFICATION (requiring modifications



and amendments to be in writing; Third Amendment, Ex. 3 (modifying and amending the terms of the Lease by extending the Lease for six-months at a ten percent (10%) rate increase and providing a new process by which JTS could extend the Lease for an additional six-month period or convert to a month-to-month lease).

In contrast, JTS' exercise of the option to renew created by the Third Amendment did nothing to alter, amend, or modify the Lease. The terms for exercising the option were already part of the Lease via the Third Amendment. Thus, the exercise of the option to renew contained in the Third Amendment was not a modification or amendment, it was simply the exercise of an amended provision of the contract that had been properly added by a written amendment to the Lease. As such, the exercise of the option was not a modification that was required to be in writing because it was not a modification at all. Furthermore, as discussed above, the Third Amendment contained no requirement that the exercise of the option to renew for six months contained therein had to be exercised via written agreement or notice. *See supra* Part IV.A.1.

However, even assuming the plain language of the Third Amendment could somehow be construed to include a requirement that the exercise of the option to renew had to be in writing, Gilbert waived such a requirement by accepting JTS' rent payments at the six-month renewal rate without objection.

While the general concept of waiver is amply explained in Idaho law, *see, e.g.*, Findings and Conclusions, pp. 5–6 (citing cases), there appears to be no Idaho case law directly on point regarding the issue of waiver as applied to a requirement in the underlying lease that the exercise of an option to extend needed to be in writing. However, in *Oxford Properties & Finance Ltd. v. Engle*, the Ninth Circuit, relying on a wide survey of law from various states developed a four-

step analysis to determine whether such a requirement was waived. 943 F.2d 1150, 1154 (9th Cir. 1991). That analysis includes: (1) whether the lessor has continued to accept rent payments from the lessees after the date that the original agreement would have expired; (2) whether the rent increased by the amount established for the renewal period in the lease; (3) whether the tenant remained in continual possession of the premises; and (4) the extent, if any, of objections by the lessor to the continuance of tenancy after the original lease term had expired. *Id.*

Here, all four points fall squarely in favor of JTS and a finding that Gilbert, to the extent any writing or notice requirement existed, waived such requirement. First, it is undisputed that Gilbert continued to accept rent payments from the JTS after the date the original six-month extension in the Third Amendment expired. Second, it is undisputed that JTS paid the rent amount established in the Third Amendment for the six-month renewal period. Third, JTS remained in continual possession of the Property. And fourth, it is uncontested that Gilbert made no objection of any kind to JTS continued tenancy for more than two months after the expiration of the original six-month extension under the Third Amendment, and in fact only made objection to JTS' continued tenancy when CLC required Gilbert to send an eviction notice as a condition of closing on the Property. Ex. 287, Tr. 472 (“[I]n connection with the pending close on [the Property] we insist that the seller or the seller’s agent fill out and serve the attached termination of tenancy notice . . . by the end of the day tomorrow, December 10, 2014.”); Tr. 261, 280–81. Such facts are more than sufficient to find that Gilbert waived any writing requirement that may have been implied in the Third Amendment. *See Oxford Properties*, 943 F.2d at 1154 (and the cases cited therein).

Therefore, even assuming that any sort of written agreement or notice requirement could somehow be read into the plain language of the Third Amendment, Gilbert waived any such requirement through its actions and JTS asks that the Court reconsider its ruling that a written agreement was required before the option to extend contained in the Third Amendment could be exercised by JTS.

3. Even if a written agreement or notice requirement existed and was not waived, the doctrine of substantial performance requires that six-month extension option be enforced.

“In Idaho, recovery is allowed on proof of substantial performance in a proper case.”

*Weed v. Idaho Copper Co.*, 51 Idaho 737, 10 P.2d 613, 621 (1932).“ ‘Substantial performance’ is performance which, despite deviation or omission, provides the important and essential benefits of the contract.” *Ujdur v. Thompson*, 126 Idaho 6, 9, 878 P.2d 180, 183 (Ct. App. 1994).

“Although the doctrine of substantial performance most often applies to construction contracts, it is not necessarily limited to that context and may apply to any contract.” *Id.*

Here, even assuming that a written agreement or notice requirement could be read into the Third Amendment, JTS substantially performed the requirements to exercise the six-month option to renew by paying the six-month rate at the conclusion of the Lease extension. The only requirement that JTS arguably did not perform was to provide a written notice or agreement regarding the renewal. However, the essential benefits of the contract were (1) that JTS would have use of the Property and (2) that Gilbert timely received rent. Both of those benefits were met when JTS paid rent at the six-month renewal rate and Gilbert accepted such payment and allowed JTS to remain in the Property without comment. As such, both parties substantially performed their parts of the six-month renewal option, i.e., JTS timely paid the rent at the

required rate, and Gilbert accepted that rent and allowed JTS to remain in the Property. Accordingly, having substantially performed the Lease, as modified by the Third Amendment, Gilbert could not then say that JTS has no right to remain in possession of the Property.

**B. Because JTS properly exercised the six-month renewal option under the Third Amendment, JTS should prevail on its counterclaims.**

In its counterclaim, JTS alleged Breach of Contract – Constructive Eviction; Refund of Security Deposit; and Refund of Pro-Rated Share of February 2015 Rent. As discussed above, JTS properly exercised the six-month option to renew by complying with requirements for such in the Third Amendment. *See supra*. As such, JTS was entitled to remain in the Property until April 15, 2015. *See Ex. 3, ¶ 3*.

However, CLC breached the Lease by filing suit to evict JTS before the Lease term had expired. As a result of the CLC’s actions, JTS was denied the benefit of the Property until April 15, 2015, and was forced to accelerate its move to its new building. Thus, the Court should grant JTS’ counterclaims and grant JTS’ damages in the amount of \$35,492.66, as set out in the following table. *See also Ex. 290*

<b>JTS’ Damages Due to CLC’s Eviction Action</b>	
Employee Overtime Costs	\$21,685.31
Scissor Lift Rentals	\$6,863.80
Refund of Security Deposit	\$3,020.84
Refund of Overpayment for February Rent	\$3,922.71
<b>TOTAL</b>	<b>\$35,492.66</b>

**C. Even if the Court finds that JTS did not exercise the six-month renewal option, CLC was only entitled to damages related to JTS' alleged failure to timely vacate the Property.**

In its Findings and Conclusions, the Court found that because JTS and Gilbert did not execute a written agreement to renew the lease JTS became a “month-to-month tenant or at-will tenant after October 15, 2014.” Findings and Conclusions, pp. 5–6. The Court then found that JTS: (1) was “liable for unlawful detainer because it failed to vacate the Property within the timeframe set forth in the notice to vacate”; (2) was “liable for breach of contract because it failed to vacate the Property after its term expired; removed the transformer after the term expired and without Plaintiff’s permission; and failed to make repairs”; and (3) “breached the implied covenant of good faith and fair dealing when it failed to given timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option.” Findings and Conclusions, pp. 7–8. For the reasons discussed below, each of these findings should be reconsidered.

1. Damages for unlawful detainer should be limited to the time period of February 1, 2015, to February 12, 2015.

Even assuming that JTS did not properly exercise the six-month renewal, and therefore, as a month-to-month tenant, was required to vacate the Property by January 31, 2014, JTS was only in possession of the Property for twelve days beyond the timeframe set forth in the notice to vacate. *See* Reply to Counterclaim, ¶ 40 (admitting that JTS vacated the Property on February 12, 2015). Thus, at least as to the unlawful detainer action, CLC should only be allowed to recover for any damages incurred for the twelve days JTS allegedly unlawfully detained the Property.

Under Idaho Code section 6-316 a landlord may recover “in addition to possession of his property; damages and rent found due.” *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940, 539 P.2d 288, 293 (1975). In order to recover for damages, the landlord “has the burden of proving that the claimed damages are the proximate or direct result of the unlawful detention.” *Id.*

JTS only detained the Property for twelve days beyond the timeframe set out in the notice to vacate. *See* Reply to Counterclaim, ¶ 40 (admitting that JTS vacated the Property on February 12, 2014). Thus, CLC may only recover for any damages, including any special damages, for the twelve days JTS remained on the Property. After that, any such damages, while possibly related to some other cause, for example, as CLC claims, from the removal of the temporary 480V transformer, would not be related to the detention of the Property. That is, while CLC alleges that the removal of the temporary transformer may have caused other damages to CLC, those damages are not related to JTS detention of the Property. Therefore, any such damages related to the removal of the temporary transformer are not recoverable in an unlawful detainer action. *See Texaco*, 96 Idaho at 940, 539 P.2d at 293 (noting that damages claimed under Idaho Code section 6-316, must be from “the proximate or direct result of the unlawful detention” (emphasis added)). Accordingly, CLC’s recovery on its unlawful detainer action, if any, should be limited to the damage, if any, that was incurred from February 1, 2015, to February 12, 2015, the length of JTS’ alleged unlawful detention.

It also bears noting that JTS paid CLC a full month’s rent for the month of February. *See* Tr. 82; Ex. 22 (showing that CLC credits JTS for February rent). CLC retained this amount in full. *See* Reply to Counterclaim, ¶ 42 (admitting that CLC retained JTS’ February rent). Thus, CLC has already recovered more than the rent for the twelve days JTS allegedly unlawfully

detained the Property and should be estopped from any further recovery for its unlawful detainer action.

2. Damages for breach of contract, if any, should be limited to those related to JTS' alleged failure to timely vacate.

The Court found that JTS was liable for breach of contract “because it failed to vacate the Property after its term expired; removed the transformer after the term expired and without Plaintiff’s permission; and failed to make repairs.” Findings and Conclusions, p. 8. The Court further found that JTS “breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option.” *Id.* For the reasons discussed below, damages for breach of contract, including for the breach of the implied covenant of good faith and fair dealing, if any, should be limited to those related to JTS’ alleged failure to timely vacate.

- a) **JTS’ is not liable for any damages related to the removal of the temporary 480V transformer because JTS was entitled to remove it.**

In *Lewiston Pre-Mix Concrete, Inc. v. Rhode*, the Idaho Court of Appeals explained what happens when a lessee holds over after his tenancy for a fixed term of years expires:

[T]he lessor must elect to either treat the lessee as a trespasser or hold him to a new tenancy. If he treats the lessee as a trespasser, the lessor may bring an action for unlawful detainer. *See* I.C. § 6–303 *et seq.* If, however, the lessor seeks, implicitly or explicitly, to hold the lessee to a new tenancy, a new lease arises by operation of law.

110 Idaho 640, 644–45, 718 P.2d 551, 555–56 (Ct. App. 1985). This new tenancy will govern the rights of the parties “not based upon the original lease, but upon a new tenancy created by

law.” *Id.* at 645, 718 P.2d at 556. That being said, the Court of Appeals then stated that “[t]he terms of the original lease are usually carried over into the new tenancy.”<sup>3</sup> *Id.*

The Lease explicitly provided that “Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease.” *See* Ex. 1, p. 5 “SURRENDER OF PREMISES.” Thus, even if the terms of the Lease carried over into the new month-to-month lease, JTS was entitled to remove its trade fixtures and personal property “upon the termination of the Lease.” Notably, the plain language states “upon the termination of the Lease.” It does not say *before* the expiration or termination of the Lease. Rather, it expressly provides that upon, i.e., after, the expiration or termination of the Lease, JTS was entitled to remove its trade fixtures and personal property. Moreover, the December 11, 2014 eviction letter, which was sent at CLC’s instance, clearly states that JTS was required to remove its “trade fixtures . . . and personal property of any kind[.]” Ex. 13. Thus, not only was JTS entitled, under the plain terms of the Lease, to remove any of its trade fixtures once the Lease terminated, i.e., after January 31, 2014, JTS was required to do so by the December 11, 2014 eviction letter.

In *Steel Farms, Inc. v. Croft & Reed, Inc.*, the Idaho Supreme Court provided three general tests to apply in determining whether a fixture has become a permanent fixture that is to remain with the property when the lessee departs:

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<sup>3</sup> Although JTS recognizes that the Court is bound to follow the Court of Appeals decision in *Lewiston Pre-Mix Concrete, Inc. v. Rhode*, JTS disagrees that the terms of the original lease should be carried over into the new tenancy in this instance. If the terms of the original lease are carried over into the new tenancy, what is the purpose of the rule that a new tenancy arises at the expiration of the old? If the terms remain the same, nothing has changed, and the rule that a “new tenancy arose” is rendered a nullity.



(1) annexation to the realty, either actual or constructive; (2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) intention to make the article a permanent accession to the freehold.

154 Idaho 259, 268, 297 P.3d 222, 231 (2012) (quoting *Rayl v. Shull Enterprises Inc.*, 108 Idaho 524, 527, 700 P.2d 576, 570 (1984)). The Court then went on to explain that it is the third factor, the intention to make the article a **permanent** accession, that is the most important. *Id.* (“Of these three factors, whether the party installing the object had the intention to annex the object to the land at the time of installation, as objectively demonstrated by the circumstances surrounding the disputed item’s installation, is the most significant.”). “The remaining two factors are intended to assist the fact finder in determining the parties’ intent.” *Id.*

Here, the objective circumstances surrounding the installation of the *temporary* 480V transformer clearly indicate that the *temporary* 480V transformer was never intended to be a “permanent accession.” Indeed, this fact is clearly demonstrated by the fact that JTS *paid for the removal* of the temporary 480V transformer when JTS entered into the lease agreement with Idaho Power. Tr. 299 (“So in February of 2014, [JTS] came to you [Idaho Power] and said ‘We want this. We’re going to pay for you to install it and we’re going to pay for you to remove it,’ and they had to do all that up front and then you went and installed it? / Yep, yep.”). That the 480V transformer was always intended to be temporary is further buttressed by the testimony of the Idaho Power representative that leaving the 480V transformer on the Property would be “out of our realm of how we [Idaho Power] do business,” and that “It’s temporary so it’s coming back out? / Yeah.” Tr. 302. Finally, by its very nature, it is clear that that transformer was intended to be a temporary trade fixture, acquired for the sole purpose of providing JTS power in addition to the power that already serviced the Property. Tr. 108 (“[W]hen we had brought the extra

machinery in to bring all our processes in-house, we needed more power so we asked for a temporary transformer from Idaho Power and that's the 480-volt breaker panel and transformer . . . It was booked and bought and rented under a temporary transformer. We were obligated to give it back to Idaho Power[.]"). Removal of the temporary 480V transformer simply returned the Property to the same power source it had when JTS moved in. Tr. 310 ("Was that old transformer replaced by the new one that was put in? / It was not."); Tr. 307 ("So the building was not without power? / No."); Tr. 552 (Blake Jackson testifying that there was power to the building after the temporary 480V transformer was removed: "And there was power to the building? / Well, there was 110, right")

Thus, although the first factor in *Steel Farms* is in favor of finding that the transformer was an improvement because it was attached to the ground, the second factor, militates in favor of finding it was a temporary trade fixture because its sole purpose was one of a temporary nature, i.e., to provide JTS power in addition to the power that already serviced the Property while JTS was on the Property. Thus, when the *temporary* transformer was removed, the Property was left with the same power source it had when JTS took possession of the Property in 2012. But, more importantly, the third—and most significant—factor, weighs heavily in favor of finding it was a trade fixture because the objective circumstances surrounding its installation clearly indicate that it was always intended to be a temporary power source and not a “permanent accession” to the Property. *See Duff v. Draper*, 98 Idaho 379, 382, 565 P.2d 572, 575 (1977) (above-ground, moveable components of irrigation system were not fixtures, even though they were bolted to a concrete foundation embedded in the ground).

Based on the above, it is clear that the temporary 480V transformer was a trade fixture, not an improvement and, as such, under the plain language of the Original Lease Agreement, JTS was entitled to remove it.

Further, it is clear that CLC was aware of the temporary nature of the 480V transformer no later than February 25, 2017, when counsel for JTS responded to an email from counsel for CLC and stated: “[JTS] tells me it did not have anyone removing an electrical panel. More likely, it was Idaho Power removing their temporary transformer[.]” Ex. 260; Tr. 525.

Moreover, even if the temporary 480V transformer was an improvement rather than a trade fixture, the Lease is silent as to whether the lessor or the tenant was entitled to keep improvements. However, the Lease did provide: “Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement.” Ex. 1, p. 5, SURRENDER OF PREMISES. It is undisputed that at the beginning of the Original Lease Agreement the Property had power and that power was not 480V power. It is also undisputed that after the temporary 480V transformer was removed from the Property, the Property had the same source of power it had when JTS took possession of the Property. Tr. 552 (Blake Jackson testifying that there was power to the building after the temporary 480V transformer was removed: “And there was power to the building? / Well, there was 110, right”); Tr. 310 (“Was that old transformer replaced by the new one that was put in? / It was not.”); Tr. 307 (“So the building was not without power? / No.”). Consequently, after the temporary 480V transformer was removed from the Property, the Property was returned to CLC with the same source of

power that existed when JTS entered into the Lease and took possession of the Property in 2012.

*Id.*

Finally, the December 11, 2014 eviction letter sent at CLC's instance, explicitly states that JTS should remove its "trade fixtures, fencing, and personal property of any kind, and surrender [the Property] in the same condition, reasonable wear and tear excepted, as [the Property] were in at the beginning of the Lease." Ex. 13. It is undisputed that the Property did not have 480V power "at the beginning of the Lease." Tr. 299 (noting that JTS had the temporary 480V power installed in February 2014, which was approximately two years after the beginning of the Lease). It is further undisputed that the Property was surrendered with the same power source it had "at the beginning of the Lease." *See* Tr. 307, 310, 552. Thus, not only was JTS complying with the plain terms of the Lease by removing temporary 480V transformer, JTS was following the explicit instructions of the eviction letter that CLC insisted was sent before it would close on the Property.

Even though CLC now contends that the 480V was essential to its tenant's operations and the removal of the 480V power caused damages, there is no evidence in the record that any representations were made to CLC that the 480V power was included with the Property. Tr. 186:7-9 ("[D]id any Johnson Thermal employee make any representation about the 480 power? / No."). Nor is there any evidence that CLC made any inquiry regarding the 480V power or requested a list of fixtures or personal property JTS was going to be removing from the Property. If 480V power was crucial to CLC, CLC, as part of its due diligence as the purchaser of the Property, should have verified that the 480V power was included in the sale of the Property. *See, e.g., Barab v. Plumleigh*, 123 Idaho 890, 894, 853 P.2d 635, 639 (Ct. App. 1993) (noting the

rule of *caveat emptor* and that “[t]he general rule is that the vendor of real property who parts with title, possession, and control of the property is permitted to shift all responsibility for the condition of the land to the purchaser.”). Indeed, JTS did exactly what the December 11, 2014 eviction letter obligated it to do and removed all its fixtures and personal property and delivered the Property in the same power condition it was in when JTS began leasing the Property from Gilbert.

Ultimately, because the temporary 480V transformer was a temporary trade fixture and because it is undisputed that the Property had power from sources other than the temporary 480V transformer when the Lease was originally entered into by JTS and Gilbert, JTS was entitled, under the plain language of the Lease—and required under the language of the December eviction letter—to remove the temporary 480V transformer. Accordingly, because it was not a breach of the Lease to remove the temporary 480V transformer, any breach of contract damages cannot include any damages that flowed from the removal of the temporary 480V transformer.

Further, CLC failed to mitigate its damages. All CLC had to do to avoid any damages related to the loss of 480V power was rent a generator. *See* Tr. 653 (“And if you’re on site and a building does not have 480 power, how do you deal with that in your construction business? / We just rent a generator -- a 480 volt three phase generator and plug into a panel and then power up our equipment. / From the generator? / From a generator, correct.”). Instead, CLC sat idly by while it waited for Idaho Power to reinstall the 480V power. Accordingly, even if the Court finds that JTS was not entitled to remove the temporary 480V transformer, CLC should not be able to recover damages related to the 480V power because it failed to reasonably mitigate such damages. *See McCormick Int’l USA, Inc. v. Shore*, 152 Idaho 920, 924, 277 P.3d 367, 371 (2012)

(“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....’ ” (quoting *Indus. Leasing Corp. v. Thomason*, 96 Idaho 574, 577, 532 P.2d 916, 919 (1974)))

**b) JTS’ should not be held liable for any damages related to an alleged failure to repair.**

In its answer to JTS’ counterclaim, CLC admitted that JTS vacated the building on February 12, 2015. *See* Reply to Counterclaim, ¶ 40. CLC also admitted that “it changed the locks on the building located at the Property on or around February 12, 2015.” *Id.* ¶ 41. JTS fully intended to make all repairs required under the lease. Ex. 18; *See* Tr. 107 (listing “patch asphalt,” “cover holes,” and “fill hole” among other repairs JTS intended to make). However, when JTS returned to the Property to make the repairs, only two days after vacating on February 12, 2015, the building locks had been changed and JTS had no access to the building to make the intended repairs. *See* Tr. 109–110 (“Did [JTS] ever attempt to go back and make the repairs? / Yes. / Okay, When? / The weekend of February 14. . . . You sure about that date? / Yes.”). JTS should not be held liable for repairs that, by CLC’s actions, it was prevented from completing.

Further, it is undisputed that all repairs made to the Property were not paid by CLC, but instead were voluntarily paid by a separate entity, Peterbilt. Tr. 328 (“[T]he cost was sent back to Caldwell Peterbilt.”). “The doctrine of voluntary payment provides that a person cannot, by way of set-off or counterclaim, or by direct action, recover back money voluntarily paid with full knowledge of the facts and without any fraud, duress or extortion, where no obligation to make such payment existed. *Action Collection Serv., Inc. v. Jackson*, No. 35226, 2009 WL 9150844, at \*4 (Idaho Ct. App. July 8, 2009) (citing *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108

P.2d 833, 838 (1940)). Peterbilt was fully aware of the facts surrounding the issues between JTS and CLC and it was under no obligation to pay for the repairs to the Property. Moreover, CLC has made no showing that it had a contractual obligation to pay Peterbilt for the repairs. Thus, JTS has no obligation to pay CLC for repairs that Peterbilt, a third-party entity, voluntarily paid for. *See Action Collection Serv.* 2009 WL 9150844, at \*4.

**c) JTS' did not breach the implied covenant of good faith and fair dealing and should not be required to pay any damages related to any alleged breach of the same.**

The Court found that JTS “breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option.” This finding is inconsistent with (1) the facts of the case; and (2) the Court’s finding that the Lease expired and JTS and Gilbert entered into a month-to-month or at-will tenancy.

First, the Court found that after October 15, 2014, due to JTS’ failure to exercise the renewal options in the Third Lease Amendment, JTS “carried on as a month-to-month or at-will tenant.” Findings and Conclusions, p. 5. As the Court noted, at a minimum, Gilbert’s acceptance of rent payments from JTS in November and December created a new at-will tenancy. *Id.* at p. 6 (citing *Lewiston Pre-Mix Concrete, Inc. v. Rhode*, 110 Idaho 650 (Ct. App. 1985)). However, the Court then found that JTS breached the implied covenant of good faith and fair dealing when JTS “failed to pay the higher rent amount for the *month-to-month option*.” Findings and Conclusions, p. 8 (emphasis added). These two findings are incompatible. Either JTS exercised one of the options to renew found in the Third Amendment and thereby was bound to pay the rent listed for that option. Or, JTS, by failing to execute a written agreement, did not exercise

either renewal option and became an at-will tenant. It is inconsistent to find that JTS did not properly renew the Lease and thereby became an at-will tenant, and then, later, find that JTS breached an implied covenant of good faith and fair dealing for failing to pay rent at the month-to-month option rate that JTS did not exercise and therefore was not bound to pay.

Rather, by accepting JTS' payment of \$6,000, plus triple net for the months of December and November, the only consistent finding would be either (1) JTS properly exercised its option to renew for six months by paying the six-month rate; or (2) JTS did not properly renew the Lease, but by accepting payment, the parties entered into a new at-will tenancy at the monthly rate of \$6,000 plus triple net. Accordingly, the Court should reconsider its findings that JTS both failed to renew the Lease and then failed to pay rent at the renewal rate. Both cannot be true.

Second, the Court found that JTS was an at-will tenant and therefore its tenancy could be terminated "by giving written notice to the tenant at least one (1) month before the termination date/date to vacate." Findings and Conclusions, p. 6. It then found that JTS' tenancy was terminated by Gilbert's December 11, 2014 notice to vacate and JTS was "liable for breach of contract because it failed to vacate the Property after its term expired." *Id.* at 8. Thus, according to these rulings, once the "timeframe set forth in the notice to vacate" passed, *id.* at 7, JTS' term had expired and it was required to vacate the Property. As such, no notice to vacate from JTS was required because the term had already expired. JTS was not the one who terminated the tenant/landlord relationship and therefore was under no obligation to "notify" CLC of when it was planning to move out, according to the Court's ruling, JTS was already obligated to move out on January 31, 2014.



Furthermore, even assuming the provisions of the Lease carried over into the new at-will tenancy, the provisions in the Lease only require notice of the lessee's "intention to renew the lease." *See* Ex. 1, pp. 1–2, TERMS OF LEASE, OPTION TO RENEW. There is no requirement in the Lease that JTS notify the landlord of its intention to vacate.

Finally, even though JTS was not required to provide any notice of its intent to vacate, JTS did provide notice of its intent to vacate. It is undisputed that on February 6, 2015, JTS' counsel sent notice to CLC's counsel that JTS intended to vacate the Property on February 12, 2015. Tr. 513; Ex. 258. It is also undisputed that JTS vacated the Property on February 12, 2015. *See* Reply to Counterclaim, ¶ 40 (admitting that JTS vacated the building on February 12, 2017.).

Based on the fact that not only was JTS under no obligation to provide notice of its intent to vacate because Gilbert had already terminated the tenancy, the Court should reconsider its finding that JTS breached the covenant of good faith and fair dealing by failing to "give timely notice of when it would vacate the Property."

3. Because CLC should not be able to recover for damages related to the removal of the temporary 480V transformer, failure to repair, or breach of the implied covenant of good faith and fair dealing, the Court should accordingly reduce CLC's damages to those only related to JTS alleged failure to timely vacate.

The Court found that JTS was liable for:

rent due under the Lease Agreement through April 15, 2015 (\$7,603.12) (Ex. 22); damages and costs caused by Defendant's removal of the transformer (\$7,929) (Exs. 22 and 26); Peterbilt's rent and triple-net for its old lease (\$14,587.92) (Exs. 22-24); cost of Peterbilt's idle employee (\$7,696.22) (Exs. 22 and 25); costs to repair the Property (\$2,600.00) (Exs. 22, 27, and 28); and Peterbilt's lost profits (\$45,973.00) (Exs. 22 and 29).

Findings and Conclusions, p. 9. Each of these amounts should be reduced to include damages only for February 1, 2015, to February 12, 2015, which is the timeframe of JTS' alleged failure to vacate the Property.

**a) Rent Due.**

Here, the Court found that the Lease was not renewed. It explicitly found that JTS failed to exercise the six-month option to renew under the Third Amendment by not executing a written agreement. Findings and Conclusions, pp. 5–7. To then find that JTS is liable for “rent due under the Lease Agreement” after the Court had already found that the Lease had expired on October 15, 2014, is contradictory and these damages should be disallowed. Either JTS exercised the six-month option to renew the Lease and was bound to pay rent until April 15, 2015, or it failed to exercise the six-month option to renew the Lease and it was **not** bound to pay rent until April 15, 2015. If JTS did not exercise its six-month option to renew the Lease, then it created an at-will tenancy and JTS was only obligated to pay rent on a month-to-month basis. The amount of the rent due under the at-will tenancy was the amount offered by JTS and accepted, by Gilbert, i.e., \$6,000 plus triple net. Further, it is undisputed that JTS paid rent for the entire month of February, which more than covered its twelve days as a holdover tenant. Tr. 82; Ex. 22 (showing that CLC credits JTS for February rent). No damages should be allowed for “rent due” as all rent due under the at-will tenancy was paid.

**b) The Costs To Repair The Property.**

As discussed above, because JTS was prevented from repairing the Property by CLC's actions, it should not have to bear the responsibility for CLC's actions. Further, Peterbilt, a third-

party, voluntarily paid the costs of repair, not CLC. Thus, no damages should be allowed for repair to the Property either. *See supra* PART IV.B.2.b.

**c) Peterbilt's Damages.**

Peterbilt is not a party to this action and CLC should not be allowed to recover damages incurred by Peterbilt. It is undisputed that CLC and Peterbilt are separate limited liability entities. CLC and Peterbilt chose to take advantage of the protections offered by organizing as separate entities. As such, they must also take with that choice the consequences. One of which is the fact that CLC, as a separate entity from Peterbilt, cannot recover damages on Peterbilt's behalf. Accordingly, CLC does not have standing to bring claims against JTS' for damages allegedly suffered by Peterbilt. *Bayes v. State*, No. 37469, 2010 WL 9589689, at \*2 (Idaho Ct. App. Dec. 20, 2010) ("Ordinarily a person must be asserting his or her own legal rights and interests in order to have standing." (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010))).

Furthermore, even if that were not the case, Peterbilt itself does not have standing to recover against JTS. *See Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) ("It is axiomatic in the law of contract that a person not in privity cannot sue on a contract."). Peterbilt did not "exchange the promissory words" with JTS and therefore is not privity to the Lease and consequently does not have standing to recover any of its alleged damages against JTS. *Id.* ("Privity" refers to "those who exchange the [contractual] promissory words or those to whom the promissory words are directed." (quoting *Calemari and Perillo, Contracts* § 17-1 (2d ed. 1977))).

At best, Peterbilt would have an action against CLC for recovery of any damages it allegedly suffered by reason of CLC's failure to timely deliver the Property. However, it is undisputed that Peterbilt was in the Property no later than the end of May 2015. Tr. 554 (Blake Jackson testifying that the move was completed before June 1, 2015: "Even before June 1, it was completed? / Oh yeah. I think Bruce said that we moved on like May 8 or 10, or something like that."). The lease between Peterbilt and CLC did not have an effective date until June 1, 2015. *Compare* Ex. 21, p. 14 ("Lessor [CLC] and Tenant [Peterbilt] have executed this Lease to be effective as of the date stated in the first paragraph of this Lease."), *with* Ex. 21, p. 1 ("This Lease is entered into as of June 1, 2015 . . ."). Thus, Peterbilt would have no action against CLC because its lease with CLC was not effective until June 1, 2015, well after Peterbilt was fully moved into the Property.<sup>4</sup>

Moreover, even if Peterbilt had a claim against CLC for damages, CLC still would not have standing to recover Peterbilt's damages against JTS because CLC did not allege that it was liable for Peterbilt's damages and CLC did not demonstrate that it suffered any injury due to Peterbilt's alleged damages. As such, CLC cannot seek redress of an injury that it did not suffer. *See, e.g., Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (noting that to have standing a litigant must "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." (quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989))).

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<sup>4</sup> Although CLC testified that the "commencement date" of February 1, 2008, in the Lease was a typo that was supposed to read 2015, there is no evidence in the record that the June 1, 2015, effective date was a typo.

Thus, because CLC does not have standing to allege or recover damages allegedly suffered by Peterbilt—a separate entity not party to this suit—the Court should reconsider and disallow an award of any damages on behalf of Peterbilt, including the award for Peterbilt’s lost profits, the cost of its idle employee, and rent for Peterbilt’s old lease. Such a reconsideration would result in a refund to JTS in the amount of \$9,688.44 as reflected in the chart below:

<b>CLC’s Damages Without Peterbilt’s Damages</b>	
12 Days of Feb. Rent (\$7,730 / 28 days x 12 days)	\$3,312.56
JTS’ Feb. Rent Payment	(\$7,730)
JTS’ Security Deposit	(\$5,271)
<b>TOTAL</b>	<b>\$(9,688.44)</b>

Even if the Court allowed the damages related to the cost to repair, it would still result in a refund to JTS in the amount of \$7,088.44 (\$9,688.44 refund – \$2,600 for repair damages).

**d) Even if the Court’s Allows CLC to Recover on Behalf of Peterbilt, Peterbilt’s Lost Profits Should be Reduced.**

The damages for Peterbilt’s lost profits should not be allowed. *See supra* Part IV.C.3.c; *see also Curtiss Aeroplane & Motor Corp. v. Haymakers Warehousing Corp.*, 264 S.W. 326, 329 (Tex. Civ. App. 1924) (noting that to allow a landlord to recover for lost rent and lost profits of a prospective tenant would allow a double recovery). Further, the Court should not allow lost profits because Peterbilt was not planning on moving into the building until after April 15, 2015. Tr. 330–31. Thus, JTS’ twelve day delay did not impact Peterbilt’s profits. Moreover, the calculation of lost profits, if any, should be based on a comparison of the average of the three months of profit right before Peterbilt moved into the Property, i.e., profits for February, March, and April 2015 (which averaged \$8,454), to the three months average after Peterbilt moved into the Property, i.e., May, June, and July 2015 (which averaged \$8,397). This would result in a

difference of lost profits in the amount of \$-57.00. CLC's insistence that the month of May not be included in the lost profit analysis because that is the month Peterbilt moved into the Property is unfounded. Peterbilt was always going to have to move and incur the lost profits associated with moving. By not counting the month of May in the lost profit calculation, the Court allows Peterbilt to recover lost profits related to moving, not lost profits related to JTS' alleged failure to timely vacate the Property.

However, even if the Court does allow lost profits, because two months of the alleged delay were related to the loss of the 480V transformer, which JTS was entitled to remove, Peterbilt's damages for lost profits should be reduced to one month as well, which, even using the inflated figures supplied by Peterbilt that do not account for the month of May, would be at most \$15,324.33 (\$45,973 / 3). *See* Exs. 22 and 29; Tr. 425:5–10 (explaining that the \$45,973 figure was based on lost profits for February, March, and April).

**e) If Allowed, the Remaining Damages Should also be Reduced.**

The remaining damages awarded by the Court are directly related to the delay caused by the lack of 480V power. CLC testified that the main factor affecting the amount of time it took Peterbilt to move into the Property was directly related to the lack of 480V power and not due to JTS moving out in mid-February. Tr. 350:4–11 (“[JTS’ moving out in mid-February] didn’t change a whole lot of the remodel. It changed – what changed it was the power being pulled.”); Tr. 364:17–19 (noting that the two-month extension for Peterbilt’s old building was sent on March 2, 2015, because “that’s the date we became aware that the power had been – the 480 power had been pulled from the building.”).

However, as discussed above, under the plain language of the Lease, JTS was entitled to remove the temporary 480V transformer. *See supra* Part IV.B.2.a. Thus, although the lack of 480 power may have delayed Peterbilt from moving into the Property, that delay was not a result of any breach of contract by JTS. Indeed, as required by the Lease and the December 11, 2014 eviction letter, JTS returned the Property to CLC with the same source of power JTS received when it entered into the Lease with Gilbert and took possession of the Property. Tr. 310 (“Was that old transformer replaced by the new one that was put in? / It was not.”); Tr. 307 (“So the building was not without power? / No.”); Tr. 552 (Blake Jackson testifying that there was power to the building after the temporary 480V transformer was removed: “And there was power to the building? / Well, there was 110, right”).

Therefore, damages related to Peterbilt’s rent and triple-net for its old lease, if allowed, should be reduced to cover only the month of February, which is the only month directly related to JTS’ alleged failure to timely vacate. This would total at most \$4,862.62 (\$14,587 total awarded for Feb., Mar., and April old lease rent and triple net / 3). *See* Exs. 22–24. The remaining amounts for Peterbilt’s rent and triple-net for its old lease are directly related to Peterbilt’s acquisition of 480V power, which as explained above, JTS is not liable for.

Similarly, the cost of Peterbilt’s idle employee, if allowed, should be reduced to one month of idleness, or approximately \$2,565.41 (\$7,696.22 / 3 months). *See* Exs. 22 and 25.

Ultimately, even if the Court reads a written agreement or notice requirement into the Third Amendment and finds that JTS did not properly exercise the six-month renewal option; and even if the Court determines that CLC somehow has standing to recover damages on Peterbilt’s behalf; damages should still be reduced to those directly related to JTS’ failure to

timely vacate the Property and should not include those related to the removal of the temporary 480V transformer or the alleged implied breach of the covenant of good faith and fair dealing. After accounting for JTS' February rent and security deposit, this would result in a refund due to JTS in the amount of \$2,260.23 (see table below).

<b>Damages Related to 12 Day Holdover</b>	
12 Days of Feb. Rent (\$7,730 / 28 days x 12 days)	\$3,312.56
Cost of Idle Employee for Feb.	\$2,565.41
Feb. Rent for Peterbilt's Old Lease	\$4,862.64
JTS' Feb. Rent Payment	(\$7,730)
JTS' Security Deposit	(\$5,271)
<b>TOTAL</b>	<b>\$(2,260.23)</b>

Even assuming the Court awards CLC the costs to repair the Property and uses Peterbilt's inflated lost profit numbers to award one month of lost profits, the total damages directly related to JTS' failure to timely vacate would only total \$15,664.10.

<b>Damages Related to 12 Day Holdover w/ cost to Repair Property and 1 Month of Lost Profit Using Peterbilt's Inflated Lost Profit Figure.</b>	
12 Days of Feb. Rent (\$7,730 / 28 days x 12 days)	\$3,312.56
Cost of Idle Employee for Feb.	\$2,565.41
Feb. Rent for Peterbilt's Old Lease	\$4,862.64
Costs to Repair Property	\$2,600.00
1 Month of Peterbilt's Lost Profits	\$15,324
JTS' Feb. Rent Payment	(\$7,730)
JTS' Security Deposit	(\$5,271)
<b>Total</b>	<b>\$15,664.10</b>

**D. Attorney fees.**

In the event the Court reconsiders its Findings and Conclusions and finds that JTS did in fact comply with the plain language of the Third Lease Amendment, JTS is entitled to an award of its fees and costs pursuant to I.C. 12-120(3) and the terms of the Lease.



**E. The court should alter the Judgment entered on January 24, 2018.**

If the Court reconsiders its Findings and Conclusions, it should also then alter, amend, or vacate the Judgment entered on January 24, 2018, to reflect its new findings.

**V.  
CONCLUSION**


The Third Amendment was a validly executed written amendment to the Lease. As such, it modified the terms of the Lease by extending the Lease for six months and adding a new process by which JTS could extend the Lease for an additional six-month period or go to a month-to-month tenancy. JTS exercised its right to the six-month option by complying with the plain language requirements of the Third Lease Amendment. Even if JTS did not properly exercise the option, by accepting payments for November and December, Gilbert either waived any writing requirement or accepted JTS' substantial performance. As such, the Court should grant JTS' motion for reconsideration and motion to alter, amend or vacate judgment and, in so doing, (1) find that JTS was entitled to remain on the Property until April 15, 2015; (2) enter an order granting JTS' damages in the amount of \$35,492.66 as outlined in its Counterclaim and Section IV.B, above; and (2) amend the Judgment entered on January 23, 2018, accordingly.

At minimum, the Court should reduce CLC's damages to only those damages directly related to JTS' alleged failure to timely vacate the Property and disallow all damages related to the removal of the temporary 480V transformer.

DATED THIS 15<sup>th</sup> day of March, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By

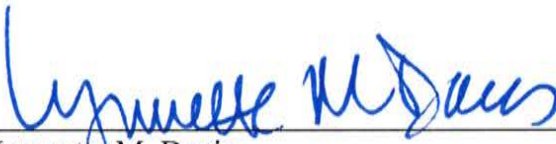
  
Lynnette M. Davis, ISB No. 5263  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of March, 2018, I caused to be served a true copy of the foregoing DEFENDANT JOHNSON THERMAL SYSTEMS' MEMORANDUM IN SUPPORT OF COMBINED MOTIONS FOR RECONSIDERATION AND TO ALTER, AMEND, OR VACATE JUDGMENT by the method indicated below, and addressed to each of the following:

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE CANYON OF COUNTY**

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<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p style="text-align: center;">Defendant.</p>	<p><b>MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION TO RECONSIDER</b></p> <p>Case No. CV15-587</p> <p>Judge Chris Nye</p>
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Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this opposition to the *Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (3/15/18)* and supporting memorandum (together the “Motion to Reconsider”) filed by Defendant Johnson Thermal Systems, Inc. (“JTS”). For the reasons below, CLC respectfully requests that the *Motion to Reconsider* be denied.

## **INTRODUCTION**

The Court will recall that at the conclusion of the trial in this case the parties stipulated to closing arguments by written brief not to exceed twenty pages [694:1-20<sup>1</sup>]. Unsatisfied with the Court's *Judgment (1/22/18)*, JTS now deems it prudent to toss that stipulation aside and submits a *Motion to Reconsider*, which is more than twice in length (41 pages total) and purportedly incorporates "all prior briefing" for the Court to consider anew. *Motion to Reconsider* at 2. This grossly overlength memorandum revisits almost every factual and legal arguments previously claimed by JTS, which the Court has already rejected in pretrial orders and dismissed in its *Findings of Fact and Conclusions of Law (1/4/18)*.

For the reasons below, each of JTS's arguments should again be rejected. In denying the *Motion to Reconsider*, CLC asks the Court to consider its denial within the context of CLC's pending request for attorney fees, which is supplemented by the *Supplemental Memorandum of Attorney Fees and Costs* and supporting affidavit filed contemporaneous herewith. CLC specifically asks the Court to reject JTS's averment that the significant attorney fees incurred by CLC in this action have been unreasonable or excessive in the light of JTS's actions and this most recent filing.

## **STANDARD**

"When deciding [a] motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Fagnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103 (2012).

In this case, JTS asks the Court to reconsider its *Findings of Fact and Conclusions of Law*,

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<sup>1</sup> All references to trial testimony are cited in brackets.

which are the predicate for the Court's *Judgment*. Because JTS challenges factual findings made by the Court, which JTS does not distinguish from disputed conclusions of law, the Court can limit its review "to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Big Wood Ranch, LLC v. Water Users' Assn. of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 230, 345 P.3d 1015 (2015) (citations omitted); *see also* Idaho R. Civ. P. 52(a). Additionally, the Court may "liberally construe" its findings of fact in favor of the judgment entered, which will not be set aside unless "clearly erroneous." *Big Wood Ranch*, 158 Idaho at 230; *see also* Idaho R. Civ. P. 52(a)(7). Significantly, JTS does not present any "new" evidence or authority. *See Fragnella*, 153 Idaho at 276. JTS's arguments have previously been heard and rejected by the Court in pretrial motions, at trial, and in closing arguments.

As discussed below, JTS does not show that the Court's findings of fact are unsupported or clearly erroneous, or that they undermine the Court's conclusions of law in favor of CLC. Accordingly, the Court can appropriately deny the *Motion to Reconsider* and affirm its *Judgment*.<sup>2</sup>

### **OBJECTION TO EVIDENCE NOT ADMITTED AT TRIAL**

In asking the Court to reconsider its *Findings of Fact and Conclusions of Law* and alter the *Judgment*, JTS submits affidavit testimony of its prior counsel and the affidavits and depositions of testifying witnesses, which were not admitted as evidence at trial. *Motion to Reconsider* at 4-5 (citing *Affidavit of Rebecca A. Rainey in Support of Motion for Partial Summary Judgment, Deposition of Lincoln Hagood, Deposition of Susan Johnson, and Affidavit of Darrell Gustaveson*).

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<sup>2</sup> The Court has discretion whether to entertain a motion to alter or amend the *Judgment* under Rule 59(e). *Schultz v. State*, 155 Idaho 877, 883, 318 P.3d 646 (2013); *Pandrea v. Barrett*, 160 Idaho 165, 171, 369 P.3d 943 (2016). For substantially the same reasons, the Court should reject this additional request by JTS.

Because these statements are not “new” evidence and are not “admissible” under any hearsay exception, CLC objects to their consideration and requests that they be excluded by the Court. *See Fragnella*, 153 Idaho at 276 (“On a motion for reconsideration, the court must consider any new admissible evidence or authority.” (emphasis added)).

## **ARGUMENT**

### **A. JTS DID NOT EXERCISE THE SIX-MONTH OPTION.**

JTS again attempts to avoid all liability in this case by rearguing the claim that it silently exercised, without written notice, paragraph 3 of the Third Lease Amendment (*Ex. 3*) to extend the Lease (*Ex. 1*) six months from October 15, 2014, through April 15, 2015 (the “six-month option”). This rejected argument ignores the plain language of the Lease, which (1) required any extension to be in writing. Furthermore, it is at odds with the Court’s factual findings about The Gilbert Family and JTS’s actions, which (2) never evinced a waiver of the writing requirement nor demonstrated JTS’s intent to exercise the six-month option.

#### **1. The Court correctly found that JTS did not exercise the six-month option in writing and, therefore, was a month-to-month or at-will tenant after the Lease expired.**

JTS first argues that the Third Lease Amendment required no writing in order for it to exercise the six-month option.<sup>3</sup> This argument entirely ignores paragraph 4 of the Third Lease Amendment, which expressly incorporated and reaffirmed all other provisions of the Lease,<sup>4</sup>

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<sup>3</sup> JTS argues that the Third Lease Agreement created “a third way the Lease could be extended,” the first and second ways being the “Option to Renew” and “Modification” provisions of the original Lease (*Ex. 1*), respectively. *Motion to Reconsider* at 11-13. Whether this created a “third” option or not, for the reasons discussed, JTS was required to exercise that option in writing, which it did not.

<sup>4</sup> “All other terms and conditions of the Lease Agreement [*Ex. 1*], not specifically amended hereby, remain in full force and effect.” *Ex. 3* at ¶ 4 (emphasis added).

including the requirement that an option be exercised in writing:

Option to Renew: Upon Lessor's receipt of **written notice by the Lessee** at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease . . .

*Ex. 1* at 2 (emphasis added).

JTS cites the case of *Dante v. Golas* to argue that the incorporated 60-day notice requirement was eliminated because the Third Lease Amendment allowed the six-month option to be exercised “at the conclusion of the lease extension” on October 15, 2014. Yet this argument misses the mark on the material requirement for a writing, which, unlike JTS, the lessees in *Dante* actually satisfied. *Dante v. Golas*, 121 Idaho 149, 150, 823 P.2d 183 (1992) (observing that the lessees twice sent written letters before the end of the lease term to exercise a purchase option); *see also Dennett v. Kuenzli*, 130 Idaho 21, 24 and 29, 936 P.2d 219 (1997) (stating that the plaintiff gave written notice in accordance with the option agreement). Because of paragraph 4, the 60-day notice requirement was not modified by the Third Lease Amendment. Moreover, even assuming that the notice provision was changed, at best, JTS could only have exercised its option “at the conclusion of the lease extension,” on October 15, 2014, by sending written notice via certified mail in accordance with the Lease:

Option to Renew: Upon Lessor's receipt of **written notice by the Lessee** [at the conclusion of the lease extension], Lessor grants to Lessee an option to renew this Lease . . .

*Ex. 1* at 2 (emphasis added) (modification according to JTS's argument).

Notices: Any notice or demand given under the terms of this Agreement shall be deemed delivered when mailed through the United States certified mail, postage prepared . . .

*Id.* at 4.

Of course, JTS did not send written notice that it was exercising the six-month option, let alone at the conclusion of the Lease extension, on October 15, 2014, or via certified mail. Throughout its communications, JTS never expressed any written or oral intent to exercise the six-month option [39:11-19, 40:7-10, 55:13-56:7, 78:21-79:4, 80:13-81:1, 82:21-83:5, 138:4-13, 147:12-20, 232:16-233:7, 241:9-19]. Instead, JTS only communicated potential exit dates that were less than six months and before April 15, 2015. *Ex. 5* (stating a potential December or January exit date) [237:6-16]; *Ex. 6* (stating a potential January or February exit date); *Ex. 7* (failing to correct Mr. Hagood’s representation that JTS was “shooting for December 15th” to vacate) [239:24-240:4, 242:1-13]. For these reasons, and because of JTS’s other words and conduct, which “did not demonstrate intent to be any more than a month-to-month tenant after October 15, 2014[,]” the Court correctly concluded that “Gilbert’s acceptance of the \$6,000/month rent checks for November and December 2014 did not demonstrate intent to extend the lease for six months.” *Findings of Fact and Conclusions of Law* at 6-7 (emphasis added); *see also CLC’s Closing Trial Brief (11/20/17)* at 2-4 (citing additional evidence of JTS’s words and conduct).

Finally, the Court also correctly concluded that the Lease “required all amendments, modifications, or changes to be in writing signed by the parties.” *Findings of Fact and Conclusions of Law* at 5; *see also Ex. 1* at 5 (“Modification”). In each prior extension of the Lease, the parties executed writings to memorialize a term greater than a month-to-month or at-will holdover period. *Ex. 2* (First Lease Amendment); *Ex. 3* (Third Lease Amendment). These writings were both necessary because JTS did not give the required 60-day notice and because the last extension (the First Lease Amendment) had already expired. After the Third Lease Amendment and the expiration of the Lease on October 15, 2014, no similar writing was ever executed by the parties



consistent with their prior conduct. *Findings of Fact and Conclusions of Law* at 6.

The evidence at trial conclusively established that the Lease was never extended in writing “in the manner prescribed in the parties’ contract.” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743 (2007) (concluding that the lessees did not timely exercise an option to purchase and that their ongoing lease payments did not otherwise satisfy the requirements of their contract). JTS did not give any written statement of intent to extend the Lease through April 15, 2015. 29 A.L.R.4th 903 § 3 (1984) (“[T]o be effective, a notice exercising an option to renew must contain a definite statement of intent to renew in accordance with the terms specified for renewal by the underlying lease.”). Therefore, the Court should not alter its conclusion that JTS failed to exercise the six-month option and, consequently, was a month-to-month or at-will tenant after October 15, 2014.

**2. The Court correctly found that The Gilbert Family and CLC did not waive the requirement for a writing.**

JTS next argues that the requirement for a writing was waived because The Gilbert Family accepted two payments of rent for the months of November and December 2014 after the Lease expired. In support of this argument, JTS cites for persuasive value the Ninth Circuit opinion of *Oxford Props. & Fin. Ltd. v. Engle*, which discussed and applied common law principles of waiver to find that a defendant lessee exercised a lease extension by continuing to make rent payments. 943 F.2d 1150 (9th Cir. 1991). JTS suggests that the Ninth Circuit applied a four-part formulaic test in that case to determine waiver. However, the court merely identified circumstances that have generally been considered and reinforced the same rule recognized in Idaho that:

Whether a lessor has implicitly waived the notice requirement must be determined based on the facts of the individual case that bear on the **intent** of the parties.

*Id.* at 1154 (emphasis added); compare with *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 719, 330 P.3d 1067 (2014) (“Waiver is foremost a question of intent’ and the party proving waiver is required to show a clear intent to waive” (citations omitted)); see also *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 521, 650 P.2d 657 (1982) (“[W]aiver is primarily a question of intent, and we believe the better policy is to judge each situation on a case by case basis.”).

In this case, the Court correctly concluded that JTS did not satisfy its burden to show a clear intent to waive the requirement for a written extension of the Lease.<sup>5</sup> *Findings of Fact and Conclusions of Law* at 5-6. As discussed above, each prior extension of the Lease was in writing.<sup>6</sup> *Exs. 2 and 3*. After the Third Lease Amendment was entered and leading up to the expiration of the Lease on October 15, 2014, all communications between JTS and The Gilbert Family’s representative, Mr. Hagood—including, significantly, in response to Mr. Hagood’s specific written requests for notice—demonstrated a clear intent by JTS to vacate as soon as possible and before the end of the six-motion option period. *Exs. 5, 6, and 7* (providing potential exit dates that were less than six months after October 15, 2014). Indeed, as a consequence of JTS’s representations, The Gilbert Family listed the Property for sale in early October 2014, at the end of the Third Lease Amendment. *Ex. 7* [75:2-11, 275:16-22]. Thereafter, unlike the defendant in

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<sup>5</sup> Notably, JTS did not assert waiver as an affirmative defense in its pleading. *Answer to Amended Complaint and Counterclaim* (4/10/15).

<sup>6</sup> JTS again suggests in its opening “Factual Background” statements that the 60-day notice requirement was waived by prior extensions of the Lease. *Motion to Reconsider* at 3. However, this requirement for written notice was reaffirmed by the express inclusion of paragraph 4 in the Third Lease Amendment. *Ex. 3* at ¶ 4. Furthermore, by twice executing writings after the 60-day notice period was expired (*Exs. 2 and 3*), and once after the entire Lease was expired (*Ex. 3*), both JTS and The Gilbert Family reaffirmed the importance of a writing and demonstrated their intent that an expired Lease could not be extended for a fixed term unless in writing signed by both parties.

*Oxford*, The Gilbert Family did not continue to accept rent payments without protest for many years. See *Oxford*, 843 F.2d at 1154 (finding that the lessor's predecessor accepted the lessee's rent without objection for a year and, later, following a dispute about the extension, continued to accept rent for another ten years). To the contrary, and consistent with JTS's representations that it intended to leave before the six-month period ended, in early December 2014, less than one-and-a-half month after the Lease expired, The Gilbert Family gave notice that the Lease was expired and that JTS was occupying the Property as an at-will tenant. *Ex. 9* ("Most leases carry over on a month to month basis once the lease has expired."); *Ex. 13* ("Lessee did not provide timely written notice of the exercise of the option at the conclusion of the lease extension under the Third Lease Amendment. . . . Lessee did not obtain writing signed by all parties that would modify the Lease in any way that the payment of rent after the conclusions . . . of the lease extension as being an effective exercise of the lease extension option.").

Finally, mere acceptance of rent does not, in and of itself, evidence intent of waiver or suggest that a lease extension is exercised. Rather, as correctly stated by the Court, "a fixed-term tenancy becomes a tenancy at will when, after the lease term expires, the landlord expressly or implicitly permits the tenant to stay on the property, the landlord accepts rent from the tenant, and the parties have not reached an agreement to extend the lease." *Findings of Fact and Conclusions of Law* at 6 (citing, among other authorities, *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho 640, 644-45, 718 P.2d 551 (1985)). In this case, The Gilbert Family's acceptance of rent was consistent JTS's representations about vacating the Property as soon as possible before April 15, 2015, and does not evidence anything other than a month-to-month or at-will holdover tenancy.

For these reasons, and others discussed in the closing briefs, the Court correctly decided

that there was no waiver. *Findings of Fact and Conclusions of Law* at 5-6; *CLC's Closing Trial Brief* at 2-4. Accordingly, the Court's factual findings and conclusion on this issue should also not be disturbed.

**3. JTS's payment of rent as a holdover tenant does not evidence "substantial performance" for the unexercised the six-month option.**

JTS last argues that it substantially performed under the written notice requirement by paying two months' rent after the Lease expired and, thus, the absence of a writing to exercise the six-month option should be excused.<sup>7</sup> However, this argument completely ignores the case cited by JTS, which holds that a tender of performance after a specified cutoff date, especially in an option contract, "may not be considered in determining whether there was substantial performance." *Ujdur v. Thompason*, 126 Idaho 6, 9, 878 P.2d 180 (1994) (emphasis added) (*Southern v. Southern*, 92 Idaho 180, 438 P.2d 925 (1968)). Here, the Lease demanded strict compliance with deadlines. *Ex. 1* at 5 ("Time of Essence"). JTS never tendered performance before the October 15, 2014 expiration date. To the contrary, JTS concedes that it did not pay The Gilbert Family the first additional rent until November 2014. *Motion to Reconsider* at 4. JTS did not even pay the full six months rent through April 2015 [81:16-82:12].

Furthermore, "there can be no 'substantial performance' where the part unperformed touches the fundamental purpose of the contract and defeats the object of the parties entering into the contract." *Ujdur*, 126 Idaho at 9 (citations omitted). The Court has already concluded that JTS "breached the implied covenant of good faith and fair dealing when it [a] failed to give timely notice of when it would vacate the Property, and [b] failed to pay the higher rent amount for the

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<sup>7</sup> JTS also did not assert this affirmative defense in its pleading.

month-to-month option.” *Findings of Fact and Conclusions of Law* at 8. These conclusions are findings that JTS “violate[d], nullifie[d] or significantly impair[ed]” The Gilbert Family and CLC’s “benefit[s] of the contract.” *Drug Testing Compliance Grp., LLC v. DOT Compliance Serv.*, 161 Idaho 93, 102-03, 383 P.3d 1263 (2016). In the face of these conclusions, JTS cannot legitimately argue that it provided “the essential benefits of the contract” and substantially performed. *Motion to Reconsider* at 19. By depriving The Gilbert Family and CLC the benefit of actual notice when JTS would vacate the Property, repeatedly representing exit dates before April 15, 2015, while simultaneously paying the lesser amount of rent, and only later arguing that the six-month option was silently exercised in order to gain leverage for delaying its exit, JTS materially breached the Lease. *CLC Closing Trial Brief* at 6-8. This breach deprived CLC the material benefit of a timely and orderly repossession of the Property, which the Lease and its written notice requirement necessarily contemplated.

As such, JTS has no claim for supposed substantial performance and the Court should reject this final new argument.

**B. JTS WAS NOT ENTITLED TO POSSESSION THROUGH APRIL 15, 2015.**

Based on the foregoing, the Court correctly concluded that JTS did not exercise the six-month option, but was a holdover tenant after the Lease expired on October 15, 2014. *Findings of Fact and Conclusions of Law* at 5-7. Because JTS carried on as a month-to-month or at-will tenant, the Court also correctly concluded that JTS is liable for unlawful detainer and breach of contract for failure to vacate within the time specified by the Notice of Termination (*Ex. 13*). *Id.* at 7-8. Accordingly, the Court should deny JTS’s argument that it was entitled to possession through April 15, 2015, or that it somehow prevailed on its counterclaims for breach of contract and constructive

eviction. *See also CLC Closing Trial Brief* at 9-10 (explaining that JTS cannot prevail on its constructive eviction claim, because even assuming, *arguendo*, that the six-month option was exercised, CLC did nothing to disturb possession by merely filing the lawsuit).

**C. CLC IS ENTITLED TO ALL DAMAGES AWARDED BY THE COURT.**

With respect to damages, JTS argues (1) that the award of special damages for unlawful detainer should be limited to the date when JTS ultimately vacated; (2) that the award of consequential damages for breach of contract should be eliminated or reduced because the terms of the Lease did not carry over into its holdover tenancy, and because JTS supposedly did not violate those terms; and (3) that CLC's resulting liability to Peterbilt should be eliminated from the award of damages. Each of these arguments and their subparts is addressed in turn and should be rejected for the reasons below.

**1. The Court correctly found that CLC incurred special damages because of JTS's unlawful detainer.**

JTS first argues that the Court's award of special damages should be reduced because CLC cannot recover for injuries that were occasioned by something other than JTS's unlawful detainer. Idaho Code § 6-316 (“[T]he court . . . shall also assess the damages occasioned to the plaintiff . . . by any forcible or unlawful detainer . . .”); *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940, 539 P.2d 288 (1975); *Brooks v. Coppedge*, 71 Idaho 166, 170, 228 P.2d 248 (1951). JTS argues that because it vacated the Property on or about February 12, 2015, no award of special damages can arise after that date.<sup>8</sup> This argument fails because the damages that JTS caused for the month of February

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<sup>8</sup> There was conflicting testimony whether JTS actually vacated on February 12, 2015 [180:10-185:6]. Regardless, because JTS did not give prior notice, CLC only discovered that JTS had abruptly abandoned on February 17, 2015 [393:19-395:12].

were clinched when it refused to vacate by January 31, 2015. When JTS refused to vacate by this date, according to the Notice of Termination, Peterbilt (CLC's lessee) could not take possession and was obliged to extend its old lease an entire month [316:18-317:14]. Additionally, by the time that CLC learned JTS had abruptly abandoned, it was next to impossible for Peterbilt to occupy the Property before the end of the month [364:7-10]. Consequently, JTS's unlawful detainer caused damages beyond the disputed last date of its occupation, at least through the end of February 2015, and, therefore, JTS is liable for all special damages for that period (including CLC's resulting liability to Peterbilt for payments on the old lease, lost profits, and idle employee, discussed *infra*). *CLC Closing Trial Brief* at 16-17.

JTS further argues that its instruction to remove power after abandoning the Property is not related to its unlawful detainer and, thus, CLC cannot recover special damages resulting from that incident. However, JTS's instruction occurred on February 23, 2018 (*Ex. 20*) [287:16-288:4], which was before Peterbilt could occupy the Property because of JTS's refusal to vacate, *supra*. Consequently, the damages incurred by CLC after the removal of power through April 2015 (including CLC's resulting liability to Peterbilt) were also the result of JTS's unlawful detainer *Ex. 23* [323:8-324:10, 364:15-19, 532:16-25, 535:23-536:9]. *See Brooks*, 71 Idaho at 170 ("the landlord [who successfully proves unlawful detainer] is entitled to . . . any damages alleged and proven").

Accordingly, the Court should reject JTS's request to reduce the award of special damages for unlawful detainer.

**2. The Court correctly found that CLC incurred consequential damages because of JTS's breach of contract.**

JTS next argues that the Court's award of consequential damages should be eliminated

because terms of the Lease, which JTS violated when it ultimately vacated, should not have been carried over into its new tenancy. JTS suggests that even though it delayed vacating the Property and caused damages for unlawful detainer, *supra*, without supposedly being bound under the Lease, it was free to abandon the Property with no further obligation. As conceded by JTS, however, this argument is contrary to the rule in Idaho, which explicitly recognizes that “[t]he terms of the original lease are usually carried over into the new tenancy.” *Lewiston Pre-Mix*, 110 Idaho at 645.<sup>9</sup> In the case of *Lewiston Pre-Mix*, for example, the Court specifically concluded that terms of a written lease carried over into a new tenancy, even though that new tenancy was created by the lessee’s continued payment of rent, rather than its exercise of a five-year option in the lease agreement.<sup>10</sup> *Id.* at 645. The Court recognized that “terms related to the landlord-tenant relationship are carried over” into the new tenancy, which in that case included a provision about the removal of leasehold improvements. *Id.* at 645-46 (citing 2 M. Friedman, *Friedman on Leases* § 18.4 (1983)).

This is exactly the case here. After the Lease expired on October 15, 2014, and JTS continued as a month-to-month or at-will tenant, the terms of the original Lease carried over. These terms included, among others, the following:

Surrender of Premises: Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in the same state of condition, reasonable wear and tear expected, that the premises was in at the beginning of this Agreement. . . .

*Id.* at 5.

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<sup>9</sup> JTS concedes “that the Court is bound to following the Court of Appeals decision in *Lewiston Pre-Mix* . . .” *Motion to Reconsider* at 24 n. 3.

<sup>10</sup> Like the Lease in this case, in *Lewiston Pre-Mix*, the lease agreement “contained a provision allowing the lessee to renew the lease for an additional period . . . provided that the lessee complied with the notice provisions of the lease[,]” which the lessee did not exercise. *Id.* at 643.



Time of Essence. Time is of the essence in all provisions of this lease.

*Id.*

Maintenance and Repair: . . . The Lessee agrees to maintain the demised premises and improvements in good condition and repair, reasonable wear and tear excepted.

. . .

*Id.* at 3.

Improvements: The Lessee shall not reconstruct, remodel or change any part of the premises without the consent of the Lessor . . .

*Id.* (emphasis added).

Liability Insurance: . . . Lessee agrees to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use or occupancy of the premises by Lessee, Lessee's agents, . . . or Lessee's guests caused by either negligent or intentional acts.

*Id.* at 2.

Indemnification of Lessor: Lessee shall indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee . . .

*Id.* at 5.

When JTS failed to vacate the Property by January 31, 2015, it violated its obligation to timely quit and surrender the premises. That breach caused CLC to incur the liabilities discussed above, namely its resulting liability to Peterbilt because of the unavailability of the Property for the month of February 2015. As a commercial tenant occupying the Property under the Lease with obligations to indemnify the Lessor, JTS reasonably contemplated at the time of contracting that its breach would cause such damages to CLC. *Lamb v. Robinson*, 101 Idaho 703, 705, 620 P.2d 276 (1980); *Galindo v. Hibbard*, 106 Idaho 302, 306-07, 678 P.2d 94 (1984). Indeed, when JTS negotiated the Third Lease Amendment, it expressly understood that the landlord desired to have

a new tenant or buyer “tak[e] the space over from [JTS]” as soon as it vacated. *Ex. 4* [21:6-22:13]. For this reason, throughout the extended term of the Lease, Mr. Hagood inquired several times about the status of JTS’s exit. *Exs. 5, 6, and 7.*

After JTS refused to timely vacate, and before Peterbilt could occupy the Property, JTS instructed Idaho Power to remove the 480V Transformer. *Ex. 20* [287:16-288:4]. This was also a violation of the Lease, specifically the “Improvements” provision, which required JTS to obtain CLC’s consent before making any changes to the Property. *Ex. 1* at 3. Because of this violation and the removal of power, Peterbilt could not occupy the Property for another two months through April 2015 [295:2-9, 321:13-18, 401:15-17], which caused additional damages. *Ex. 23* [323:8-324:10, 364:15-19, 532:16-25, 535:23-536:9]. Again, by including this provision in the Lease, along with the other provisions for indemnity, JTS reasonably contemplated at the time of contracting that such a violation would cause damages. (However, it is significant that **reasonable contemplation of the parties at the time of contracting is not a requirement to recover special damages for unlawful detainer, *supra*. See *Brooks*, 71 Idaho at 170.)**

Accordingly, the Court should also reject JTS’s argument to eliminate the award of consequential damages for breach of contract.

*a. JTS could not remove the 480V Transformer without CLC’s consent and, therefore, is liable for damages caused by its removal.*

As a subpart to its consequential damages argument, and in attempt to reduce but not entirely eliminate that award, JTS argues that it should not be held liable for contract damages caused by the removal of the 480V Transformer. Specifically, JTS contends that even though the terms of the Lease carried over, it was nonetheless entitled to remove the 480V Transformer as a

temporary improvement or trade fixture,<sup>11</sup> and, therefore, damages resulting from the loss of power are not recoverable. JTS focuses on the circumstances of installing the 480V Transformer and whether it was considered a permanent improvement to the Property. However, these arguments each fail because they ignore the specific breach of the “Improvements” provision for which the Court found JTS liable; specifically,

Defendant is liable for breach of contract because it . . . removed the transformer after the term expired and without Plaintiff’s permission . . .

*Findings of Fact and Conclusions of Law* at 8 (emphasis added).

When JTS gave the instruction to remove the 480V Transformer, it knew that Idaho Power would enter the Property [127:25-128:3, 308:5-8, 691:10-13]. JTS also understood that it required CLC’s permission [128:23-129:22]. Yet, JTS failed to inform CLC that Idaho Power would be entering the Property or that it would be tearing out the 480V Transformer, removing power, and leaving a hole in the parking lot. *See Exs. 220 and 286* [109:11-17, 128:4-17, 130:1-8, 156:15-21, 186:7-12, 396:9-12, 691:14-17]. Regardless of who owned the 480V Transformer (Idaho Power) or whether it was considered a temporary improvement or trade fixture, these were indisputably changes to the Property, which required the consent of CLC under the “Improvements” provision of the Lease. *Ex. 1* at 5. JTS did not obtain this consent.<sup>12</sup>

But for JTS’s cancellation, Idaho Power would not have entered the Property to remove

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<sup>11</sup> Notably, in making this argument, JTS contradicts the claim that it had completely vacated the Property on February 12, 2015. As stated above, the instruction to remove the 480V Transformer was made on February 23, 2015, and the Transformer itself was not removed until the later at the end of the month. By claiming that it was entitled to remove the 480V Transformer as a temporary fixture, JTS necessarily concedes that it had not completely vacated the Property.

<sup>12</sup> Even assuming that JTS could remove “its [not Idaho Power’s] trade fixtures and personal property” from the Property under the “Surrender or Premises” provision, the instruction to remove the 480V Transformer was still made without CLC’s consent and was given after JTS’s abandonment, not “upon termination of the Lease.” *Ex. 1* at 5 (emphasis added). Furthermore, the hole left in the parking lot from the removed 480V Transformer did not leave the Property “in the same state of condition” as at the beginning of the Lease. *Id.*

the power [308:13-24, 309:24-310:2]. Had Idaho Power known that JTS did not have the consent of the landlord, it would not have entered the Property, but contacted CLC [298:12-15]. Had CLC been contacted, it would have arranged for the 480V Transformer to remain so that power to the Property could be preserved, which Idaho Power would have accommodated [295:16-21, 298:4-11, 365:6-12]. Instead, because of JTS's instruction, power was removed and was not restored for approximately two months until April 30, 2015 [295:2-9, 321:13-18, 401:15-17].

Therefore, the Court should reject JTS's argument to remove all damages for the months of March and April 2015 caused by the removal of the 480V Transformer.

*i. JTS failed to satisfy its burden of proof on mitigation of damages.*

JTS very briefly challenges the Court's rejection of its mitigation defense related to the removal of the 480V Transformer. *Findings of Fact and Conclusions of Law* at 9. However, JTS does nothing more than simply rehash its previous unsupported argument. A defendant who asserts an affirmative defense of avoidable consequences (also known as the mitigation-of-damages doctrine) bears the burden of proving that (1) a proposed means of mitigation was available and reasonable under the circumstances, (2) could be accomplished at a reasonable cost, and (3) was within the plaintiff's ability. *McCormick Intl. USA, Inc. v. Shore*, 152 Idaho 920, 924, 277 P.3d 397 (2012). Importantly, "[p]roof of the latter of these three [factors] requires more than a mere suggestion that a means of mitigation exists." *Id.* In this case, the self-serving testimony of JTS's unqualified principal does not address, let alone satisfy, these factors (i.e. availability, cost, and ability by CLC) [652:19-653:24<sup>13</sup>]. Therefore, the Court correctly concluded that JTS

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<sup>13</sup> For example, JTS offered no testimony or foundation about Peterbilt's power needs for its truck-service business or whether those power needs could reasonably be accommodated by temporary generators, which JTS's principal had apparently rented for some unrelated construction projects, during unspecified periods, in unspecified locations, using

failed to support its mitigation defense and should not reconsider this finding.

***b. JTS is liable for not making required repairs to the Property.***

JTS's next argues that contract damages should be reduced by the amounts required to make repairs to Property after JTS finally vacated. In making this argument, JTS does not dispute failing to make the repairs or that it was required to do so under the terms of the Lease. *Ex. 1* at 3 ("Maintenance and Repair") and 5 ("Surrender of Premises"). Instead, JTS regurgitates a tired claim that it was somehow prevented from completing the repairs and that these costs were not incurred by CLC. Each of these arguments has previously been rejected by the Court and they should likewise be rejected here. *Defendant's Motion In Limine Denied, August 2, 2017.*

First, JTS was never prevented from cooperating with CLC to make the required repairs. CLC only made the repairs following communications ignored by JTS. *Exs. 30 and 31* [395:24-396:8, 406:19-23, 407:11-16]. Second, JTS never disputed that the repairs were necessary, nor presented evidence to show that it could have accomplished the same for a lesser cost. The unfinished repair items were expressly conceded by JTS shortly before it vacated. *Ex. 18*. Lastly, CLC demonstrated its resulting liability to Peterbilt for the repairs, along with other damages owed, which is addressed *infra*. *See also CLC's Closing Trial Brief* at 15-17 (citations to the evidence and record regarding CLC's resulting liability to Peterbilt). Peterbilt did not "voluntarily" make the repairs without expectation of being compensated by CLC [410:17-23].

Accordingly, the Court should reject JTS's arguments to reconsider the award of damages

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unspecified equipment, and for unspecified amounts. JTS has absolutely no basis to aver that temporary generators were reasonably available to satisfy Peterbilt's power needs or that they more economical than Peterbilt's extension of its old lease so that it could continue operating with diminished capacity. Peterbilt did not cease all operations or sit "idly by" waiting for Idaho Power to reinstall the 480V Transformer [323:8-324:10].

for repair costs.

- c. JTS's breach of the implied covenant of good faith and fair dealing is not inconsistent with the Court's other findings and JTS is liable for all contract damages according to that breach.*

JTS next challenges the Court's findings that it breached both the express terms of the Lease and the implied covenant of good faith and fair dealing. *Drug Testing Compliance Group, LLC v. DPT Compliance Serv.*, 161 Idaho 93, 102-03, 383 P.3d 1263 (2016) ("A violation of the [implied] covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract."). JTS argues that these findings of express and implied breach are inconsistent with one another, in that after the expiration of the Lease, JTS was a month-to-month or at-will tenant and, thus, was not required to give any notice of its actual exit date. This argument should also be rejected because the terms of the Lease carried over and because The Gilbert Family and CLC reasonably expected such notice given the circumstances of the Third Lease Amendment.

The Third Lease Amendment was entered, at JTS's insistence, specifically in contemplation of JTS vacating the Property sometime before April 15, 2015. *Ex. 4* [24:2-5, 25:9-12, 57:25-58:3, 70:14-21]. (Otherwise, JTS could have simply exercised renewed the Lease for another one-year term. *Ex. 1* at 2 ("Option to Renew")). In proposing the Third Lease Amendment, JTS made it known that the Property would need to be leased or sold upon JTS completing its new building. *Ex. 4*. This necessarily imputed an obligation on JTS, if not expressly then at least impliedly, to give notice of its actual exit date so that The Gilbert Family (and CLC as successor) could plan for an orderly sale and repossession of the Property. Indeed, in contemplation of JTS's exit, The Gilbert Family listed the Property for sale in early October 2014 at the end of the Third Lease Amendment. *Ex. 7* [75:2-11]. After the Lease expired, however,

JTS refused to give notice of a firm exit date and, in bad faith, attempted to gain leverage by claiming a right to possession through April 15, 2015; not for the purpose of actually staying six months, but to delay repossession of the Property. *Ex. 9* (“Good luck with that! It appears we have the option to extend the lease so we will exercise the option. If they evict us we will fight it which should take at least 6 months.”) [133:8-15]. By these actions, JTS materially impaired The Gilbert Family and CLC’s right to notice and a timely and orderly exit so that the Property could be relet, and thereby breached the implied covenant. *See Drug Testing Compliance Group*, 161 Idaho at 102-03.

Additionally, the claim for breach of the implied covenant of good faith and fair dealing has been asserted by CLC in the alternative. *CLC Closing Trial Brief* at 5; *see also* Idaho R. Civ. P. 8(d)(3). Assuming, *arguendo*, that JTS somehow convinces the Court to reconsider its findings and determine that JTS could silently exercise the six-month option without written notice—it could not, *supra*—then JTS still breached the implied covenant by (i) failing to give timely notice when it would vacate the Property, and (ii) failing to pay the higher amount of rent for the month-to-month option.

The Third Lease Amendment was the product of JTS’s instance—not the Gilbert Family—to remain on the Property only so long as necessary to complete its new building. *Ex. 4* [24:2-5, 25:9-12, 57:25-58:3, 70:14-21]. Instead of renewing the Lease for another one-year fixed term (*Ex. 1* at 2 (“Option to Renew”)), JTS asked for a lesser six-month term with a month-to-month option thereafter. *Ex. 3* at ¶ 3. In exchange for this lesser term, The Gilbert Family had a reasonable expectation of notice from JTS about its exit date. This expectation was evidenced by provisions incorporated from the Lease (*Ex. 1* at 1 (“Term of Lease”), 2 (“Option to Renew”), and

5 (“Time of the Essence”)) and confirmed by Mr. Hagood’s subsequent communications. *Exs. 5, 6, and 7*. In reliance on JTS’s representation that it would vacate sometime in December or January, The Gilbert Family listed the Property for sale in early October 2014. *Ex. 7*. Knowing that the Property was listed for sale, JTS had a good faith obligation to give notice to The Gilbert Family and its agent, Mr. Hagood, whether JTS would extend the Lease and for how long [29:5-20]. This good faith obligation to give notice extended to CLC as the successor landlord under the Lease. *Ex. 1* at 6, “Binding Effect”).

By claiming a silent exercise of the six-month option, without written notice, in paying Mrs. Gilbert (an elderly widow residing in St. George, Utah [218:5-12]<sup>14</sup>), while simultaneously and consistently representing an exit date before the end of that six months (*Exs. 5, 6, and 7* [237:6-16, 239:24-240:4, 242:1-13]), JTS first violated the implied covenant by nullifying, or at least significantly impairing, The Gilbert Family’s right (and CLC’s right as successor) to actual notice when JTS would leave. Had JTS given notice that it would exercise the six-month option, then the Property likely would not have been listed for sale until a later date. Instead, when the Property was listed for sale and sold in November 2014, it was not represented to CLC that JTS would occupy through April 15, 2015 [275:16-22, 380:7-10, 461:12-17].

Second, by belatedly claiming a right to possess through April 15, 2015, while at the same time asserting termination sometime before that date, JTS also violated the implied covenant by depriving The Gilbert Family and CLC of the higher rent that JTS agreed to pay in exchange for

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<sup>14</sup> Mrs. Gilbert’s deposition testimony shows that she relied on Mr. Hagood to make all decisions regarding the Property and that she had no communications with JTS about extending the Lease. *Depo. of Arlene Gilbert* at 49:18-50:6, 54:8-55:10, 61:14-19. JTS’s principals confirmed that they exclusively communicated with Mr. Hagood about the Third Lease Amendment [12:12-14, 30:18-21, 39:6-10, 54:22-55:7, 65:2-66:8]. Mrs. Gilbert was not aware of any modification or amendments to the Lease. *Depo. of Arlene Gilbert* at 33:13-19.



the month-to-month option. *Ex. 3* at ¶ 3(b). In remaining silent, JTS hoped to both continue paying the lesser amount of monthly rent and avoid committing to pay full rent for the next six months. This impaired The Gilbert Family and CLC's right to the full amount of rent through April 15, 2015, which otherwise would have been due had JTS actually given notice for the six-month option. *Id.* at ¶ 3(a).

Finally, as discussed above, JTS evidenced bad faith by asserting the six-month option for the purpose of delaying repossession of the Property. *Ex. 9* [133:8-15]. Before the threat of eviction, JTS never insisted upon staying on the Property for the duration of the six-month option [131:15-132:11]. Afterwards, JTS continued to tie its exit to completing the new building and asserted an earlier exit date of March 1, 2015, while insisting upon a right to possession until April 15, 2015. *Ex. 9-12 and 14-17* [80:13-22, 100:2-7, 144:16-145:17, 385:18-386:10, 567:4-9]. These conflicting, self-serving representations materially impaired the rights of The Gilbert Family and CLC to terminate the Lease in a planned and orderly manner, which otherwise would have been completed by January 31, 2015, if JTS were up front about its month-to-month tenancy.

Therefore, even if JTS could have exercised the six-month option without written notice, it still breached the Lease and Third Lease Amendment by depriving The Gilbert Family and CLC of (i) actual notice when it would exit and (ii) rent and termination rights commensurate with JTS's occupation.

Accordingly, the Court should not reconsider its findings about JTS's breach of the implied covenant of good faith and fair dealing, and the damages according to that breach. *Drug Testing Compliance Group*, 161 Idaho at 103 ("A violation of the implied covenant is a breach of contract" and results in contract damages. (citations omitted)).

**3. CLC's resulting liability to Peterbilt should not be eliminated from the Court's award of special and consequential damages.**

JTS's last argument for reducing damages challenges the alleged standing of Peterbilt in this action to claim injury. However, the Court correctly decided that this is not an issue of Peterbilt's standing or privity vis-à-vis JTS, but rather CLC's resulting liability to Peterbilt because of JTS's unlawful detainer and breach of contract. *Findings of Fact and Conclusions of Law* at 4 and 9; *see also CLC's Memorandum in Opposition to Defendant's Motion In Limine (7/26/17); Defendant's Motion In Limine Denied, August 2, 2017.*

Contrary to JTS's unsupported averment, the unrebutted testimony of Blake Jackson confirmed that the Peterbilt Lease (*Ex. 21*) was entered before CLC closed its purchase of the Property in December 2014 [375:20-376:3, 377:17-21]. Otherwise, CLC could not have obtained outside financing [375:9-376:10]. Thereafter, CLC's obligations to Peterbilt under the Peterbilt Lease commenced on February 1, 2015—not June 1, 2015—which corresponded with the January 31, 2015 terminate date in the Notice of Termination. *Ex. 21* at §§ 2.1(g) and 4.1 [313:19-314:3, 379:11-380:6, 384:8-13, 430:11-25]. When JTS refused to vacate and unlawfully detained the Property after February 1, 2015, Peterbilt could not take possession and was obliged to extend its old lease one month [316:18-317:4, 364:7-10]. Later, when JTS instructed Idaho Power to cancel services, Peterbilt was forced against to extend its old lease another two months through April 30, 2015. *Ex. 23* [323:8-324:10, 364:15-19]. During this time, Peterbilt paid the mortgage on the Property for CLC (because CLC did not have an occupying tenant paying rent<sup>15</sup>) and also continued to pay rent and utilities under the old lease. *Ex. 24* [324:4-19]. Because the old lease

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<sup>15</sup> This fact negates JTS's argument that Peterbilt supposedly was not going to start paying anything until June 1, 2015 [407:24-409:10].

was in a smaller building, Peterbilt’s planned expansion was delayed and Peterbilt lost profits. *Ex.* 29 [316:6-14, 363:3-9]. Peterbilt also incurred the cost of an idle employee, who had been hired to work in the expanded location. *Ex.* 25. Peterbilt also paid for Idaho Power to restore power to the Property. *Ex.* 26. According to the Peterbilt Lease,<sup>16</sup> as well as CLC and Peterbilt’s un rebutted course of dealing,<sup>17</sup> CLC was liable for all these costs incurred because of Peterbilt’s delayed occupation of the Property, which the Court correctly found JTS reasonably anticipated and was obligated to indemnify under the Lease:

In the Lease Agreement, Defendant agreed “to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee’s agents, employees or customers or Lessee’s guests caused by either negligent or intentional acts,” (Ex. 1, “Liability Insurance); and to “indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of the Lease.” (Ex. 1, “Indemnification of Lessor”).

*Findings of Fact and Conclusions of Law* at 9.

Therefore, the Court’s award of damages should not be revisited or reduced based on CLC’s resulting liability to Peterbilt.

***a. CLC’s resulting liability for Peterbilt’s lost profits should not be reduced.***

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<sup>16</sup> “Lessor Defaults. If Lessor [CLC] fails or neglects to keep and perform any of the covenants or agreements in this [Peterbilt] Lease . . . any amount or amounts which Tenant [Peterbilt] advances on Lessor’s behalf will be repaid by Lessor to Tenant . . .” *Ex.* 21 at § 11.2. “Remedies. In the tent of material breach or default . . . either party shall have all rights and remedies available to them . . .” *Id.* at § 11.3. “Interruption of Business. . . . If such impairment or closure continues for thirty (30) consecutive days, Tenant may . . . [assert] all other remedies now or hereafter afforded or provided by law or this Lease . . .” *Id.* at § 6.8; *see also id.* at §§ 2.1(g), 5.1, and 5.3 (Peterbilt’s right to make use of the Property starting on the Commencement Date, February 1, 2015).

<sup>17</sup> Even if CLC’s resulting liability to Peterbilt was somehow not established under the Peterbilt Lease, the parties’ un rebutted course of dealing shows that CLC would reimburse Peterbilt for all costs incurred because of Peterbilt’s delayed occupation of the Property [326:19-22, 409:11-411:1]. Notably, JTS argued, unsuccessfully, for its own reimbursement of costs expended by a related company, Industrial Builders, purportedly on JTS’s behalf, because of its alleged expedited move [650:2-12, 655:3-7, 681:6-23].

Relatedly, JTS argues that CLC's resulting liability for Peterbilt's lost profits should be reduced because Peterbilt was, from the beginning, supposedly not planning to occupy the Property until April 15, 2015. This is not correct. According to the Commencement Date in the Peterbilt Lease (*Ex. 21* at § 2.1(g)), when the Property was purchased in December 2014, Peterbilt planned to take possession on February 1, 2015 [313:19-314:3, 380:2-6]. Not until January 2015, after JTS had made clear that it refused to vacate (*e.g. Ex. 14 and 17* (“[JTS] has until April 15, 2015 to vacate the property.”)), did Peterbilt give instructions to its contractor that buildout could start in April 2015, when it was expected that JTS would finally be out [330:11-332:5]. In the meantime, Peterbilt's plan, from the beginning, was to occupy the Property and to do its buildout at the same time, which it profitably accomplished in prior buildouts [314:8-315:3, 331:22-24, 557:12-558:15, 581:4-582:18]. Because Peterbilt was prevented from occupying the larger Property, first by JTS's refusal to vacate by January 31, 2015 [316:18-317:14, 364:7-10], and second by removing the power, [(*Ex. 23*) 323:8-324:10, 364:15-19, 532:16-25, 535:23-536:9], *supra*, Peterbilt's planned expansion was delayed and Peterbilt lost profits *Ex. 29* [316:6-4, 363:3-9].

JTS further argues that Peterbilt's lost profits should be creatively “averaged” to eliminate all profits and arrive at a net negative during the three-month period that Peterbilt's occupation was delayed. JTS offers the Court no authority or guidance, other than its own fiat, why Peterbilt's profits should be zeroed out. Blake Jackson testified that the average monthly profits for 2015, after the move-in was completed, was \$21,421. *Ex. 29* [419:22-420:12, 424:11-425:10]. Taking this average and moving Peterbilt's date of possession back to February 1, 2015—when JTS should have been out and Peterbilt moved in—shows that Peterbilt lost three full months of profitability during 2015, which the Court appropriately awarded in damages. Contrary to JTS's assertion, this

does take into account the costs for Peterbilt’s move in May 2015 (-\$5,854), which are merely shifted three months earlier, according to the date when JTS should have been out (Ex. 29):

actual date	<u>2/28/15</u>	<u>3/31/15</u>	<u>4/30/15</u>	<u>5/31/15</u>	<u>6/30/15</u>	<u>7/31/15</u>	<u>8/31/15</u>	<u>9/30/15</u>
Profits	\$9,881	\$5,404	\$10,078	<b>-\$5,854</b>	\$8,980	\$22,065	\$34,640	\$19,997
<i>had JTS vacated</i>	<u>2/28/15</u>	<u>3/31/15</u>	<u>4/30/15</u>	<u>5/31/15</u>	<u>6/30/15</u>	<u><b>Average</b></u>	<u><b>Average</b></u>	<u><b>Average</b></u>
<i>Profits</i>	<b>-\$5,854</b>	\$8,980	\$22,065	\$34,640	\$19,997	<b>\$21,421</b>	<b>\$21,421</b>	<b>\$21,421</b>

Taking these lost profits for three months and subtracting Peterbilt’s actual average profits during the delay (\$6,096 per month), arrives at a reasonable amount of lost profits attributable to JTS’s unlawful detainer and breach of contract: \$45,973. Ex. 29.

JTS fails to demonstrate how Peterbilt’s calculation of lost profits is unreasoned, lacks reasonable certainty, or is merely speculation. *Galindo*, 106 Idaho at 307 (“The standard of reasonable certainty does not demand proof with mathematical exactitude. Rather, it ‘require[s] only that the damages be taken out of the realm of speculation.’ . . . The calculation of lost profits must be based upon evidence which leads to a reasoned conclusion.” (citations omitted)). As such, the Court should reject JTS’s argument to reconsider this award.

***b. By awarding CLC damages for its resulting liability to Peterbilt for lost profits, the Court has not given CLC double recovery.***

JTS last argues that allowing CLC to recover for Peterbilt’s lost profits is “double damages” and, therefore, should be disallowed by the Court. *Curtiss Aeroplane & Motor Corp. v. Haymakers Warehousing Corp.*, 264 S.W.2d 326, 329 (Tex. Civ. App. 1924). This argument wrongly suggests that CLC’s alternative claim for lost rent from Peterbilt has been doubly calculated. *CLC’s Closing Trial Brief* at 19-20. It has not. In awarding damages for Peterbilt’s

lost profits, the Court has not awarded the \$8,375 in greater rent that CLC would have realized from Peterbilt under the Peterbilt Lease during the months of February, March, and April 2015, if JTS had timely vacated and not removed power. *Compare id. with Findings of Fact and Conclusions of Law* at 9. Thus, there is no award of “double damages” and the Court should not reconsider this decision. *Curtiss Aeroplane*, 264 S.W.2d at 329 (distinguishing the “rental value” of the property—i.e. CLC’s alternative claim for \$8,375—from “lost profits” for “use of the premises”—i.e. CLC’s resulting liability to Peterbilt for lost profits<sup>18</sup>—to reject an award of “double damages” for both).

Finally, and importantly, even if the Court were to accept JTS’s arguments to reconsider Peterbilt’s lost profits—and it should not for the reasons stated, *supra*—then CLC’s alternative claim for lost rent from Peterbilt would necessarily need to be awarded by the Court; specifically, \$8,375 *plus* any other amounts not paid by JTS for the period of February through April 2015. *CLC’s Closing Trial Brief* at 19-20.

Therefore, for the foregoing reasons, the Court should not reconsider the award of damages for JTS’s unlawful detainer and breach of contract, but should uphold its decision:

Based on Defendant’s unlawful detainer and breach of contract, the terms of the Lease Agreement and amendments, and the applicable law, Plaintiff may recover the following Damages from Defendant: rent due under the Lease Agreement through April 15, 2015 (**\$7,603.12**) (*Ex. 22*); damages and costs caused by Defendant’s removal of the transformer (**\$7,929.00**) (*Exs. 22 and 26*); Peterbilt’s rent and triple-net costs for its old lease (**\$14,587.92**) (*Exs. 22-24*); cost of Peterbilt’s idle employee (**\$7,969.22**) (*Exs. 22 and 25*); costs to repair the Property

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<sup>18</sup> Notably, this case supports CLC’s claim against JTS for resulting liability to Peterbilt. *Curtiss Aeroplane*, 264 S.W.2d at 329 (“Appellant [JTS] had full notice of the contract between the Warehousing Corporation [CLC] and the Hay Association [Peterbilt], and would be liable to the Warehousing Corporation [CLC] for whatever amount the Hay Association [Peterbilt] could recover against it.”). Because JTS was a commercial tenant paying rent, it understood that, upon vacating, the Property would be rented to a new tenant and that the new tenant would be paying rent to the landlord under the terms of a new lease agreement. *See e.g. Ex. 4* (“[T]he Gilberts feel confident that they will be able to find someone else to take the space upon your vacating it.”).

**(\$2,600.00)** (*Exs. 22, 27, and 28*); and Peterbilt's lost profits **(\$45,973.00)** (*Exs. 22 and 29*).

*Findings of Fact and Conclusions of Law* at 9 (emphasis added).

### CONCLUSION

In conclusion, the Court's findings of liability against JTS for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing are well reasoned and correct. JTS did not exercise the six-month option to extend the Lease through April 15, 2015, and, therefore, is liable to CLC. Furthermore, the Court's award of damages, including both special damages for unlawful detainer and consequential damages for breach of contract, is also well reasoned and correct. The facts and the law support the Court's calculations, which JTS has not demonstrated are erroneous, inconsistent, or otherwise incorrect.

Therefore, CLC respectfully requests that the *Motion to Reconsider* be denied and that the *Judgment* be affirmed against JTS.

DATED this 30th day of March, 2018.

STRONG & HANNI

/s/ William B. Ingram

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Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION TO RECONSIDER** to be delivered via email, to the following counsel of record this 30th day of March, 2018.

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*/ s / Sariah Runnells, secretary*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**SUPPLEMENTAL MEMORANDUM OF  
ATTORNEY FEES AND COSTS**

Case No. CV15-587

Judge Chris Nye

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Pursuant to Idaho Rule of Civil Procedure 54(d)(4) and (e)(5), Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, hereby supplements its *Memorandum of Attorney Fees and Costs (1/17/18)* with additional attorney fees and costs, which have been incurred by CLC since the filing of that memorandum. In accordance with Rule 54(d)(1)(F), CLC respectfully requests that the amounts stated in the memorandum and those set forth herein be added to the Court’s final *Judgment (1/22/18)*. This supplemental memorandum is supported by the accompanying *Supplemental Affidavit of William B. Ingram, Exhibit 2*, and below-cited authorities and contract provision.

**ATTORNEY FEES**

Pursuant to Contract or Statute. In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

Idaho R. Civ. P. 54(e)(1).

Attorney fees. In any action brought under the provisions of this chapter [Forcible Entry and Unlawful Detainer], except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees. . . .

Idaho Code § 6-324.

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney’s fee to be fixed by such court, in addition to the costs allowed by law.

*Commercial Lease Agreement* (Trial Ex. 1) at 5.

As the prevailing party, CLC is entitled to the following additional amounts of attorney fees and legal research costs, which were reasonably incurred in this action in accordance with Idaho R. Civ. P. 54(e)(3), as set forth in the *Supplemental Affidavit of William B. Ingram* (Ex. 2):

January 15 through March 28, 2018

<u>Description</u>	<u>Amount</u>
Attorney Fees	\$.....23,442.00
Legal Research Costs	\$.....174.17
<b>Subtotal</b>	<b>\$.....23,616.17</b>

*Suppl. Attorney Aff.* (Ex. 2) at ¶¶ 8-17 and Sch. 2 thereto.

**TOTAL ATTORNEY FEES (AND LEGAL RESEARCH COSTS)  
IN THIS MATTER<sup>1</sup>: \$202,469.44**

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<sup>1</sup> *Affidavit of William B. Ingram* (Ex. 1) at ¶¶ 6-29 and Sch. 1 thereto; *see also Memorandum of Attorney Fees and Costs.*

**COSTS**

Parties Entitled to Costs. Except when otherwise limited by these rules, costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Idaho R. Civ. P. 54(d)(1)(A).

As the prevailing party, CLC is entitled to the following additional costs as a matter of right in accordance with Idaho R. Civ. P. 54(d)(1)(C) and (F):

<u>Description</u>	<u>Amount</u>
Fees on Execution of Judgment	\$.....255.00
<b>TOTAL</b>	<b>\$.....255.00</b>

*Suppl. Attorney Aff.* (Ex. 2) at ¶¶ 18-21 and Sch. 2 thereto.

**TOTAL RECOVERABLE COSTS<sup>2</sup>: \$10,981.40**

DATED this 30th day of March, 2018.

STRONG & HANNI

*/ s / William B. Ingram*

\_\_\_\_\_  
Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

<sup>2</sup> *Affidavit of William B. Ingram* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto; *see also Memorandum of Attorney Fees and Costs.*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **SUPPLEMENTAL MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 30th day of March, 2018.

Lynette M. Davis  
William K. Smith  
Austin Strobel  
HAWLEY TROXELL ENNIS  
7 HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, Idaho 83701-1617

( ) U.S. Mail, postage prepaid  
( ) Facsimile  
(X) Email/CM/ECF Filing  
[ldavis@hawleytroxell.com](mailto:ldavis@hawleytroxell.com)  
[wsmith@hawleytroxell.com](mailto:wsmith@hawleytroxell.com)  
[astrobel@hawleytroxell.com](mailto:astrobel@hawleytroxell.com)

*/ s / Sariah Runnells, secretary*

---

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**SUPPLEMENTAL AFFIDAVIT OF  
WILLIAM B. INGRAM**

Case No. CV15-587

Judge Chris Nye

---

STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE        )

Pursuant to Idaho Rule of Civil Procedure 54(e)(5), William B. Ingram, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for Plaintiff Caldwell Land & Cattle, LLC (“CLC”) in the above-captioned action (the “Action”) against Defendant Johnson Thermal Systems, Inc. (“JTS”).

3. I am a shareholder with the law firm Strong & Hanni, which has represented CLC throughout this Action.

4. In preparing this affidavit, I have reviewed the time, billing, and expense records associated with this Action that have been maintained by Strong & Hanni in the ordinary course of business, as well as the briefings of the parties and orders by the Court that have been filed in the Lawsuit.

5. I am licensed to practice law in the State of Utah (admitted *pro hac vice* in this Action) and have been a member in good standing of the Utah State Bar Association since 2005.

6. This affidavit incorporates and supplements my previous *Affidavit of William B. Ingram (1/17/18)* and the *Memorandum of Attorney Fees and Costs (1/17/18)* filed contemporaneous therewith.

7. To the best of my knowledge and belief the items in this affidavit and those set forth in my previous *Affidavit of William B. Ingram (1/17/18)* are correct and the costs claimed are in compliance with Idaho Rule of Civil Procedure 54.<sup>1</sup>

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<sup>1</sup> I have considered the *Supplemental Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees (2/9/18)* filed by JTS, which argues that an affidavit supporting fees and costs must exactly state, word for word, “to the best of the party’s knowledge and belief the items are correct and that the costs claimed are in compliance with this rule [Rule 54].” While I disagree with JTS’s argument and its incorrect application of this Rule to my previous affidavit (which already attests as much), in an abundance of caution, the exact words are included in this affidavit and apply with equal force to my previous affidavit. Additionally, CLC has addressed this argument in its *Response to Defendant’s Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Attorney Fees and Costs (2/20/18)*.

**Time Spent and Work Performed by Attorneys in this Action**

8. Since January 16, 2018, the hours expended, hourly rates, attributable fees, and descriptions of the work performed by each attorney in this Action (reviewed and redacted for privilege<sup>2</sup>) is reflected in the **Schedule 2**, which has been generated from the billing records maintained by Strong & Hanni, which are described in my previous affidavit.

9. The additional attorney fees for legal services rendered by Strong & Hanni in this Action from January 16 through March 28, 2018, is \$23,442.00.

10. The additional legal research costs incurred by Strong & Hanni in this Action from January 16 through March 28, 2018, is \$174.17.

11. Thus, the total attorney fees for legal fees and legal research costs incurred by CLC in this Action are \$202,469.44. *Affidavit of William B. Ingram* (Ex. 1) and Sch. 1 thereto.

**Reasonableness of Attorney Fees**

12. I have reviewed Strong & Hanni's billing statements from each month to ensure that the rates, services performed, amount of time, and fees charged have been fair, reasonable, and appropriate.

13. Strong & Hanni periodically reviews its rates to ensure that they are consistent with the market rates charged by law firms of comparable size and experience in the area.

14. I have also conferred with other shareholders of Strong & Hanni who are licensed to practice in Idaho to confirm that the hourly rates billed in this Action are reasonable for services of a similar nature under the facts and circumstances of this case.

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<sup>2</sup> By attaching these descriptions, CLC and Strong & Hanni do not waive the attorney-client and work product privileges.

15. Based on my experience, I believe that the hours expended by each attorney and the amounts billed in this Action have been reasonably and necessarily incurred, and are in accordance with the standards in the legal community for similar work of similarly skilled attorneys under similar circumstances. In particular, this Action has involved, among many other things, (a) claims and counterclaims asserted by both parties; (b) third-party claims asserted by JTS (previously dismissed); (c) numerous settlement communications and participation in formal mediation; (d) review and production of written discovery and numerous documents; (e) ten depositions (six taken by CLC and four taken by JTS); (f) engaging with four attorneys retained by JTS; (g) preparation and filing of motions for summary judgment filed by both parties, motions to exclude evidence, and pretrial briefing; (h) calculations of lost costs and lost profits evidence; (i) preparation for and presentation of a three-day trial, including eleven witnesses and many exhibits; (j) post-trial briefing; (k) the Court's resolution of several facts and conclusions of law; and (l) most recently, a challenge to CLC's request for attorney fees and severely overlength motion to reconsider on almost every issue previously tried and decided.

16. CLC has prevailed on its claims for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, and has been awarded \$86,389.26 in damages for rent due, damage and repair to property, lost costs, and lost profits; whereas JTS has been unsuccessful in its affirmative defenses and counterclaims for breach of contract and constructive eviction. *Findings of Fact and Conclusions of Law (1/4/18); Judgment (1/22/18)*.

17. Both parties prayed to recover attorney fees and costs in their respective pleadings according to their written contract and as allowed by statute.



Costs

18. Since January 16, 2018, Strong & Hanni has also incurred various costs on behalf of CLC related to this Action, which are identified and summarized in **Schedule 2**.

19. The additional costs incurred by Strong & Hanni on behalf of CLC in this Action from January 16 through March 28, 2018, is \$255.00.

20. Thus, the total recoverable costs incurred by CLC in this Action are \$10,981.40. *Affidavit of William B. Ingram* (Ex. 1) and Sch. 1 thereto.

21. For the same reasons above, I believe that these costs have been reasonably and necessarily incurred in this Action.

Further your affiant sayeth naught.

DATED this 30<sup>th</sup> day of March, 2018.

  
\_\_\_\_\_  
William B. Ingram

SUBSCRIBED AND SWORN BEFORE ME this 30<sup>th</sup> day of March, 2018.



  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **SUPPLEMENTAL AFFIDAVIT OF WILLIAM B. INGRAM** to be delivered via email, to the following counsel of record this 20<sup>th</sup> day of March, 2018.

Lynette M. Davis  
William K. Smith  
Austin Strobel  
HAWLEY TROXELL ENNIS  
7 HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
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\_\_\_\_\_

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
1/16/2018	WBI	178356	2.2	\$295.00	\$649.00	Draft edits to attorney fee affidavit and memorandum per schedule. Review and make corrections to schedule (correct cost calculations). Review and redact privileged and work product entries. Emails with Attys Jackson and Bullock re: final edits and filing.
1/17/2018	WBI	178356	1	\$295.00	\$295.00	Complete final edits to schedule and attorney fee declaration. File judgment, memorandum of attorney fees and costs, and affidavit. Email with Atty Jackson re: same.
1/18/2018	WBI	178356	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: amended judgment. Review same for filing.
1/18/2018	RCB	178356	1.3	\$230.00	\$299.00	Analysis of ID law re pre and post judgment interest. Confer with WBI re the same and amending judgment. Draft amended judgment and notice of filing of amended judgment
1/23/2018	WBI	178356	0.1	\$295.00	\$29.50	Receive notice of Defendant's substitution of counsel.
1/23/2018	GPJ	178356	0.3	\$295.00	\$88.50	Receive Notice of Substitution of counsel. Telephone call with Blake re status.
1/24/2018	GPJ	178356	0.4	\$295.00	\$118.00	Email and telephone call with Mr. Jackson re timing of next steps. Text exchange with Mr. Jackson.
1/24/2018	WBI	178356	0.2	\$295.00	\$59.00	Receive judgment. Email and call with Atty Jackson re: same and attorney fees.
1/25/2018	GPJ	178356	0.2	\$295.00	\$59.00	Receive judgment and forward to Mr. Jackson.
1/26/2018	RCB	178356	0.2	\$230.00	\$46.00	Receipt of signed judgment. Confer with WBI re atty fee and cost memo and additional filing
2/1/2018	GPJ	179210	0.4	\$295.00	\$118.00	Receive and begin review of Memo Responding to Fee demand.
2/2/2018	GPJ	179210	0.3	\$295.00	\$88.50	Email exchange with Blake re opposition on fees.
2/5/2018	WBI	179210	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: reply memorandum for attorney fees.
2/5/2018	RCB	179210	2.3	\$230.00	\$529.00	Review and analysis of JTS's motion to disallow attorney fees. Confer with WBI re response and strategy. Call with USLaw partner in Idaho re rules and admissibility of Reply Memo. Analysis of ID law re the same. Outline reply memo to allow fees.
2/6/2018	RCB	179210	2.8	\$230.00	\$644.00	Work on draft reply memorandum in support of motion for fees. Analysis of Idaho case law re agreements and conflict of fees and statute.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
2/7/2018	RCB	179210	5.2	\$230.00	\$1,196.00	Complete draft of Reply memo in support of motion for fees. Email to WBI for review and comment
2/8/2018	RCB	179210	3.7	\$230.00	\$851.00	Revise and edit reply memo in support of fee request. Analysis of ID law re extension of lease terms after termination and reciprocal fee statute. Confer with WBI re the same. Prepare exhibits to memo.
2/8/2018	WBI	179210	1.1	\$295.00	\$324.50	Review, edit, and revise reply memorandum re: attorney fees. Confer with Atty Bullock re: same. Emails re: filing.
2/8/2018	GPJ	179210	0.3	\$295.00	\$88.50	Reply brief for fees. Email exchange with Blake.
2/12/2018	WBI	179210	0.7	\$295.00	\$206.50	Receive and review supplemental memorandum in opposition to attorney fees. Review IRCP 54 and draft analysis for reply memo. Emails with Atty Jackson re: same.
2/12/2018	RCB	179210	0.4	\$230.00	\$92.00	Receipt of supplemental briefing on attorneys fees and notice of hearing. Confer with GPJ re the same.
2/13/2018	RCB	179210	1.3	\$230.00	\$299.00	Work on draft response to supplemental briefing. Emails with WBI and GPJ re the same.
2/14/2018	RCB	179210	1.2	\$230.00	\$276.00	Continue work on draft response to supplemental briefing from JTS re attorney fees
2/15/2018	RCB	179210	1.4	\$230.00	\$322.00	Work on response to supplemental brief of JTS. Analysis of ID law re cost memorandum and attorney fees
2/16/2018	RCB	179210	2.8	\$230.00	\$644.00	Complete draft response to JTS supplemental memo re fees. Email to WBI for review and comment.
2/17/2018	WBI	179210	1.1	\$295.00	\$324.50	Review and revise response to supplemental memorandum re: attorney fees. Emails with Atty Bullock re: same.
2/20/2018	RCB	179210	0.4	\$230.00	\$92.00	Final review and edit of response. Confer with WBI re the same. Prepare for filing.
2/21/2018	RCB	179210	0.3	\$230.00	\$69.00	Emails from counsel re motion to reconsider. Emails with WBI and GPJ re strategy and response
2/21/2018	GPJ	179210	0.3	\$295.00	\$88.50	Emails re Motion to Reconsider. Telephone call with Blake re status.
2/22/2018	RCB	179210	0.5	\$230.00	\$115.00	Receipt and analysis of motion to enlarge time and motion to stay execution and supporting memoranda. Emails re the same.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
2/23/2018	RCB	179210	1.3	\$230.00	\$299.00	Receipt and analysis of amended motion to enlarge time for post trial briefings and motion to stay execution of judgment. Begin work on draft opposition
2/26/2018	RCB	179210	4.7	\$230.00	\$1,081.00	Draft opposition to Motion to Enlarge Time and Motion to Stay Execution of Judgment. Research and analysis of ID law for use in memo. Emails with WBI and GPJ re the same. Instruct staff on filing.
2/26/2018	GPJ	179210	0.8	\$295.00	\$236.00	Receive and briefly review Amended Motion, Amended Hearing Notice, Motion to Stay, Declarations, Motion to Enlarge Time, Order. Letter to Blake enclosing pleadings. Email re responsive pleading.
2/27/2018	RCB	179210	0.7	\$230.00	\$161.00	Draft motion to appear telephonically and proposed order. Emails with GPJ re the same.
3/1/2018	WBI	Prebill	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: status.
3/2/2018	WBI	Prebill	1.2	\$295.00	\$354.00	Review filings for extension of time to challenge judgment filed by opposing counsel. Confer with Atty Bullock re: same. Confer with Atty Jackson re: strategy for hearing.
3/2/2018	RCB	Prebill	0.7	\$230.00	\$161.00	Receipt of Reply memo from JTS re motion to extend time. Confer with WBI to discuss Monday hearing and strategy
3/5/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Final preparations for hearing on Motion to Extend. Confer with WBI re the same and next steps post hearing.
3/5/2018	WBI	Prebill	2.2	\$295.00	\$649.00	Prepare for hearing (review briefing and outline arguments). Confer with Atty Jackson re: same. Review docket. Appear and argue motion by telephone and discuss scheduling with Judge. Post-hearing meeting with Atty Jackson re: strategy.
3/8/2018	WBI	Prebill	0.1	\$295.00	\$29.50	Emails re: notice of hearing for attorney fees.
3/9/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Analysis of ID law and procedure on writ of execution/garnishment for execution of Judgment. Begin work on draft documents to execute on bank account of JTS
3/12/2018	RCB	Prebill	2.9	\$230.00	\$667.00	Draft writ of garnishment and affidavit in support. Draft notice and interrogatories to garnishee. Draft notice of exemptions. Call to sheriff to discuss service. Communications to Court re execution of Writ
3/13/2018	RCB	Prebill	0.6	\$230.00	\$138.00	Receipt of signed writ of garnishment from Court re Zions Bank. Draft letter to sherriff re service.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/13/2018	WBI	Prebill	0.2	\$295.00	\$59.00	Confer with Atty Jackson re: writ of execution. Review and sign same.
3/14/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Work on service of Writ of Garnishment. Communications re the same
3/16/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Receipt and analysis of Motion to Reconsider and/or vacate judgment
3/16/2018	WBI	Prebill	0.4	\$295.00	\$118.00	Receive and review Defendant's motion for reconsideration. Confer with Atty Jackson re: response to same.
3/21/2018	WBI	Prebill	4.5	\$295.00	\$1,327.50	Research authorities cited by Defendant in motion to reconsider. Begin draft memorandum in opposition (writing required to extend lease).
3/21/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Confer with GPJ re strategy on collection of judgment. Draft Application and Writ of Garnishment for Wells Fargo, Bank of Commerce, JP Morgan Chase, Bank of Idaho, Bank of the West, Key Bank, and US Bank. Work on Motion for Debtor's examination.
3/21/2018	GPJ	Prebill	0.1	\$295.00	\$29.50	Status telephone call with Blake.
3/22/2018	GPJ	Prebill	0.4	\$295.00	\$118.00	Telephone call with Blake, text and forward financials re collection.
3/22/2018	RCB	Prebill	1.6	\$230.00	\$368.00	Draft notice of garnishment for additional banks. Prepare affidavit and writs for filing. Begin draft motion for debtor exams
3/22/2018	WBI	Prebill	6.8	\$295.00	\$2,006.00	Continued draft memorandum in opposition to motion to reconsider (A.1. writing required to extend lease, 2. no waiver of writing requirement, 3. no substantial performance, B.1. special damages for unlawful detainer, research cited authorities for arguments). [REDACTED] [REDACTED] Receive and sign writs of garnishment for filing.
3/23/2018	WBI	Prebill	2.1	\$295.00	\$619.50	Continued draft memorandum in opposition to motion for reconsideration (B.1. special damages for unlawful detainer, 2. consequential damages for breach of contract).
3/23/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Revise and edit writs of garnishment per instructions from Court. Calls and emails re the same. Prepare new writs for filing. Draft letters for service of writs. Prepare notices and exemption forms for specific counties.
3/23/2018	GPJ	Prebill	0.4	\$295.00	\$118.00	Telephone call with Blake and draft email to counsel.



**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/26/2018	RCB	Prebill	0.9	\$230.00	\$207.00	Draft motion for debtor exam and proposed Order. Calls and emails with COurt re the same. Confer wtih GPJ re in person or telephonic hearing. Emails re writs
3/26/2018	WBI	Prebill	6.5	\$295.00	\$1,917.50	Continued draft memorandum in opposition to motion for reconsideration (B.2. consequential damages for breach of contract, a. removal of transformer, b. repairs, i. mitigation defense not proven, c. implied covenant of good faith and fair dealing breached, general edits, introduction). Confer with Atty Jackson re: same and emails with Atty Bullock re: filing of writs of garnishment.
3/27/2018	WBI	Prebill	8.3	\$295.00	\$2,448.50	Continued draft memorandum in opposition to motion for reconsideration (B.2.b.i. mitigation defense not proven, c. breach of implied covenant, 3. resulting liability for Peterbilt, a. lost profits recoverable, b. no double recovery, standard of review, objection to evidence, conclusion, general edits, continued research for cited authorities). Emails with Atty Jackson re: review for filing.
3/28/2018	WBI	Prebill	0.4	\$295.00	\$118.00	Emails with Atty Jackson and client re: approval of opposition to motion for reconsideration. Begin draft supplemental attorney fee affidavit.
3/28/2018	RCB	Prebill	0.4	\$230.00	\$92.00	Receive writs of garnishment from Court. Prepare and send out for service with other documents.

SUBTOTAL \$23,442.00

**Onlie Legal Research**

3/1/2018	E106	Prebill			\$34.86	Online Research for Westlaw
3/23/2018	E106	Prebill			\$139.31	Online Research for Westlaw

SUBTOTAL \$174.17

**Fees on Execution of Judgment**

3/12/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution by Zions Bank.
3/12/2018	E112	Prebill			\$70.00	RCB Canyon County Sheriff's Office fee for service of Writ of Execution.
3/13/2018	E112	Prebill			\$70.00	RCB Fee for filing Writ of Execution service fee by Canyon County Sheriff's Office.
3/14/2018	E112	Prebill			-\$70.00	RCB Canyon County Sheriff's Office fee for service of Writ of Execution.



**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee Writ of Execution from Bank of the West
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution with Bank of Commerce
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution with Wells Fargo Bank
3/23/2018	E113	Prebill			\$55.00	RCB Fee for service of Writ of execution on Bank of the West by Ada County Sheriff's Office
3/23/2018	E113	Prebill			\$70.00	RCB Fee for service of Writ of execution on Wells Fargo by Canyon County Sheriff's Office
3/23/2018	E113	Prebill			\$40.00	RCB Bonneville County Sheriff's Office fee for service of Writ of Execution on Bank of Commerce; Subpoena Fees

SUBTOTAL \$255.00

Total Addl. Fees and Legal Research \$23,616.17

Total Addl. Fees on Execution of Judgment \$255.00

**TOTAL \$23,871.17**



Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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<p>CALDWELL LAND &amp; CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND &amp; CATTLE COMPANY, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;"><b>SUPPLEMENTAL MEMORANDUM OF ATTORNEY FEES AND COSTS</b></p> <p style="text-align: center;">Case No. CV15-587</p> <p style="text-align: center;">Judge Chris Nye</p>
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Pursuant to Idaho Rule of Civil Procedure 54(d)(4) and (e)(5), Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, hereby supplements its *Memorandum of Attorney Fees and Costs (1/17/18)* with additional attorney fees and costs, which have been incurred by CLC since the filing of that memorandum. In accordance with Rule 54(d)(1)(F), CLC respectfully requests that the amounts stated in the memorandum and those set forth herein be added to the Court’s final *Judgment (1/22/18)*. This supplemental memorandum is supported by the accompanying *Supplemental Affidavit of William B. Ingram, Exhibit 2*, and below-cited authorities and contract provision.

**ATTORNEY FEES**

Pursuant to Contract or Statute. In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

Idaho R. Civ. P. 54(e)(1).

Attorney fees. In any action brought under the provisions of this chapter [Forcible Entry and Unlawful Detainer], except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees. . . .

Idaho Code § 6-324.

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney’s fee to be fixed by such court, in addition to the costs allowed by law.

*Commercial Lease Agreement* (Trial Ex. 1) at 5.

As the prevailing party, CLC is entitled to the following additional amounts of attorney fees and legal research costs, which were reasonably incurred in this action in accordance with Idaho R. Civ. P. 54(e)(3), as set forth in the *Supplemental Affidavit of William B. Ingram* (Ex. 2):

January 15 through March 28, 2018

<u>Description</u>	<u>Amount</u>
Attorney Fees	\$.....23,442.00
Legal Research Costs	\$.....174.17
<b>Subtotal</b>	<b>\$.....23,616.17</b>

*Suppl. Attorney Aff.* (Ex. 2) at ¶¶ 8-17 and Sch. 2 thereto.

**TOTAL ATTORNEY FEES (AND LEGAL RESEARCH COSTS)  
IN THIS MATTER<sup>1</sup>: \$202,469.44**

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<sup>1</sup> *Affidavit of William B. Ingram* (Ex. 1) at ¶¶ 6-29 and Sch. 1 thereto; *see also Memorandum of Attorney Fees and Costs.*

**COSTS**

Parties Entitled to Costs. Except when otherwise limited by these rules, costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Idaho R. Civ. P. 54(d)(1)(A).

As the prevailing party, CLC is entitled to the following additional costs as a matter of right in accordance with Idaho R. Civ. P. 54(d)(1)(C) and (F):

<u>Description</u>	<u>Amount</u>
Fees on Execution of Judgment	\$.....255.00
<b>TOTAL</b>	<b>\$.....255.00</b>

*Suppl. Attorney Aff.* (Ex. 2) at ¶¶ 18-21 and Sch. 2 thereto.

**TOTAL RECOVERABLE COSTS<sup>2</sup>: \$10,981.40**

DATED this 30th day of March, 2018.

STRONG & HANNI

*/ s / William B. Ingram*

\_\_\_\_\_  
Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

<sup>2</sup> *Affidavit of William B. Ingram* (Ex. 1) at ¶¶ 30-32 and Sch. 1 thereto; *see also Memorandum of Attorney Fees and Costs.*

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **SUPPLEMENTAL MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 30th day of March, 2018.

Lynette M. Davis  
William K. Smith  
Austin Strobel  
HAWLEY TROXELL ENNIS  
7 HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, Idaho 83701-1617

( ) U.S. Mail, postage prepaid  
( ) Facsimile  
(X) Email/CM/ECF Filing  
[ldavis@hawleytroxell.com](mailto:ldavis@hawleytroxell.com)  
[wsmith@hawleytroxell.com](mailto:wsmith@hawleytroxell.com)  
[astrobel@hawleytroxell.com](mailto:astrobel@hawleytroxell.com)

*/ s / Sariah Runnells, secretary*

---

Robert L. Janicki, ISB #8911  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508  
*Attorneys for Plaintiff*

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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**SUPPLEMENTAL AFFIDAVIT OF  
WILLIAM B. INGRAM**

Case No. CV15-587

Judge Chris Nye

---

STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE        )

Pursuant to Idaho Rule of Civil Procedure 54(e)(5), William B. Ingram, being first duly sworn, deposes and states as follows:

1. I am over eighteen years of age and have personal knowledge of the information contained herein.

2. I am an attorney of record for Plaintiff Caldwell Land & Cattle, LLC (“CLC”) in the above-captioned action (the “Action”) against Defendant Johnson Thermal Systems, Inc. (“JTS”).

3. I am a shareholder with the law firm Strong & Hanni, which has represented CLC throughout this Action.

4. In preparing this affidavit, I have reviewed the time, billing, and expense records associated with this Action that have been maintained by Strong & Hanni in the ordinary course of business, as well as the briefings of the parties and orders by the Court that have been filed in the Lawsuit.

5. I am licensed to practice law in the State of Utah (admitted *pro hac vice* in this Action) and have been a member in good standing of the Utah State Bar Association since 2005.

6. This affidavit incorporates and supplements my previous *Affidavit of William B. Ingram (1/17/18)* and the *Memorandum of Attorney Fees and Costs (1/17/18)* filed contemporaneous therewith.

7. To the best of my knowledge and belief the items in this affidavit and those set forth in my previous *Affidavit of William B. Ingram (1/17/18)* are correct and the costs claimed are in compliance with Idaho Rule of Civil Procedure 54.<sup>1</sup>

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<sup>1</sup> I have considered the *Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Costs and Attorney Fees (2/9/18)* filed by JTS, which argues that an affidavit supporting fees and costs must exactly state, word for word, “to the best of the party’s knowledge and belief the items are correct and that the costs claimed are in compliance with this rule [Rule 54].” While I disagree with JTS’s argument and its incorrect application of this Rule to my previous affidavit (which already attests as much), in an abundance of caution, the exact words are included in this affidavit and apply with equal force to my previous affidavit. Additionally, CLC has addressed this argument in its *Response to Defendant’s Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Attorney Fees and Costs (2/20/18)*.

**Time Spent and Work Performed by Attorneys in this Action**

8. Since January 16, 2018, the hours expended, hourly rates, attributable fees, and descriptions of the work performed by each attorney in this Action (reviewed and redacted for privilege<sup>2</sup>) is reflected in the **Schedule 2**, which has been generated from the billing records maintained by Strong & Hanni, which are described in my previous affidavit.

9. The additional attorney fees for legal services rendered by Strong & Hanni in this Action from January 16 through March 28, 2018, is \$23,442.00.

10. The additional legal research costs incurred by Strong & Hanni in this Action from January 16 through March 28, 2018, is \$174.17.

11. Thus, the total attorney fees for legal fees and legal research costs incurred by CLC in this Action are \$202,469.44. *Affidavit of William B. Ingram* (Ex. 1) and Sch. 1 thereto.

**Reasonableness of Attorney Fees**

12. I have reviewed Strong & Hanni's billing statements from each month to ensure that the rates, services performed, amount of time, and fees charged have been fair, reasonable, and appropriate.

13. Strong & Hanni periodically reviews its rates to ensure that they are consistent with the market rates charged by law firms of comparable size and experience in the area.

14. I have also conferred with other shareholders of Strong & Hanni who are licensed to practice in Idaho to confirm that the hourly rates billed in this Action are reasonable for services of a similar nature under the facts and circumstances of this case.

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<sup>2</sup> By attaching these descriptions, CLC and Strong & Hanni do not waive the attorney-client and work product privileges.

15. Based on my experience, I believe that the hours expended by each attorney and the amounts billed in this Action have been reasonably and necessarily incurred, and are in accordance with the standards in the legal community for similar work of similarly skilled attorneys under similar circumstances. In particular, this Action has involved, among many other things, (a) claims and counterclaims asserted by both parties; (b) third-party claims asserted by JTS (previously dismissed); (c) numerous settlement communications and participation in formal mediation; (d) review and production of written discovery and numerous documents; (e) ten depositions (six taken by CLC and four taken by JTS); (f) engaging with four attorneys retained by JTS; (g) preparation and filing of motions for summary judgment filed by both parties, motions to exclude evidence, and pretrial briefing; (h) calculations of lost costs and lost profits evidence; (i) preparation for and presentation of a three-day trial, including eleven witnesses and many exhibits; (j) post-trial briefing; (k) the Court's resolution of several facts and conclusions of law; and (l) most recently, a challenge to CLC's request for attorney fees and severely overlength motion to reconsider on almost every issue previously tried and decided.

16. CLC has prevailed on its claims for unlawful detainer, breach of contract, and breach of the implied covenant of good faith and fair dealing, and has been awarded \$86,389.26 in damages for rent due, damage and repair to property, lost costs, and lost profits; whereas JTS has been unsuccessful in its affirmative defenses and counterclaims for breach of contract and constructive eviction. *Findings of Fact and Conclusions of Law (1/4/18); Judgment (1/22/18)*.

17. Both parties prayed to recover attorney fees and costs in their respective pleadings according to their written contract and as allowed by statute.



Costs

18. Since January 16, 2018, Strong & Hanni has also incurred various costs on behalf of CLC related to this Action, which are identified and summarized in **Schedule 2**.

19. The additional costs incurred by Strong & Hanni on behalf of CLC in this Action from January 16 through March 28, 2018, is \$255.00.

20. Thus, the total recoverable costs incurred by CLC in this Action are \$10,981.40. *Affidavit of William B. Ingram* (Ex. 1) and Sch. 1 thereto.

21. For the same reasons above, I believe that these costs have been reasonably and necessarily incurred in this Action.

Further your affiant sayeth naught.

DATED this 30<sup>th</sup> day of March, 2018.

  
\_\_\_\_\_  
William B. Ingram

SUBSCRIBED AND SWORN BEFORE ME this 30<sup>th</sup> day of March, 2018.



  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **SUPPLEMENTAL AFFIDAVIT OF WILLIAM B. INGRAM** to be delivered via email, to the following counsel of record this 20<sup>th</sup> day of March, 2018.

Lynette M. Davis  
William K. Smith  
Austin Strobel  
HAWLEY TROXELL ENNIS  
7 HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
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( ) U.S. Mail, postage prepaid  
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[astrobel@hawleytroxell.com](mailto:astrobel@hawleytroxell.com)

  
\_\_\_\_\_

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
1/16/2018	WBI	178356	2.2	\$295.00	\$649.00	Draft edits to attorney fee affidavit and memorandum per schedule. Review and make corrections to schedule (correct cost calculations). Review and redact privileged and work product entries. Emails with Attys Jackson and Bullock re: final edits and filing.
1/17/2018	WBI	178356	1	\$295.00	\$295.00	Complete final edits to schedule and attorney fee declaration. File judgment, memorandum of attorney fees and costs, and affidavit. Email with Atty Jackson re: same.
1/18/2018	WBI	178356	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: amended judgment. Review same for filing.
1/18/2018	RCB	178356	1.3	\$230.00	\$299.00	Analysis of ID law re pre and post judgment interest. Confer with WBI re the same and amending judgment. Draft amended judgment and notice of filing of amended judgment
1/23/2018	WBI	178356	0.1	\$295.00	\$29.50	Receive notice of Defendant's substitution of counsel.
1/23/2018	GPJ	178356	0.3	\$295.00	\$88.50	Receive Notice of Substitution of counsel. Telephone call with Blake re status.
1/24/2018	GPJ	178356	0.4	\$295.00	\$118.00	Email and telephone call with Mr. Jackson re timing of next steps. Text exchange with Mr. Jackson.
1/24/2018	WBI	178356	0.2	\$295.00	\$59.00	Receive judgment. Email and call with Atty Jackson re: same and attorney fees.
1/25/2018	GPJ	178356	0.2	\$295.00	\$59.00	Receive judgment and forward to Mr. Jackson.
1/26/2018	RCB	178356	0.2	\$230.00	\$46.00	Receipt of signed judgment. Confer with WBI re atty fee and cost memo and additional filing
2/1/2018	GPJ	179210	0.4	\$295.00	\$118.00	Receive and begin review of Memo Responding to Fee demand.
2/2/2018	GPJ	179210	0.3	\$295.00	\$88.50	Email exchange with Blake re opposition on fees.
2/5/2018	WBI	179210	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: reply memorandum for attorney fees.
2/5/2018	RCB	179210	2.3	\$230.00	\$529.00	Review and analysis of JTS's motion to disallow attorney fees. Confer with WBI re response and strategy. Call with USLaw partner in Idaho re rules and admissibility of Reply Memo. Analysis of ID law re the same. Outline reply memo to allow fees.
2/6/2018	RCB	179210	2.8	\$230.00	\$644.00	Work on draft reply memorandum in support of motion for fees. Analysis of Idaho case law re agreements and conflict of fees and statute.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
2/7/2018	RCB	179210	5.2	\$230.00	\$1,196.00	Complete draft of Reply memo in support of motion for fees. Email to WBI for review and comment
2/8/2018	RCB	179210	3.7	\$230.00	\$851.00	Revise and edit reply memo in support of fee request. Analysis of ID law re extension of lease terms after termination and reciprocal fee statute. Confer with WBI re the same. Prepare exhibits to memo.
2/8/2018	WBI	179210	1.1	\$295.00	\$324.50	Review, edit, and revise reply memorandum re: attorney fees. Confer with Atty Bullock re: same. Emails re: filing.
2/8/2018	GPJ	179210	0.3	\$295.00	\$88.50	Reply brief for fees. Email exchange with Blake.
2/12/2018	WBI	179210	0.7	\$295.00	\$206.50	Receive and review supplemental memorandum in opposition to attorney fees. Review IRCP 54 and draft analysis for reply memo. Emails with Atty Jackson re: same.
2/12/2018	RCB	179210	0.4	\$230.00	\$92.00	Receipt of supplemental briefing on attorneys fees and notice of hearing. Confer with GPJ re the same.
2/13/2018	RCB	179210	1.3	\$230.00	\$299.00	Work on draft response to supplemental briefing. Emails with WBI and GPJ re the same.
2/14/2018	RCB	179210	1.2	\$230.00	\$276.00	Continue work on draft response to supplemental briefing from JTS re attorney fees
2/15/2018	RCB	179210	1.4	\$230.00	\$322.00	Work on response to supplemental brief of JTS. Analysis of ID law re cost memorandum and attorney fees
2/16/2018	RCB	179210	2.8	\$230.00	\$644.00	Complete draft response to JTS supplemental memo re fees. Email to WBI for review and comment.
2/17/2018	WBI	179210	1.1	\$295.00	\$324.50	Review and revise response to supplemental memorandum re: attorney fees. Emails with Atty Bullock re: same.
2/20/2018	RCB	179210	0.4	\$230.00	\$92.00	Final review and edit of response. Confer with WBI re the same. Prepare for filing.
2/21/2018	RCB	179210	0.3	\$230.00	\$69.00	Emails from counsel re motion to reconsider. Emails with WBI and GPJ re strategy and response
2/21/2018	GPJ	179210	0.3	\$295.00	\$88.50	Emails re Motion to Reconsider. Telephone call with Blake re status.
2/22/2018	RCB	179210	0.5	\$230.00	\$115.00	Receipt and analysis of motion to enlarge time and motion to stay execution and supporting memoranda. Emails re the same.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
2/23/2018	RCB	179210	1.3	\$230.00	\$299.00	Receipt and analysis of amended motion to enlarge time for post trial briefings and motion to stay execution of judgment. Begin work on draft opposition
2/26/2018	RCB	179210	4.7	\$230.00	\$1,081.00	Draft opposition to Motion to Enlarge Time and Motion to Stay Execution of Judgment. Research and analysis of ID law for use in memo. Emails with WBI and GPJ re the same. Instruct staff on filing.
2/26/2018	GPJ	179210	0.8	\$295.00	\$236.00	Receive and briefly review Amended Motion, Amended Hearing Notice, Motion to Stay, Declarations, Motion to Enlarge Time, Order. Letter to Blake enclosing pleadings. Email re responsive pleading.
2/27/2018	RCB	179210	0.7	\$230.00	\$161.00	Draft motion to appear telephonically and proposed order. Emails with GPJ re the same.
3/1/2018	WBI	Prebill	0.2	\$295.00	\$59.00	Confer with Atty Bullock re: status.
3/2/2018	WBI	Prebill	1.2	\$295.00	\$354.00	Review filings for extension of time to challenge judgment filed by opposing counsel. Confer with Atty Bullock re: same. Confer with Atty Jackson re: strategy for hearing.
3/2/2018	RCB	Prebill	0.7	\$230.00	\$161.00	Receipt of Reply memo from JTS re motion to extend time. Confer with WBI to discuss Monday hearing and strategy
3/5/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Final preparations for hearing on Motion to Extend. Confer with WBI re the same and next steps post hearing.
3/5/2018	WBI	Prebill	2.2	\$295.00	\$649.00	Prepare for hearing (review briefing and outline arguments). Confer with Atty Jackson re: same. Review docket. Appear and argue motion by telephone and discuss scheduling with Judge. Post-hearing meeting with Atty Jackson re: strategy.
3/8/2018	WBI	Prebill	0.1	\$295.00	\$29.50	Emails re: notice of hearing for attorney fees.
3/9/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Analysis of ID law and procedure on writ of execution/garnishment for execution of Judgment. Begin work on draft documents to execute on bank account of JTS
3/12/2018	RCB	Prebill	2.9	\$230.00	\$667.00	Draft writ of garnishment and affidavit in support. Draft notice and interrogatories to garnishee. Draft notice of exemptions. Call to sheriff to discuss service. Communications to Court re execution of Writ
3/13/2018	RCB	Prebill	0.6	\$230.00	\$138.00	Receipt of signed writ of garnishment from Court re Zions Bank. Draft letter to sherriff re service.

**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/13/2018	WBI	Prebill	0.2	\$295.00	\$59.00	Confer with Atty Jackson re: writ of execution. Review and sign same.
3/14/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Work on service of Writ of Garnishment. Communications re the same
3/16/2018	RCB	Prebill	0.5	\$230.00	\$115.00	Receipt and analysis of Motion to Reconsider and/or vacate judgment
3/16/2018	WBI	Prebill	0.4	\$295.00	\$118.00	Receive and review Defendant's motion for reconsideration. Confer with Atty Jackson re: response to same.
3/21/2018	WBI	Prebill	4.5	\$295.00	\$1,327.50	Research authorities cited by Defendant in motion to reconsider. Begin draft memorandum in opposition (writing required to extend lease).
3/21/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Confer with GPJ re strategy on collection of judgment. Draft Application and Writ of Garnishment for Wells Fargo, Bank of Commerce, JP Morgan Chase, Bank of Idaho, Bank of the West, Key Bank, and US Bank. Work on Motion for Debtor's examination.
3/21/2018	GPJ	Prebill	0.1	\$295.00	\$29.50	Status telephone call with Blake.
3/22/2018	GPJ	Prebill	0.4	\$295.00	\$118.00	Telephone call with Blake, text and forward financials re collection.
3/22/2018	RCB	Prebill	1.6	\$230.00	\$368.00	Draft notice of garnishment for additional banks. Prepare affidavit and writs for filing. Begin draft motion for debtor exams
3/22/2018	WBI	Prebill	6.8	\$295.00	\$2,006.00	Continued draft memorandum in opposition to motion to reconsider (A.1. writing required to extend lease, 2. no waiver of writing requirement, 3. no substantial performance, B.1. special damages for unlawful detainer, research cited authorities for arguments). [REDACTED] [REDACTED] Receive and sign writs of garnishment for filing.
3/23/2018	WBI	Prebill	2.1	\$295.00	\$619.50	Continued draft memorandum in opposition to motion for reconsideration (B.1. special damages for unlawful detainer, 2. consequential damages for breach of contract).
3/23/2018	RCB	Prebill	2.3	\$230.00	\$529.00	Revise and edit writs of garnishment per instructions from Court. Calls and emails re the same. Prepare new writs for filing. Draft letters for service of writs. Prepare notices and exemption forms for specific counties.
3/23/2018	GPJ	Prebill	0.4	\$295.00	\$118.00	Telephone call with Blake and draft email to counsel.



**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/26/2018	RCB	Prebill	0.9	\$230.00	\$207.00	Draft motion for debtor exam and proposed Order. Calls and emails with COurt re the same. Confer wtih GPJ re in person or telephonic hearing. Emails re writs
3/26/2018	WBI	Prebill	6.5	\$295.00	\$1,917.50	Continued draft memorandum in opposition to motion for reconsideration (B.2. consequential damages for breach of contract, a. removal of transformer, b. repairs, i. mitigation defense not proven, c. implied covenant of good faith and fair dealing breached, general edits, introduction). Confer with Atty Jackson re: same and emails with Atty Bullock re: filing of writs of garnishment.
3/27/2018	WBI	Prebill	8.3	\$295.00	\$2,448.50	Continued draft memorandum in opposition to motion for reconsideration (B.2.b.i. mitigation defense not proven, c. breach of implied covenant, 3. resulting liability for Peterbilt, a. lost profits recoverable, b. no double recovery, standard of review, objection to evidence, conclusion, general edits, continued research for cited authorities). Emails with Atty Jackson re: review for filing.
3/28/2018	WBI	Prebill	0.4	\$295.00	\$118.00	Emails with Atty Jackson and client re: approval of opposition to motion for reconsideration. Begin draft supplemental attorney fee affidavit.
3/28/2018	RCB	Prebill	0.4	\$230.00	\$92.00	Receive writs of garnishment from Court. Prepare and send out for service with other documents.

SUBTOTAL \$23,442.00

**Onlie Legal Research**

3/1/2018	E106	Prebill			\$34.86	Online Research for Westlaw
3/23/2018	E106	Prebill			\$139.31	Online Research for Westlaw

SUBTOTAL \$174.17

**Fees on Execution of Judgment**

3/12/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution by Zions Bank.
3/12/2018	E112	Prebill			\$70.00	RCB Canyon County Sheriff's Office fee for service of Writ of Execution.
3/13/2018	E112	Prebill			\$70.00	RCB Fee for filing Writ of Execution service fee by Canyon County Sheriff's Office.
3/14/2018	E112	Prebill			-\$70.00	RCB Canyon County Sheriff's Office fee for service of Writ of Execution.



**CALDWELL LAND & CATTLE LLC v. JOHNSON THERMAL SYSTEMS, INC.**

Case No. CV15-587 (Idaho 3d Jud. Dist.)

Date	Atty	Invoice	Hours	Rate	Amount	Description
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee Writ of Execution from Bank of the West
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution with Bank of Commerce
3/23/2018	E112	Prebill			\$5.00	RCB Statutory fee for Writ of Execution with Wells Fargo Bank
3/23/2018	E113	Prebill			\$55.00	RCB Fee for service of Writ of execution on Bank of the West by Ada County Sheriff's Office
3/23/2018	E113	Prebill			\$70.00	RCB Fee for service of Writ of execution on Wells Fargo by Canyon County Sheriff's Office
3/23/2018	E113	Prebill			\$40.00	RCB Bonneville County Sheriff's Office fee for service of Writ of Execution on Bank of Commerce; Subpoena Fees

SUBTOTAL \$255.00

Total Addl. Fees and Legal Research \$23,616.17

Total Addl. Fees on Execution of Judgment \$255.00

**TOTAL \$23,871.17**



**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND AND CATTLE,  
LLC, an Idaho limited liability company  
a/k/a CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC.,

Defendant.

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)  
) Case No.: CV-2015-587  
)  
)  
)

**ORDER DENYING COMBINED  
MOTIONS FOR  
RECONSIDERATION AND TO  
ALTER, AMEND, OR VACATE  
JUDGMENT**

The matter before the Court is Johnson Thermal Systems, Inc.'s ("JTS") combined motions for reconsideration and to alter, amend, or vacate judgment. Previously, the Court granted JTS's motion to enlarge time, and denied JTS's motion to stay execution of judgment. *See* I.R.C.P. 62 (discretionary decision); *Haley v. Clinton*, 123 Idaho 707 (Ct. App. 1993).

**I. Background**

The Court held a three-day bench trial in August 2017. The Court entered its findings of fact and conclusions of law on January 5, 2018. The Court determined that JTS was liable for unlawful detainer and breach of contract, and awarded \$86,389.26, plus statutory interest, to Caldwell Land and Cattle, LLC ("CLC"). The Court ruled in CLC's favor on JTS's counterclaims.

New counsel substituted in for JTS on January 23, 2018. Judgment was entered January 24, 2018. JTS timely filed its combined post-judgment motions on March 15, 2018.<sup>1</sup> CLC filed its opposition on March 30, 2018.

## **II. JTS's combined post-judgment motions**

JTS asks the Court to reconsider its findings of fact and conclusions of law and decide that (1) JTS properly exercised the six-month renewal option under the Third Lease Amendment; and (2) even if JTS did not exercise the six-month renewal, CLC's damages should be limited to those damages related to JTS's failure to timely vacate. JTS asks the Court to alter, amend, or vacate judgment accordingly.

Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. Additionally, this Court will not substitute its view of the facts for that of the trial court. This Court exercises free review over matters of law.

*Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 230 (2015) (internal citations omitted). Generally, preponderance of the evidence is the standard in a civil case. *Ebert v. Newton*, 97 Idaho 418 (1976).

On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. In other words, if the

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<sup>1</sup> Motions to reconsider, or to alter or amend judgment, must be filed and served within 14 days after entry of judgment. I.R.C.P. 11.2(b); 59. However, due to a clerical error, the Court granted JTS's motion to enlarge time to file its combined post-judgment motions.

original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration.

*Fragnella v. Petrovich*, 153 Idaho 266, 276 (2012) (referring to internal cites omitted); I.R.C.P. 11.2(b); *Johnson v. Lambros*, 143 Idaho 468, 473 (Ct. App. 2006) (A party may ask a trial court to correct “errors of law or fact in the initial decision.”).

I.R.C.P. 59(e) permits a trial court to alter or amend a judgment. “Pursuant to I.R.C.P. 59(e), a district court can correct legal and factual errors occurring in proceedings before it.” *In re SRBA*, 149 Idaho 532, 542 (2010). The Court’s decision on a Rule 59(e) motion is discretionary. *Id.*; *see also*, I.R.C.P. 60 (Relief under Rule 60 is discretionary).

After considering the parties’ arguments and the applicable law, including the arguments and legal authority JTS cited in its memorandum in support of its combined post-judgment motions, the Court finds that its findings of fact and conclusions of law, entered January 5, 2018, are correct. The Court therefore denies JTS’s combined motions for reconsideration, and to alter, amend, or vacate judgment.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. JTS’s motion for reconsideration is denied; and
2. JTS’s motion to alter, amend, or vacate judgment is denied.

DATED: April 4th, 2018

  
\_\_\_\_\_  
Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

Signed: 4/4/2018 02:12 PM

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

Robert Janicki  
William Ingram  
STRONG & HANNI  
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Salt Lake City, Utah 84111

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\_\_\_\_\_

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Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

REPLY MEMORANDUM IN SUPPORT  
OF MOTION TO DISALLOW  
PLAINTIFF'S COSTS AND ATTORNEY  
FEES [I.R.C.P. 54] AND OPPOSITION  
TO SUPPLEMENTAL MEMORANDUM  
OF ATTORNEY FEES AND COSTS

Defendant Johnson Thermal Systems, Inc., through counsel of record Hawley Troxell  
Ennis & Hawley LLP, hereby submits its Reply Memorandum in Support of Motion to Disallow  
Plaintiff's Costs and Attorney Fees [I.R.C.P. 54] and Opposition to Supplemental Memorandum  
of Attorney Fees and Costs.

## I.

### INTRODUCTION

On February 8, 2018, Plaintiff Caldwell Land & Cattle, LLC (“CLC” or “Plaintiff”) filed its *Reply Brief in Support of Memorandum of Attorney Fees and Costs* (“Opposition”). Therein, Plaintiff argues that: (1) the fee provision of the Lease Agreement is applicable; (2) that Idaho Code § 6-324 requires that the Court award attorneys’ fees; and (3) that the attorney fees sought by CLC are reasonable. On February 20, 2018, in response to Defendant’s *Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Costs and Attorney Fees [I.R.C.P. 54]* (“Supplemental Memorandum”), Plaintiff filed its *Response to Defendant’s Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Attorney Fees and Costs* (“Supplemental Response”). Therein, Plaintiff argues: (1) that JTS’s argument regarding Rule 54(d)(4) certification is untimely; (2) that attorney fees are separately governed by Rule 54(e); (3) that the Affidavit of William B. Ingram complies with Rule 54(d) and (e); and (4) that by application of Rule 11(b), CLC’s filings meet Rule 54(d)’s certification requirement. On March 30, 2018, CLC filed Plaintiff’s *Supplemental Memorandum of Attorney Fees and Costs*, which was supported by the concurrently-filed *Supplemental Affidavit of William B. Ingram*. Therein, Plaintiff claims additional attorney fees and costs in the amount of \$23,616.17.

For the reasons argued below, the arguments asserted in each of CLC’s responsive filings are without merit. Notably, however, CLC does not argue that the case is exceptional and does not respond to or attempt to rebut Defendant’s arguments pertaining to CLC’s request for discretionary costs. Accordingly, CLC’s claimed discretionary costs should not be awarded. Similarly, CLC does not respond to or attempt to rebut many of JTS’s asserted grounds for the unreasonableness of the fee award requested. The requested fee award should be appropriately

reduced on those unopposed grounds. Moreover, the requested fees and costs should be disallowed or reduced based on the reasons articulated below. Lastly, CLC's request for an award of its supplemental fees and costs should be disallowed or appropriately reduced.

**A. CLC Is Not Entitled To An Award Of Its Costs And Attorney Fees, Because It Failed To Timely File A Compliant Memorandum Of Costs And Attorney Fees Within 14 Days Of Entry Of Judgment.**

The Court should disallow all costs and fees sought by CLC because CLC's Memorandum of Attorney Fees and Costs filed on January 17, 2018, does not comply with Idaho Rule of Civil Procedure 54(d)(4), which states:

(4) *Memorandum of Costs.* At any time after the verdict of a jury or a decision of the court, but not later than 14 days after entry of judgment, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense. **The memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule.** Failure to timely file a memorandum of costs is a waiver of the right to costs. A memorandum of costs prematurely filed is considered as timely.

Idaho R. Civ. P. 54(d)(4) (emphasis added). Under Idaho Rule of Civil Procedure 54(e)(5), attorney fees are considered costs and therefore are governed by Rule 54(d)(4). I.R.C.P. 54(e)(5) ("Attorney fees . . . are costs in an action and [are] processed in the same manner as other costs included in the memorandum of costs.").

Here, neither CLC's Memorandum of Attorney Fees and Costs nor the supporting Affidavit of William B. Ingram "state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule" as Rule 54(d)(4)

indicates a “memorandum of costs” **must** do. This certification is mandatory and is absent.<sup>1</sup> In the absence of the mandatory certification language from Rule 54(d)(4), none of CLC’s January 17, 2018 filings qualifies as a “memorandum of costs” under Idaho law. Since CLC has not filed a document that complies with Rule 54(d)(4), CLC has failed to meet the jurisdictional requirements of Idaho Rule of Civil Procedure 54 and is not entitled to an award of costs and attorney fees.

In opposition, CLC argues: (1) JTS’s argument under Rule 54(d)(4) is untimely; (2) that attorney fees are separately governed by Rule 54(e); (3) that the affidavit complies with Rule 54(d) and (e); (4) that CLC’s filings have the appropriate certification; and (5) that the inclusion of the certification language in the March 30, 2018 *Supplemental Affidavit of William B. Ingram* somehow cures the failure to include the required language in the initial *Memorandum of Attorney Fees and Costs*. Each argument lacks merit.

First, CLC argues that JTS’s argument raised in its Supplemental Memorandum is untimely. However, the instant objection presents the threshold question of the jurisdictional validity of the “memorandum of costs” filed. As noted by the Idaho Supreme Court, the 14-day period to file objections to costs and fees in a motion to disallow is only triggered by the filing of a valid “memorandum of costs.” *See Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 103, 279 P.3d 80, 89 (2012) (“The requirement of filing a motion to disallow costs depends upon there being a memorandum of costs filed by the opposing party. If

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<sup>1</sup> *See Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995) (“When used in a statute, the word ‘may’ is permissive rather than the imperative or mandatory meaning of ‘must’ or ‘shall’”); *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008) (rules of statutory construction apply to both statutes and rules of civil procedure) (citations omitted).



Mr. Mihara’s affidavit did not constitute a memorandum of costs, then there was no requirement that MetLife file a timely motion to disallow the costs.”). Here, since CLC has not filed any document qualifying as a “memorandum of costs,” JTS’s 14-day period to object was never triggered and the argument is not “untimely” as no clock ever began to run on JTS for the filing of a motion to disallow. In other words, the Court only has jurisdiction to address the issue of fees if it first determines that CLC filed a valid, timely “memorandum of costs” pursuant to Rule 54(d)(4). Here, CLC failed to do so.

Alternatively, the Idaho Supreme Court has indicated that a party’s subsequent filings under Idaho R. Civ. P. 54 may be considered as supplements to previous timely filings, so long as the opposition has a “full and fair opportunity to be heard.” *See In re SRBA*, 149 Idaho 532, 543–44, 237 P.3d 1, 12–13 (2010). Notwithstanding that JTS’s 14-day period to object was never triggered based on the jurisdictional defect in CLC’s January 17, 2018 filings, Defendant clearly timely filed its initial Motion to Disallow even if it had been triggered. Moreover, CLC has already had an opportunity to brief the issue in its Supplemental Response and will further have a full and fair opportunity to be heard as to the objection raised in Defendant’s Supplemental Memorandum at oral argument on April 19, 2018. It can thus, in the alternative, be considered as a supplemental argument to the timely filed Motion to Disallow (just as CLC is now seeking to have the Court consider supplemental fees and costs).

Second, Plaintiff argues that attorney fees are *separately* governed under Idaho Rule of Civil Procedure 54(e) and that JTS is “conflating the requirements for costs with the separate requirements for attorney fees.” Not so. Pursuant to Rule 54, attorneys fees *are costs*, are to be

included in the memorandum of costs, and thus, are included in the costs certification required by Rule 54(d)(4). Rule 54(e)(5) states:

*(5) Attorney Fees as Costs. Attorney fees, when allowable by statute or contract, are costs in an action and processed in the same manner as other costs and included in the memorandum of costs.* A claim for attorney fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.

Idaho R. Civ. P. 54(e)(5) (emphasis added). Since attorneys fees *are* costs pursuant to Rule 54 and are required to be included in the memorandum of costs, failure to properly certify costs is logically also a failure to certify any claimed attorney fees. In addition to being inconsistent with the language of Rule 54, CLC's position is also inconsistent with CLC's own prior actions. Indeed, if Rule 54's fee requirements are entirely separate from its costs requirements, why did CLC treat the attorney fees as a type of cost by filing a joint *Memorandum of Attorney Fees and Costs*, which, consistent with Rule 54, sought to process CLC's claimed attorney fees along with its claimed costs?

Third, CLC argues that the affidavit complies with Rule 54(d). However, this is plainly not the case because it does not include the certification language that Rule 54(d)(4) indicates it **must** have. Asserting a belief under oath in an *affidavit* that costs were reasonably incurred is not an inclusion of the proper certification language in a *memorandum of costs*, nor does the portion of Mr. Ingram's Affidavit cited by CLC indicate "that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule" as required by Rule 54(d). CLC seems to be arguing that compliance with Rule 54(d) can be gleaned from the contents of the Affidavit, despite the lack of certifying language. Even if this were true, Rule 54(d)(4) is concerned with *certification* of compliance. Rule 54(d)(4)'s

certification language (or anything similar to it) does not appear in the memorandum of costs nor in the affidavit.

Fourth, CLC argues that because counsel's signing of the memorandum of costs and affidavit implicitly comes with the warranties of Rule 11(b), that Rule 54(d)(4)'s certification requirement has been met. Presumably, however, the Idaho Supreme Court was aware of Rule 11(b)'s existence when it included in Rule 54(d)(4) an additional certification requirement. Holding that Rule 11(b)'s implied warranties meet Rule 54(d)(4)'s certification requirement would render Rule 54(d)(4) a nullity, because no attorney would ever need to include Rule 54(d)(4)'s certification language, but could instead rely on the implied Rule 11(b) warranties that come with every pleading, motion, or affidavit signed by an attorney. Patently, the Idaho Supreme Court did not intend for Rule 54(d)(4)'s certification requirement to be a nullity.

Lastly, CLC attempts to retroactively cure the failure to include Rule 54(d)(4)'s mandatory certification language in its initial *Memorandum of Attorney Fees and Costs* by now including the certification language in the *Supplemental Affidavit of William B. Ingram*, filed March 30, 2018, which includes a footnote asserting that "the exact words are included in this affidavit and apply with equal force to my previous affidavit." CLC cites no authority for this bold proposition. While true that Idaho law permits a party to supplement a previously-filed *valid* memorandum of costs and attorney fees, JTS is unaware of any ruling of the Idaho Supreme Court that permits a party to retroactively cure through supplementation a previously-filed *invalid* document that did not meet Rule 54(d)(4)'s certification requirements. Since CLC did not timely file a valid memorandum of costs and attorney fees within 14 days of entry of judgment, CLC is not entitled to an award of its costs or attorney fees.

**B. CLC Should Be Estopped From Relying On The Fee Provision Of The Lease Agreement And Is Not Entitled To Recover Fees Incurred Related To The Unlawful Detainer Claim Pursuant To Idaho Code § 6-324 Because Clc's Counsel Has Not Apportioned Their Fees.**

CLC first argues that they should be awarded fees pursuant to the Lease Agreement's attorney fee provision. CLC first asserts that *Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977), a case relied on in JTS's prior briefing, is distinguishable, and that Idaho law indicates that lease terms are usually carried over into the new tenancy. *See* Opposition at 3 (citing *Lewiston Pre-Mix Concrete, Inc. v. Rhode*, 110 Idaho 640, 645, 718 P.2d 551, 556 (Idaho Ct. Appl. 1985) and *Pearson v. Harper*, 87 Idaho 245, 255, 392 P.2d 687, 692 (1964)). JTS acknowledges that under Idaho law and at common law, lease terms usually carry over into the new tenancy. However, neither *Lewiston Pre-Mix Concrete, Inc.* nor *Pearson* deal with the issue of a party attempting to rely on a fee shifting provision where the party had successfully taken the position that the same lease agreement was not renewed. As CLC points out and as JTS has already indicated in prior briefing, the *Ellis* case is factually distinguishable, however, JTS maintains that its rationale extends to the present circumstances.

Fundamentally, JTS's argument in reliance on *Ellis* is one of judicial estoppel. Here, CLC sought a ruling from the Court that the contract had expired on October 15, 2014 (i.e. had not been renewed for a new 6-month term), treated the new arrangement as a tenancy-at-will, and pursued remedies under Idaho's unlawful detainer statute. Am. Compl. at ¶ 23, 58 (filed March 9, 2015). JTS took the position that the lease had been renewed for a new 6-month term and no unlawful detainer had occurred. The Court held that the lease was *not* renewed and that defendant was unlawfully present on the leased property between January 31, 2015 and February 15, 2015 after receiving notice to vacate from the prior owner of the leased property.

Now, inconsistent with its prior position that the Lease Agreement had not been renewed, CLC relies on the contract it successfully argued was not renewed in support of its award for attorney fees. The Court should estop CLC from doing so.

CLC next argues, in the alternative, that fees should be awarded pursuant Idaho Code § 6-324. Revealingly, however, CLC attempts to bootstrap the Lease Agreement's fee shifting provision, and also cites case law supporting the proposition that a contractual fee shifting provision prevails over a statute when awarding attorney fees. Opposition at 5 ("so, while JTS appears to argue that Section 6-324 would only allow CLC to recover fees that were incurred to regain possession of the property, *the fee provision of the Lease Agreement governs the relationship between the parties.*"). CLC's argument pertaining the application of Idaho Code § 6-324 can be read as little more than a reiteration of their request for attorney fees pursuant to the Lease Agreement's fee shifting provision. As argued above, CLC should be estopped from doing so.

In any event, CLC does not address JTS's alternative argument that even if fees are not cut off at a specific point in time, only fees incurred in litigating the unlawful detainer claim are recoverable pursuant to Idaho Code § 6-324. By its plain language, § 6-324 applies only to actions "brought under the provisions of this chapter," i.e., unlawful detainer actions. CLC has asserted three other claims beyond just an unlawful detainer claim (breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and malicious injury to property), and in addition to the three other causes of action, CLC also unsuccessfully sought an award of punitive/treble damages. CLC has not provided the Court with any means by which to

apportion fees incurred in litigating the unlawful detainer claim versus the other claims and damages alleged.

Additionally, even if the Court finds that fees are awardable pursuant the parties' contract, fees and costs incurred in litigating the intentional and malicious injury to property claim--a separate tort claim--are not governed under the Lease Agreement's attorney fee provision and should have been apportioned. The Lease Agreement's "Enforcement Expenses" provision, which allows for the recovery of fees and costs in certain circumstances, applies only to actions brought "to enforce any of the provisions of or to collect any sums due under the terms of this Agreement[.] *Commercial Lease Agreement* (Trial Ex. 1) at 5. Further, the Lease Agreement's "Indemnification of Lessor" provision (which was not cited as a basis for the recovery fees in CLC's *Memorandum of Attorney Fees and Costs*, but which CLC now appears to untimely rely on) clearly applies only to "activities or omissions...during the term of this Lease." Plainly, the intentional and malicious injury to property claim was not brought to enforce the Lease Agreement or collect any sums due under the Lease Agreement, nor does it deal with activities or omissions during the term of the Lease Agreement. Accordingly, the fees incurred in litigating the intentional and malicious injury to property claim are not recoverable and should have been apportioned out of the *Memorandum of Attorney Fees and Costs*.

As the proponent of the fees, the burden is on CLC to properly document its fees. *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) "[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation[.]"). Here, because CLC has not provided the Court with a means by which to apportion fees, the fees are unapportionable and should be disallowed. *See Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78, 910 P.2d 744,

750 (1996) (affirming the denial of the requested attorneys' fees where the non-recoverable fees could not be isolated from the recoverable fees).

**C. In The Alternative, The Fees Sought Are Unreasonable And Should Be Appropriately Reduced.**

If the Court determines that CLC is entitled to an award of costs and fees, the Court should, in the alternative, reduce the amount of costs and fees awarded to CLC to reflect Idaho Rule of Civil Procedure 54's express limitation on awarding only fees *reasonably* incurred. Idaho R. Civ. P. 54(e)(1). CLC correctly states that JTS has not challenged the reasonableness of the *rates* charged by CLC's attorneys. However, as argued previously in JTS' *Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54]*, the requested fee award is unreasonable because: (1) the overall fees requested are unreasonable given the lack of complex issues in this case, the amount in controversy, and the damages awarded; (2) the fees requested reflect duplication of effort and work; (3) the documentation reflects that CLC's counsel engaged in block-billing, rendering it impossible to determine the reasonableness of time expended on each discrete task; (4) CLC's counsel took an unreasonable amount of time to complete certain tasks; (5) CLC's counsel billed full attorney rates for administrative or clerical/paralegal tasks; (6) CLC's counsel billed an unreasonable amount of time for intra-firm communication and strategizing; (7) CLC's counsel billed an unreasonable amount of time for new counsel coming up to speed.<sup>2</sup> Notably, CLC does not respond to JTS' arguments that

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<sup>2</sup> JTS also included a Section in its Memorandum entitled "Other objections to fees." *Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54]* at 16-17 (filed January 31, 2018). Notably, CLC does not address any of these objections in its Opposition or Supplemental Opposition. If fees are to be awarded, the fee award should be appropriately reduced on these other grounds to reflect a reasonable fee award.

CLC's counsel charged full attorney rates for administrative/clerical/paralegal tasks, that counsel billed an unreasonable amount of time for communication/strategizing, or that CLC's counsel billed an unreasonable amount of time for new counsel coming up to speed. In light of the absence of any argument or proof that the amounts billed were reasonable, the Court should appropriately reduce the requested award of fees on these unopposed grounds.

CLC does take issue with JTS' arguments regarding the overall complexity of the case, duplication of effort, block-billing, and that CLC's counsel took an unreasonable amount of time to complete certain tasks, such as the written closing statement. Opposition at 2, 6-7. As to block-billing, CLC asserts that block-billing is only an issue if recoverable and non-recoverable fees are at issue. Opposition at 7. This argument is unpersuasive in two respects. First, the rationale cited by courts for reducing fees based on block-billing is not based on apportionment between recoverable and non-recoverable fees, but is "because block billing makes it more difficult to determine how much time was spent on particular activities" and "lump[s] together multiple tasks, making it impossible to evaluate their reasonableness." *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) and *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004). Second, despite CLC's argument to the contrary, apportionment between recoverable and non-recoverable fees *is* at issue in this case. Even if the Court determines CLC is not estopped from relying on the Lease Agreement's fee shifting provision, fees incurred in litigating the intentional and malicious injury to property claim are *not* recoverable pursuant to the Lease Agreement's "Enforcement Expenses" or "Indemnification of Lessor" provisions and should have been apportioned out.



CLC's remaining objections are based on the alleged actions of JTS' former counsel. Frankly, JTS's former counsel's staffing decisions, billing practices, and the amount of time it did or did not take former counsel to complete certain tasks are entirely irrelevant to the determination of the reasonableness of CLC's counsel's claimed fees. In addition to being irrelevant, CLC's arguments are entirely speculative. Simply because two attorneys were present for JTS does not mean that JTS was billed for the full rates of each attorney present. However, here, we know that CLC was billed the full time *and* full partner rates for two partners to attend trial and a deposition. CLC makes much of JTS listing attorney Graden Jackson as a fact witness. JTS acknowledges that it listed Mr. Jackson as a potential fact witness. Notably, however, fact witnesses are entitled to a \$20 per day fact witness fee for their time (and even then, only for the days they actually testify), *not* full partner-level attorney rates. Idaho R. Civ. P. 54(d)(1)(C)(iii).

It is CLC's counsel's claimed fees (not JTS' former counsel's fees) that are under scrutiny and must withstand a "reasonableness" review pursuant to Idaho R. Civ. P. 54(e). There is little doubt that had the tables been turned, CLC would also have performed a thorough review of the billing statements of JTS' former counsel and likewise made objections to the reasonableness of fees.<sup>3</sup> However, this is not what occurred in this case. CLC, as the prevailing party and proponent of their requested fees, bears the burden of establishing the *reasonableness* of the fee award they request. Attempting to speculatively poke holes and speculating that JTS'

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<sup>3</sup> It is worth noting the difference between recovering fees from a client that were incurred pursuant to an agreement between the attorney and client and seeking to have a third party pay those fees. In the latter circumstance, the Idaho Rules of Civil Procedure impose a reasonableness standard.

former counsel may have also charged unreasonable fees does nothing to help CLC meet the burden of establishing the reasonableness of the fee award requested.

Lastly, CLC attempts to suggest that there is some contradiction between JTS' assertion that CLC should be estopped from relying on the Lease Agreement's fee shifting provision and JTS asserting in its counterclaim entitlement to fees under the Lease Agreement's fee shifting provision. However, no such contradiction exists. JTS has maintained since the outset of this action that the Lease Agreement was renewed, which is entirely consistent with relying on the Lease Agreement's fee shifting provision.<sup>4</sup>

**D. CLC Is Not Entitled To Any Discretionary Costs.**

As noted above, CLC has made no argument in support of its requested award of discretionary costs. Since there has been no showing that this case is exceptional as is required in Idaho for an award of discretionary costs, the Court should disallow CLC's requested award of discretionary costs in the amount \$5,483.88 and the requested award of legal research costs in the amount of \$1,597.22 that was improperly categorized as attorney fees rather than discretionary costs. See *Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013); *Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214, 1229 (2016), *reh'g denied* (Mar. 31, 2016) (overturning trial court award of discretionary costs as abuse of discretion).

**E. CLC Is Not Entitled To Any Supplemental Attorney Fees Or Costs.**

On March 30, 2018, CLC filed its *Supplemental Memorandum of Attorney Fees and Costs*, which was supported by the *Supplemental Affidavit of William B. Ingram* (collectively,

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<sup>4</sup> CLC argues that JTS does not address the indemnification provision in the Lease Agreement in its argument. *Reply Brief in Support of Memorandum of Attorney Fees and Costs* at 4, fn. 1. Notably, however, CLC did not cite the indemnification provision in support of its claim for attorney fees.

“Supplemental Filings”). Therein, CLC seeks an award of an additional award of attorney fees in the amount of \$23,616.17, and additional costs in the amount of \$255.00. CLC’s Supplemental Filings have the same defects as CLC’s original attorney fee filings. As argued above, the untimely inclusion of the certification language from Rule 54 in the *Supplemental Affidavit of William B. Ingram* does not cure the fact that neither the original-filed Affidavit nor the *Memorandum of Attorney Fees and Costs* included the required certification language. Additionally, even if the Court were to determine that CLC is entitled to an award of its attorney fees, CLC’s supplemental time entries should also be appropriately reduced based on the use of block-billing. JTS thus incorporates by reference the arguments made above and in its *Memorandum in Support of Motion to Disallow Plaintiff’s Costs and Attorney Fees [I.R.C.P. 54]* (filed January 31, 2018), and *Supplemental Memorandum in Support of Motion to Disallow Plaintiff’s Costs and Attorney Fees [I.R.C.P. 54]* (filed February 9, 2018) in opposition to the Supplemental Filings.

In addition to these objections, JTS raises the following specific objections to the supplemental fees outlined in the Supplemental Filings:

(1) The two entries for WBI dated January 16, 2018 and January 17, 2018 were incurred prior to the filing of Plaintiff’s Memorandum of Attorney Fees and Costs (filed January 17, 2018). Because these fees were incurred prior to the filing of the Memorandum of Attorney Fees and Costs and were not timely included in the Memorandum of Attorney Fees and Costs, CLC has waived the right to claim these fees. Idaho R. Civ. P. 54(d)(4). Thus, even if the Court were to determine that CLC is entitled to an award of supplemental fees, that amount should be reduced by **\$944.00**.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of April, 2018, I caused to be served a true copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES [I.R.C.P. 54] AND OPPOSITION TO SUPPLEMENTAL MEMORANDUM OF ATTORNEY FEES AND COSTS by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson  
William B. Ingram  
STRONG AND HANNI  
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\_\_\_\_\_  
/s/ Lynnette M. Davis  
Lynnette M. Davis

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Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

SUPPLEMENTAL REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISALLOW PLAINTIFF'S  
COSTS AND ATTORNEY FEES  
[I.R.C.P. 54] AND OPPOSITION TO  
SUPPLEMENTAL MEMORANDUM OF  
ATTORNEY FEES AND COSTS

Defendant Johnson Thermal Systems, Inc., through counsel of record Hawley Troxell Ennis & Hawley LLP, hereby submits its Supplemental Reply Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54] and Opposition to Supplemental Memorandum of Attorney Fees and Costs.

**I. DISCUSSION**

On April 11, 2018, Defendant Johnson Thermal Systems ("JTS") filed its *Reply Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees [I.R.C.P. 54]*



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of April, 2018, I caused to be served a true copy of the foregoing SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW PLAINTIFF'S COSTS AND ATTORNEY FEES [I.R.C.P. 54] AND OPPOSITION TO SUPPLEMENTAL MEMORANDUM OF ATTORNEY FEES AND COSTS by the method indicated below, and addressed to each of the following:

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\_\_\_\_\_  
/s/ Lynnette M. Davis  
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Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

NOTICE OF APPEAL

TO: CALDWELL LAND & CATTLE, LLC, a/k/a CALDWELL LAND & CATTLE  
COMPANY, LLC AND THEIR COUNSEL OF RECORD IN THE ABOVE-CAPTIONED  
ACTION, STRONG AND HANNI, 102 South 200 East, STE 800, Salt Lake City, UT, 84111,  
AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, JOHNSON THERMAL SYSTEMS, INC. (“JTS”), appeals against the Respondent, CALDWELL LAND & CATTLE, LLC (“CLC”), to the Idaho Supreme Court from: (1) the *Judgment* entered in the above-entitled action on January 24, 2018; (2) the *Findings of Fact and Conclusions of Law* entered on January 5, 2018; and (3) the *Order Denying Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment* entered on April 4, 2018, Honorable Chris Nye, District Judge presiding. Copies of the above are attached to this Notice of Appeal.
2. Appellant has a right to appeal to the Idaho Supreme Court, and the judgment, decision, and order described in paragraph 1 above are appealable under Idaho Appellate Rule 11(a)(1).
3. A preliminary statement of the issues on appeal which the Appellant intends to assert in the appeal are:
  - a. Whether the District Court committed error when it ruled that, under the plain language of the Lease and the Third Amendment, JTS did not successfully exercise its option to extend the lease for an additional six-month term.
  - b. Whether the District Court committed error when it ruled that JTS and CLC’s predecessor-in-interest to the Lease were required to execute a written agreement to renew the Lease under the Third Amendment.
  - c. Whether the District Court committed error when it ruled that JTS did not intend to renew or extend the Lease for an additional six-month term under the Third Amendment.

- d. Whether the District Court committed error when it ruled that JTS was a month-to-month or at-will tenant after October 15, 2014.
- e. Whether the District Court committed error when it ruled that CLC's predecessor-in-interest to the Lease did not waive the right to contest the six-month extension when it accepted rent payments at the six-month extension rate.
- f. Whether the District Court committed error when it ruled that the parties had not substantially performed the Lease extension.
- g. Whether the District Court committed error when it ruled that JTS was liable for unlawful detainer and breach of the Lease.
- h. Whether the District Court committed error when it ruled that CLC was entitled to damages related to the removal of the temporary 480V power transformer, even though JTS was required to remove the transformer under the terms of the Lease and the Notice of Termination letter sent at CLC's insistence.
- i. Whether the District Court committed error when it allowed CLC to recover damages on behalf of Caldwell Peterbilt, LLC, a non-party to the suit.
- j. Whether the District Court committed error when it found that JTS had breached the covenant of good faith and fair dealing.
- k. Whether the District Court committed error when it ruled that JTS did not properly exercise its six-month option to extend the Lease but then ruled that JTS was liable for the rent due under the six-month option to extend.
- l. Whether the District Court committed error when it ruled that CLC was entitled to recover damages, and specifically lost profit damages, under the Indemnification

and Insurance Liability provisions of the Lease when the District Court had already ruled that the Lease had expired.

- m. Whether the District Court committed error when it ruled that JTS could not recover on any of its counterclaims.
- n. Whether the District Court committed error when it entered judgment in favor of CLC and against JTS.
- o. Whether the District Court committed error in awarding CLC damages in the amounts alleged.
- p. Whether the District Court committed error when it denied JTS' Combined Motion for Reconsideration and to Alter, Amend or Vacate Judgment.

**Appellant reserves the right to assert additional issues on appeal pursuant to Idaho**

**Appellate Rule 17(f).**

- 4. No order has been entered sealing all or any portion of the record.
- 5. Appellant requests the preparation of the reporter's transcripts in both hard copy and electronic format of the proceedings before the District Court. The date and title of the proceedings are:
  - a. August 23 – 25, 2017, Court Trial before the Honorable Christopher S. Nye. Reporter, Tamara A. Weber. The number of transcript pages estimated is 700.
  - b. August 2, 2017, hearing on Defendant's Motion in Limine. Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.

- c. April 21, 2016, hearing on Defendant’s Motion for Partial Summary Judgment.  
Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.
  - d. July 16, 2015, hearing on Plaintiff’s Motion for Partial Summary Judgment.  
Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.
6. The Appellant requests the following documents to be included in the clerk’s record in addition to those automatically included under **Idaho Appellate Rule 28**:
- a. Plaintiff’s Motion for Partial Summary Judgment (dated 4/30/2015);
  - b. Memorandum in Support of Motion for Partial Summary Judgment (dated 4/30/2015);
  - c. Memorandum in Opposition to Motion for Partial Summary Judgment (filed 7/02/2015);
  - d. Affidavit of Darrell Gustaveson (filed 7/02/2015);
  - e. Reply Memorandum in Support of Motion for Partial Summary Judgment (dated 7/09/2015);
  - f. Memorandum Decision and Order Denying Plaintiff’s Motion for Partial Summary Judgment (filed 8/14/2015);
  - g. Defendant’s Motion for Partial Summary Judgment (filed 2/12/2016);
  - h. Memorandum in Support of Motion for Partial Summary Judgment (filed 2/12/2016);

- i. Affidavit of Rebecca A Rainey in Support of Motion for Partial Summary Judgment (filed 2/12/2016);
- j. Plaintiff's Cross-Motion for Partial Summary Judgment (dated 3/23/2016);
- k. Memorandum in Opposition to Plaintiff's [Defendant's] Motion for Partial Summary Judgment and in Support of Plaintiff's Cross-Motion (dated 3/23/2016);
- l. Affidavit of Ryan C. Bullock in Support of Opposition to Motion for Partial Summary Judgment and Cross-Motion (dated 3/23/2016);
- m. Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Cross-Motions for Summary Judgment (dated 4/7/2016);
- n. Plaintiff's Reply Memorandum in Support of Cross-Motion for Summary Judgment (dated 4/14/2016);
- o. Order Granting Motion for Leave to Add Third Party and Denying Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross Motion for Partial Summary Judgment (filed 4/26/2016);
- p. Plaintiff's Pretrial Brief (dated 6/15/2017);
- q. Defendant's Pretrial Brief (dated 6/15/2017);
- r. Motion in Limine Regarding Evidence of Damages Alleged by Entities Other than Plaintiff (filed 7/18/2017);
- s. Defendant Johnson Thermal Systems' Memorandum in Support of Motion in Limine Regarding Evidence of Damages Alleged by Entities Other than Plaintiff (filed 7/18/2017);

- t. Affidavit of Rebecca A. Rainey (filed 7/18/2017);
- u. Memorandum in Opposition to Defendant's Motion in Limine (dated 7/26/2017);
- v. Affidavit of Ryan C. Bullock in Support of Memorandum in Opposition to Defendant's Motion in Limine (dated 7/26/2017);
- w. Defendant's Reply in Support of Motion in Limine (dated 7/31/2017);
- x. Affidavit of Rebecca A. Rainey in Support of Reply to Plaintiff's Opposition to Defendant's Motion in Limine (dated 7/31/2017);
- y. Plaintiff's Closing Trial Brief (dated 11/20/2017);
- z. Defendant's Proposed Findings of Fact and Conclusions of Law (filed 11/20/2017);
- aa. Findings of Fact and Conclusions of Law and Order to Prepare Final Judgment (filed 1/5/2018);
- bb. Judgment (filed 1/24/2018);
- cc. Defendant's Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 3/15/2018);
- dd. Defendant's Memorandum in Support of Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 3/15/2018);
- ee. Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider (dated 3/30/2018);
- ff. Order Denying Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 4/4/2018).

7. The Appellant requests that ALL exhibits admitted at the Court Trial be copied and sent to the Supreme Court.

8. I certify:

a. That a copy of this Notice of Appeal has been served on the reporter of whom a transcript has been requested as named below at the address:

Name and Address: Tamara A. Weber, 1115 Albany Street,  
Caldwell, ID 83605.

b. That Appellant has paid the deposit required by the District Court for preparation of the reporter's transcripts and will pay any balance due once Appellant has received the final costs.

c. That Appellant has paid the deposit required by the District Court for preparation of the clerk's record and will pay any balance due once Appellant has received the final costs.


d. That Appellant has paid the filing fee.

e. That service has been made upon all parties required to be served pursuant to

**Idaho Appellate Rule 20.**

DATED THIS 2<sup>nd</sup> day of May, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Lynnette M. Davis, ISB No. 5263  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of May, 2018, I caused to be served a true copy of the foregoing NOTICE OF APPEAL by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, UT 84111  
(Attorneys for Plaintiff)

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Clerk of the District Court  
Third Judicial District  
Canyon County  
1115 Albany Street  
Caldwell, ID 83605

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- Hand Delivered
- Overnight Mail
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- iCourt

Tamara A. Weber  
Court Reporter  
c/o Canyon County District Court  
1115 Albany Street  
Caldwell, ID 83605

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Facsimile:
- iCourt

  
\_\_\_\_\_  
Lynnette M. Davis

FILED

Signed: 1/24/2018 04:20 PM  
Date / Time:

CHRIS YAMAMOTO  
CLERK OF THE DISTRICT COURT

By: *S. Swanson*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND AND CATTLE, )  
LLC, an Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

Case No.: CV-2015-587

Plaintiff, )

**JUDGMENT**

vs. )

JOHNSON THERMAL SYSTEMS, INC., )

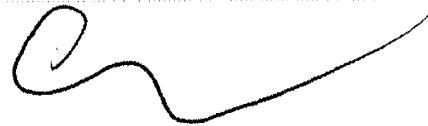
Defendant. )

JUDGMENT IS ENTERED AS FOLLOWS:

In favor of Plaintiff on Plaintiff's claims for unlawful detainer and breach of contract against Defendant, in the amount of \$86,389.26, plus statutory interest as provided by law.

In favor of Plaintiff on Defendant's counterclaims.

DATED: January 22, 2018



Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of January, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

Robert Janicki  
STRONG & HANNI  
102 South, 200 East, Suite 800  
Salt Lake City, Utah 84111

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[rjanicki@strongandhanni.com](mailto:rjanicki@strongandhanni.com)

Rebecca Rainey  
FISHER RAINEY HUDSON  
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\_\_\_\_\_  
Deputy Clerk Signed: 1/24/2018 04:21 PM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND AND CATTLE, )  
LLC, an Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )

Plaintiff, )

vs. )

JOHNSON THERMAL SYSTEMS, INC., )  
Defendant. )

Case No.: CV-2015-587

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**ORDER TO PREPARE A FINAL  
JUDGMENT**

This matter is ripe for decision after a court trial.

**I. Facts**

In February 2012, Plaintiff's predecessor in interest, the Gilbert Family Trust Partnership ("Gilbert"), and Defendant entered into a commercial lease agreement ("Lease Agreement") whereby Gilbert leased real property located at 1505 Industrial Way in Caldwell, Idaho ("the Property") to Defendant for a 13-month term. (Ex. 1).

The Lease Agreement had a renewal option that required Defendant to give written notice of its intent to renew at least 60 days prior to the lease expiration date. The Lease Agreement required that all amendments, modifications, or changes to the lease must be in writing. Gilbert

and Defendant executed three separate written amendments to the Lease Agreement. The First Amendment extended the lease term to April 15, 2014. (Ex. 2).

In 2014, Defendant had a new facility under construction at different location. Defendant planned on moving into its new facility once it was finished. Defendant was not certain when it would be completed, but believed it would be done by late 2014 to early 2015.

In April 2014, Defendant, through Sheri Johnson, and Gilbert, through Lincoln Hagood, discussed plans for renewing the lease beyond April 15, 2014. In an April 1<sup>st</sup> email to Ms. Johnson, Mr. Hagood noted that Gilbert knew about Defendant's plan to move into a new facility and advised Ms. Johnson that Gilbert may have buyers interested in the real property. (Ex. 4). He presented Ms. Johnson with various renewal terms at different rates, which included a month-to-month, a six-month, and a one-year term.

On April 10<sup>th</sup>, Ms. Johnson told Mr. Hagood that Defendant "would like to do a 6 month lease with the option to go month to month for an additional 3-6 months." (*Id.*). The parties agreed to a six-month extension. Defendant and Gilbert executed the Third Amendment to the Lease Agreement in mid-April 2014. (Ex. 3). The Third Amendment extended the lease term to October 15, 2014. The Third Amendment included a renewal option that provided:

At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:

- a. Six Month Term: Base Rent = \$6,000/mo.
- b. Month to Month Term: Base Rent = \$6,250/mo.

(Ex. 3, ¶3). The parties agreed that "All other terms and conditions of the Lease Agreement, not specifically amended hereby, remain in full force and effect." (*Id.*, ¶4).

In summer-fall 2014, Gilbert and Defendant discussed possibly extending the lease beyond October 15, 2014. In its communications with Gilbert, Defendant reaffirmed its intent to

vacate the property as soon as it could occupy its new facility. Due to the uncertainty about when it would be able to move into its new facility, Defendant could not give Gilbert a definite answer on when it would move out, whether it intended to renew, and if so, for how long. Defendant's officers told Mr. Hagood that they hoped to move out by December, but that it could be as late as February or March. (Exs. 5-7). Mr. Hagood asked Defendant to keep him informed of its plans regarding the Property.

Defendant paid rent to Gilbert in the amount of \$6,000/month, plus triple net, for November and December, 2014. Gilbert accepted those rent payments. Unlike Gilbert and Defendant's previous lease renewals, which they put in writing before the lease term expired, they did not execute a written agreement or amendment extending the lease beyond October 15, 2014. They did not have an oral agreement to extend the lease beyond October 15<sup>th</sup>.

In early December 2014, Mr. Hagood notified Defendant that Gilbert would sell the Property and that the new tenant wanted to occupy it ASAP. (Ex. 9). Gilbert and Plaintiff wanted to close before December 31, 2014.

On December 11, 2014, Gilbert sent a written notice to Defendant terminating the lease and requesting that Defendant vacate and surrender possession of the property, including removing its trade fixtures, fencing, and personal property, by January 31, 2015. (Ex. 13).

Gilbert and Plaintiff closed on the Property on or about December 31, 2014. On January 29, 2015, Defendant's counsel informed Plaintiff's counsel that Defendant would not vacate the Property until April 15, 2015, arguing that it exercised the Third Amendment's 6-month renewal option by paying the \$6,000/month base rent, plus triple-net expenses. (Ex. 17).

Defendant vacated the Property on or about February 15, 2015. Prior to vacating, Defendant's officers discussed making repairs and removing items from the Property. (Ex. 18).

Defendant made no repairs to the Premises after it vacated the Property. After Defendant vacated the Property, it instructed Idaho Power to remove a 480V electrical transformer that Defendant installed in February 2014.

Plaintiff is a holding company for Peterbilt. Plaintiff bought the Property intending to lease it to Peterbilt. Plaintiff needed to have proof of a lease in order to close on the Property. Plaintiff and Peterbilt entered into a lease agreement sometime before Plaintiff closed on the Property. (Ex. 21, "Peterbilt Lease"). Peterbilt wanted to occupy the Property on February 1, 2015; however, it was unable to occupy the Property until May 2015. Plaintiff presented evidence of damages it and Peterbilt incurred as a result of being unable to occupy the Property until May 2015.

Plaintiff filed this lawsuit on January 22, 2015. In its Verified Amended Complaint, Plaintiff alleges four claims for relief: unlawful detainer; breach of contract; breach of the implied covenant of good faith and fair dealing; and intentional and malicious injury to property. Defendant filed counterclaims for breach of contract – constructive eviction; refund of security deposit; and refund of pro rata share of February 2015 rent. Third party defendant Colliers Paragon, LLC was dismissed out of the case by stipulation.

## **II. Standard of review**

The trial court is the fact-finder in a bench trial. "[I]t is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses." *Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 230 (2015). "Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Id.* An appellate court "will liberally construe

the trial court's findings of fact in favor of the judgment entered.” *Id.* The trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Id.*; I.R.C.P. 52(a). Preponderance of the evidence is the civil case standard. *Ebert v. Newton*, 97 Idaho 418 (1976).

### III. Discussion

#### A. Defendant was a month-to-month or at-will tenant after October 15, 2014

The main issue in this lawsuit is whether Defendant properly exercised the Third Amendment’s 6-month renewal option. Based on a review of the record and applicable law, the Court finds that Defendant did not properly exercise the 6-month option, but carried on as a month-to-month or at-will tenant after October 15, 2014.

The plain language of the Lease Agreement required all amendments, modifications, or changes to be in writing and signed by the parties. Defendant and Gilbert put all of their previous renewals in writing before the lease term expired. The Third Amendment did not alter or eliminate the writing requirement. The Lease Agreement required any renewal, including a renewal under the Third Amendment, to be put in writing.

A provision in a contract that requires modifications to be in writing can be avoided by the parties to the contract where their words, acts, or conduct amount to a waiver, modification, rescission, or abandonment of that provision, or where a party by his acts or conduct is estopped to rely on it. *Rule Sales & Serv., Inc. v. U.S. Bank Nat. Ass'n.*, 133 Idaho 669, 675 (Ct. App. 1999). Such a waiver or modification “may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other.” *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717 (2014); *Idaho Migrant Council, Inc. v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 806 (Ct.App.1986) (“[A]n implied waiver occurs where a party's neglect to insist upon enforcing a right results in prejudice to another party.”) “Waiver is foremost a question of



intent,” and whether a waiver or modification has been proven is for the trier of fact. *Pocatello Hosp., LLC*, 156 Idaho at 718-719; *Dennett v. Kuenzli*, 130 Idaho 21, 26 (Ct. App. 1997). There must be “substantial evidence” of a waiver; “in order to establish waiver the intention to waive must clearly appear...” *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 520 (1982). Leniency on the part of the lessor in demanding or ensuring strict compliance with contract provisions does not necessarily equal waiver. *Id.* at 522. Waiver of one contract provision does not equal waiver of all contract provisions. *Id.*; 13 Williston on Contracts § 39:18 (4th ed.); 5 Causes of Action 2d 357 (1994). A party who waived one provision may still insist on strict compliance with other contract provisions. *Ritchie*, 103 Idaho at 522. Waiver should be decided on a case by case basis. *Id.* at 521.

Per the terms of the Lease Agreement and the Third Amendment, and consistent with the parties’ prior conduct, Defendant and Gilbert needed to execute a written agreement to renew the lease. That was not done. Nothing the record demonstrates a waiver of the writing requirement.

The parties’ intent is important in determining if a lease was renewed and the term of the renewal. *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho 640 (Ct. App. 1985). Generally, a fixed-term tenancy becomes a tenancy at will when, after the lease term expires, the landlord expressly or implicitly permits the tenant to stay on the property, the landlord accepts rent from the tenant, and the parties have not reached an agreement to extend the lease. *Id.*; *Texaco, Inc. v. Johnson*, 96 Idaho 935 (1975); *Johnston v. Schmidt*, 76 Idaho 470 (1955); 45 A.L.R.2d 827 (1956). A tenancy at will may be terminated by giving written notice to the tenant at least one (1) month before the termination date/date to vacate. *Id.*; I.C. § 55-208.

Until the present dispute arose, neither Defendant nor Gilbert intended to renew the lease for a six-month term after October 15, 2014. They did not have an agreement to renew the lease.

In discussions leading up to October 2014, Defendant made clear that it intended to move out as soon as its new facility was finished. Defendant's proposed exit dates were less than six months after October 15, 2014. Ms. Johnson told Mr. Hagood that after the lease expired in October 2014, Defendant wanted to go "month to month for an additional 3-6 months." (Ex. 4). Defendant's communications did not demonstrate intent to be any more than a month-to-month tenant after October 15, 2014. Gilbert intended to sell the property. Defendant's continued possession of the Property and Gilbert's acceptance of the \$6,000/month rent checks for November and December 2014 did not demonstrate intent to extend the lease for six months. *See* 29 A.L.R.4th 903 (1984). Defendant was a month-to-month tenant after October 15, 2014. This is consistent with Defendant's stated intent to vacate as soon as it could move to its new facility.

B. Defendant is liable for unlawful detainer and breach of contract

Defendant is liable for unlawful detainer because it failed to vacate the property within the timeframe set forth in the notice to vacate. I.C. §§ 6-303(1); 55-208(1); *Schmidt, supra*. Plaintiff, as the successor landlord, is entitled to compensation for damages caused by the unlawful detainer. I.C. § 6-303(1). "I.C. s 6-316 allows a landlord in an unlawful detainer action to recover, in addition to possession of his property, damages and rent found due. The landlord who seeks to recover damages from the holdover tenant, has the burden of proving that the claimed damages are the proximate or direct result of the unlawful detention." *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940 (1975); *Brooks v. Coppedge*, 71 Idaho 166, 170 (1951). Damages may include losses "sustained for a period subsequent to the unlawful detainer because the premises has remained unoccupied[.]" 32 A.L.R.2d 582 (1953).

The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages. *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991) (plaintiff has the burden of proving the existence of a contract and

the fact of its breach); *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985) (the damages recoverable must be caused by the breach); *Watkins Co., LLC v. Storms*, 152 Idaho 531, 539, 272 P.3d 503, 511 (2012) (the amount of damages must be proved).

*Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278 (2013). There is no dispute that the parties had a contract. Defendant is liable for breach of contract because it failed to vacate the Property after its term expired; removed the transformer after the term expired and without Plaintiff's permission<sup>1</sup>; and failed to make repairs. (*See*, Ex. 1, "Surrender of Premises;" "Time of Essence;" "Maintenance and Repair;" and "Improvements"). Defendant breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option. *See Drug Testing Compliance Grp., LLC v. DOT Compliance Serv.*, 161 Idaho 93 (2016).

Plaintiff may recover damages caused by the breach of contract. *Mosell Equities, LLC, supra*. "Consequential damages for a breach of contract are recoverable if they were within the reasonable contemplation of the parties at the time of contracting and have been established with reasonable certainty." *Galindo v. Hibbard*, 106 Idaho 302, 306-07 (Ct. App. 1984); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 97 (1986) (The damages must be reasonably foreseeable at the time of the contract). "The test for 'reasonable certainty' has been held by this court to require only that the damages be taken out of the realm of speculation." *Circle C Ranch Co. v. Jayo*, 104 Idaho 353, 356 (1983). "These requirements apply to damages for lost profits arising from breach of a lease agreement, unless the agreement provides a different measure of damages." *Galindo*, 106 Idaho at 306-307 (citing *Lamb v. Robinson*, 101 Idaho 703 (1980)).

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<sup>1</sup> There is no private cause of action for a violation of I.C. § 18-7001. A private cause of action is not necessary to assure the effectiveness of the provision. *See Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171 (1996); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94 (1986).

In the Lease Agreement, Defendant agreed “to indemnify and hold Lessor harmless from any damages, suits, judgments, liabilities or expenses arising from the use and occupancy of the premises by Lessee, Lessee’s agents, employees or customers or Lessee’s guests caused by either negligent or intentional acts,” (Ex. 1, “Liability Insurance”); and to “indemnify Lessor against liability on all claims for damages and injuries to persons or property that are claimed to have resulted from the activities or omissions of Lessee or its agent or employees during the term of the Lease.” (Ex. 1, “Indemnification of Lessor”).

Based on Defendant’s unlawful detainer and breach of contract<sup>2</sup>, the terms of the Lease Agreement and amendments, and the applicable law, Plaintiff may recover the following damages from Defendant: rent due under the Lease Agreement through April 15, 2015 (\$7,603.12) (Ex. 22); damages and costs caused by Defendant’s removal of the transformer (\$7,929.00) (Exs. 22 and 26); Peterbilt’s rent and triple-net for its old lease (\$14,587.92) (Exs. 22-24); cost of Peterbilt’s idle employee (\$7,696.22) (Exs. 22 and 25); costs to repair the Property (\$2,600.00) (Exs. 22, 27, and 28); and Peterbilt’s lost profits (\$45,973.00) (Exs. 22 and 29). Defendant did not show that Plaintiff failed to mitigate its damages. *See McCormick Int’l USA, Inc. v. Shore*, 152 Idaho 920 (2012); *Consol. AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228 (1996). The record does not support Defendant’s other affirmative defenses.

Plaintiff asks the Court to award treble damages. I.C. § 6-317; *Barth v. Canyon Cty.*, 128 Idaho 707 (1996). “[A]bsent a showing of malice, wantonness or oppression, treble damages cannot properly be awarded in an action for unlawful detainer.” *Mecham v. Nelson*, 92 Idaho 783, 789 (1969). Plaintiff failed to show that Defendant’s conduct was malicious, wanton, or oppressive. The Court cannot award treble damages.

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<sup>2</sup> Breach of the implied covenant of good faith and fair dealing is a breach of contract theory. *DOT Compliance Service*, 161 Idaho at 103.

The total award is **\$86,389.26**.


In light of the Court's decision, Defendant cannot prevail on its counterclaims. Defendant's security deposit is set off against Plaintiff's award.

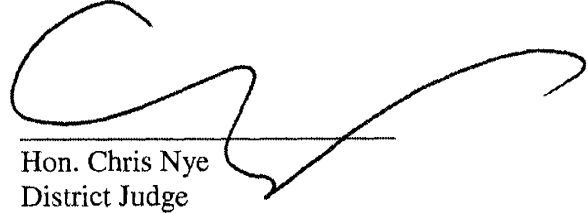
**IV. Conclusion**

For the reasons set forth above, Plaintiff is entitled to an award of \$86,389.26 on its unlawful detainer and breach of contract claims. Defendant cannot recover on its counterclaims.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that Plaintiff is entitled to a total award of \$86,389.26. IT IS FURTHER ORDERED that Plaintiff's counsel is to prepare a final judgment that is consistent with these findings of fact and conclusions of law

DATED: January , 2018

  
Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below: Signed: 1/5/2018 11:47 AM

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Deputy Clerk



New counsel substituted in for JTS on January 23, 2018. Judgment was entered January 24, 2018. JTS timely filed its combined post-judgment motions on March 15, 2018.<sup>1</sup> CLC filed its opposition on March 30, 2018.

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## II. JTS's combined post-judgment motions

JTS asks the Court to reconsider its findings of fact and conclusions of law and decide that (1) JTS properly exercised the six-month renewal option under the Third Lease Amendment; and (2) even if JTS did not exercise the six-month renewal, CLC's damages should be limited to those damages related to JTS's failure to timely vacate. JTS asks the Court to alter, amend, or vacate judgment accordingly.

Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. Additionally, this Court will not substitute its view of the facts for that of the trial court. This Court exercises free review over matters of law.

*Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 230 (2015) (internal citations omitted). Generally, preponderance of the evidence is the standard in a civil case. *Ebert v. Newton*, 97 Idaho 418 (1976).

On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. In other words, if the

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<sup>1</sup> Motions to reconsider, or to alter or amend judgment, must be filed and served within 14 days after entry of judgment. I.R.C.P. 11.2(b); 59. However, due to a clerical error, the Court granted JTS's motion to enlarge time to file its combined post-judgment motions.



original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration.

*Fragnella v. Petrovich*, 153 Idaho 266, 276 (2012) (referring to internal cites omitted); I.R.C.P. 11.2(b); *Johnson v. Lambros*, 143 Idaho 468, 473 (Ct. App. 2006) (A party may ask a trial court to correct “errors of law or fact in the initial decision.”).

I.R.C.P. 59(e) permits a trial court to alter or amend a judgment. “Pursuant to I.R.C.P. 59(e), a district court can correct legal and factual errors occurring in proceedings before it.” *In re SRBA*, 149 Idaho 532, 542 (2010). The Court’s decision on a Rule 59(e) motion is discretionary. *Id.*; *see also*, I.R.C.P. 60 (Relief under Rule 60 is discretionary).

After considering the parties’ arguments and the applicable law, including the arguments and legal authority JTS cited in its memorandum in support of its combined post-judgment motions, the Court finds that its findings of fact and conclusions of law, entered January 5, 2018, are correct. The Court therefore denies JTS’s combined motions for reconsideration, and to alter, amend, or vacate judgment.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. JTS’s motion for reconsideration is denied; and
2. JTS’s motion to alter, amend, or vacate judgment is denied.

DATED: April 4th, 2018

  
\_\_\_\_\_  
Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

Signed: 4/4/2018 02:12 PM

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

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\_\_\_\_\_

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND AND CATTLE, LLC., )  
an Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC., )

Plaintiff-Respondent, )

-vs- )

JOHNSON THERMAL SYSTEMS, INC., )  
an Idaho corporation, )

Defendant-Appellant. )

Supreme Court No. 46056-2018

CLERK'S CERTIFICATE  
OF APPEAL

Appeal from the Third Judicial District, Canyon County, Idaho

HONORABLE CHRISTOPHER S. NYE, Presiding

Case Number from Court: CV-2015-587

Order of Judgment appealed from: The Order Denying Combined Motions for  
Reconsideration and to Alter, Amend, or Vacate Judgment,  
signed and filed April 4, 2018.

The Judgment, signed January 22, 2018 and filed January 24, 2018.

The Findings of Fact and Conclusions of Law & Order to Prepare a Final Judgment,  
signed January 4, 2018 and filed January 5, 2018.

Attorneys for Appellant: Lynnette M. Davis, ISB No. 5263,  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000, PO Box 1617, Boise, Idaho 83701-1617

Attorneys for Respondent: Robert L. Janicki, Graden P. Jackson (Pro Hac Vice),  
William B. Ingram (Pro Hac vice), STRONG & HANNI  
102 South 200 East, Ste. 800, Salt Lake City, Utah 84111

Appealed by: Johnson Thermal Systems, Inc, an Idaho corporation

Appealed against: Caldwell Land & Cattle, LLC

Notice of Appeal filed: May 2, 2018

Notice of Cross-appeal filed: None

Appellant fee paid: \$129.00 filing fee paid on May 2, 2018. \$100.00 was deposited for the Clerk's Record and \$200.00 deposited for transcripts on May 7, 2018.

Request for additional Clerk's Record filed: No

Request for additional Reporter's Transcript filed: No

Name of Reporter: Tamara Weber

Was Reporter's Transcript requested: Yes

CHRIS YAMAMOTO, Clerk of the District  
Court of the Third Judicial  
District of the State of Idaho,  
in and for the County of Canyon.

By:



Deputy

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CALDWELL LAND AND CATTLE,	)	
LLC, an Idaho limited liability company	)	Case No.: CV-2015-587
a/k/a CALDWELL LAND & CATTLE	)	
COMPANY, LLC,	)	
	)	<b>ORDER AWARDING COSTS AND</b>
Plaintiff,	)	<b>ATTORNEY FEES TO PLAINTIFF</b>
	)	
vs.	)	
	)	
JOHNSON THERMAL SYSTEMS, INC.,	)	
	)	
Defendant.	)	

---

On April 19, 2018, the Court heard argument on Defendant’s motion to disallow Plaintiff’s costs and attorney fees. The parties previously filed accompanying memoranda, affidavits, and billing schedules. The Court took the motion under advisement.

**I. Case History**

Plaintiff filed its amended complaint on March 24, 2015, asserting four (4) claims against Defendant: (1) unlawful detainer; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) intentional and malicious injury to property.

Defendant filed its answer and counterclaim on April 10, 2015, asserting three (3) counterclaims against Plaintiff: (1) breach of contract / constructive eviction; (2) refund of security deposit; and (3) refund of pro-rated share of February 2015 rent.

The Court denied both parties’ competing motions for partial summary judgment.

In April 2016, Defendant filed a third-party complaint against Colliers Paragon LLC for tortious interference with contract. They stipulated to dismiss Colliers Paragon in April 2017.

William Ingram appeared *pro hac vice* for Plaintiff in July 2017.

The Court held a three-day bench trial in August 2017. The parties submitted post-trial briefing. The Court entered its findings of fact and conclusions of law on January 5, 2018. The Court determined that Defendant was liable for unlawful detainer and breach of contract, and awarded \$86,389.26, plus statutory interest, to Plaintiff. The Court ruled in Plaintiff's favor on Defendant's counterclaims.

Plaintiff filed its memorandum of costs and attorney fees ("Cost/Fee Memo"), William Ingram's supporting affidavit ("Ingram Affidavit"), and Schedule 1 on January 17, 2018.

New counsel substituted in for Defendant on January 23, 2018.

Judgment was entered January 24, 2018.

The Court denied Defendant's combined post-trial motions to reconsider and to alter, amend, or vacate judgment.

Plaintiff filed its supplemental memorandum of fees and costs, William Ingram's supplemental affidavit in support, and Schedule 2 (fees and expenses billed since January 16, 2018) on April 2, 2018.

On May 3, 2018, the Court entered an order staying execution of the judgment pending appeal to the Idaho Supreme Court.

Plaintiff requests costs and attorney fees under the parties' Commercial Lease Agreement and I.C. § 6-324. Plaintiff requests a total award of \$213,450.84, which consists of \$10,981.40 in costs and \$202,469.44 in attorney fees.

Defendant objects on several grounds.

## II. Discussion

### A. Plaintiff prevailed

I.R.C.P. 54 permits the Court to award costs and attorney fees to the prevailing party in a civil action. For the purposes of this motion, the parties agree that Plaintiff is the prevailing party. The Court also agrees, and notes that determining prevailing party status is a discretionary matter, based on the overall outcome of the entire action. I.R.C.P. 54(d)(1)(B); *Poole v. Davis*, 153 Idaho 604 (2012); *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540 (2012); *Nguyen v. Bui*, 146 Idaho 187 (Ct. App. 2008). Overall, Plaintiff prevailed in this action.

### B. Plaintiff timely and properly filed its request for costs and attorney fees

Defendant argues that the Court lacks jurisdiction to consider Plaintiff's request because neither the Cost/Fee Memo, nor the Ingram Affidavit, stated "that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule." See I.R.C.P. 54(d)(4) (certification requirement). Under Rule 54(e)(5), attorney fees are treated as costs and must be included in the memorandum of costs. "Failure to timely file a memorandum of costs is a waiver of the right to costs." I.R.C.P. 54(d)(4).

The Cost/Fee Memo and the Ingram Affidavit, viewed together, must substantially comply with Rule 54(d). *Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 102 (2012); *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 132 Idaho 754 (1999). The Court finds that the Cost/Fee Memo and the Ingram Affidavit, together, satisfy the certification requirements of Rule 54(d). See *id.* Plaintiff timely and properly filed its request for costs and fees, and the Court can consider it.

C. The Court awards \$153,379.20 in costs and attorney fees

1. *Plaintiff is entitled to \$3,379.20 in costs as a matter of right*

Plaintiff requests \$5,497.52 in costs as matter of right. Under Rule 54(d)(1)(C), Plaintiff is entitled to its court filing fees, service fees, witness fees, and deposition transcript fees. *Id.*

It does not appear that charges or fees for the court trial transcript are recoverable as a matter of right. *See id.* Plaintiff's \$1,481.12 "Trial Transcript Fee" will be treated as a discretionary cost, addressed *infra*. *See* I.R.C.P. 54(d)(1)(D) ("Additional items of costs not enumerated in, or in an amount greater than listed in subpart (C)," are discretionary costs).

Plaintiff lists its "Copying Charges" as a recoverable cost. Rule 54(d)(1)(C) allows the Court to award costs for copies of particular documents, and/or for preparation of certain items/materials. The narratives of the "Copying Charges" listed in Schedule 1 do not specify what documents or items/materials were copied. The Court is therefore unable to discern which, if any, of the "Copying Charges" falls under subpart (C). Plaintiff's "Copying Charges" will be treated as discretionary costs.

Fees on execution of a judgment are added and collected as set forth in Rule 54(d)(1)(F). The Court declines to include them in this order.

Plaintiff is therefore entitled to \$3,379.20 in costs as a matter of right.

2. *The Court declines to award discretionary costs*

Plaintiff requests \$5,483.88 in discretionary costs. When added to the discretionary costs identified in the preceding section, the total discretionary fee request comes out to \$7,347.20.

To recover discretionary costs, Plaintiff must show that "the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against



the adverse party.” I.R.C.P. 54(d)(1)(D) *Easterling v. Kendall*, 159 Idaho 902 (2016). Awarding costs under Rule 54(d)(1)(D) is within the Court’s discretion. *Id.*

“Whether discretionary costs...are ‘exceptional’ depends on whether ‘the nature of the case was itself exceptional.’” *Easterling*, 159 Idaho at 917. In *Hoagland v. Ada Cnty*, the Idaho Supreme Court set forth factors a district court should consider when determining whether costs are exceptional: “whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary cost that could have been easily avoided. Most importantly, however, a court should explain *why* the circumstances of a case render it exceptional.” 154 Idaho 900, 914 (2013); *Easterling, supra*.

The *Hoagland* factors are not present or applicable here, and the circumstances of this case do not render it exceptional. The Court declines to award discretionary costs, as it is not convinced that the claimed costs are necessary and exceptional to this litigation, and which, in the interest of justice, ought to be assessed against Defendant.

### 3. *The Court awards \$150,000 in attorney fees*

The Court may award reasonable attorney fees to the prevailing party when provided for by contract or statute. I.R.C.P. 54(e)(1). Plaintiff requests attorney fees pursuant to the Commercial Lease Agreement and to I.C. § 6-324.

The Commercial Lease Agreement provides:

**ENFORCEMENT EXPENSES:** The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney’s fee to be fixed by such court, in addition to the costs allowed by law

(*Id.*, p. 5). Despite the Court’s ruling that Defendant became a month-to-month tenant after October 2014, Plaintiff may still recover its requested attorney fees under the parties’

Commercial Lease Agreement. I.R.C.P. 54; *Bauchman-Kingston P'ship, LP v. Haroldson*, 149 Idaho 87 (2008).

Plaintiff may also recover attorney fees pursuant to I.C. § 6-324, which provides: “In any action brought under the provisions of this chapter, except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees...” *Id.*; *Action Collection Service, Inc. v. Haught*, 146 Idaho 300 (Ct. App. 2008).

The calculation of the amount of attorney fees is committed to the sound discretion of the trial court. *Eastern Idaho Agricultural Credit Ass'n v. Neibaur*, 133 Idaho 402 (1999). The Court may only award “reasonable” attorney fees, and it must consider the factors set forth in Rule 54(e)(3). The Court may apportion the fee award if it deems that a party partially prevailed. I.R.C.P. 54(d)(1)(B); *Nguyen v. Bui*, 146 Idaho 187, 192-93 (Ct. App. 2008).

The Court considered the I.R.C.P. 54(e)(3) factors as follows:

(A) The time and labor required. Plaintiff commenced this action in January 2015. Plaintiff brought four (4) claims against Defendant. Defendant asserted three (3) counterclaims against Plaintiff. The parties tried this matter at a three-day court trial in August 2017. Each side had multiple attorneys appear on their behalf. The parties engaged in an average motion practice. The parties took a total of ten (10) depositions. Eleven (11) witnesses testified at the court trial.

(B) The novelty and difficulty of the questions. This case mostly involved questions related to contracts, leases, and unlawful detainer.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. The attorneys handling this case are experienced in these areas of law.

(D) The prevailing charges for like work. The fees charged are comparable for similar work of similarly skilled attorneys under similar circumstances.

(E) Whether the fee is fixed or contingent. The fees were charged at an hourly rate, ranging from \$200-300/hour.

(F) The time limitations imposed by the client or the circumstances of the case. The Court is unaware of any time limitations imposed by the client or the circumstances of the case.

(G) The amount involved and the results obtained. Plaintiff prevailed on its claims for breach of contract, breach of implied covenant of good faith and fair dealing, and unlawful detainer. Plaintiff prevailed against Defendant's counterclaims. The Court awarded \$86,389.26 to Plaintiff. Plaintiff was unsuccessful on its malicious injury to property claim.

(H) The undesirability of the case. This case was not a particularly undesirable one.

(I) The nature and length of the professional relationship with the client. The Court is unaware of the nature and length of the professional relationship with the client.

(J) Awards in similar cases. The Court is unaware of amounts awarded in similar cases.

(K) The reasonable cost of automated legal research. Plaintiff requests \$1,771.89 in legal research costs. This cost was reasonably necessary in preparing Plaintiff's case.

(L) Any other factor that is appropriate in this case. The Court is unaware of any other factor, not already enumerated in Rule 54(3)(A)-(K), that is appropriate or applicable.

Based on a review of the record, including the documents and arguments provided in support of, and in opposition to, Plaintiff's request for costs and fees, and the applicable legal standards, the Court finds that a reasonable attorney fee award is \$150,000.

### III. Conclusion

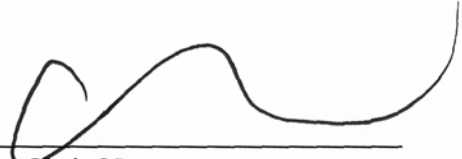
Plaintiff prevailed in this action. Plaintiff timely and properly filed its request for costs and attorney fees. Plaintiff is entitled to \$3,379.20 in costs as a matter of right. Plaintiff may recover attorney fees under the parties' contract and I.C. § 6-324. A reasonable attorney fee award in this case is \$150,000.

### ORDER

#### IT IS HEREBY ORDERED THAT:

1. Defendant's motion to disallow costs and attorney fees is denied, in part, and granted, in part, as set forth in this order; and
2. Plaintiff is awarded a total (\$) amount of \$153,379.20 in costs and attorney fees.

DATED: May 11, 2018

  
\_\_\_\_\_  
Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

Signed: 5/15/2018 08:02 AM

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

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102 South, 200 East, Suite 800  
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*T. Grant*

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND AND CATTLE, )  
LLC, an Idaho limited liability company )  
a/k/a CALDWELL LAND & CATTLE )  
COMPANY, LLC, )  
Plaintiff, )  
vs. )  
JOHNSON THERMAL SYSTEMS, INC., )  
Defendant. )

Case No.: CV-2015-587  
**AMENDED JUDGMENT**


JUDGMENT IS ENTERED AS FOLLOWS:

In favor of Plaintiff on Plaintiff's claims for unlawful detainer and breach of contract against Defendant, in the amount of \$86,389.26, plus statutory interest as provided by law.

In favor of Plaintiff on Defendant's counterclaims.

Plaintiff is awarded \$153,379.20 in costs and attorney fees.

DATED: May 14, 2018

  
\_\_\_\_\_  
Hon. Chris Nye  
District Judge

**CERTIFICATE OF SERVICE**

Signed: 5/15/2018 08:00 AM

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018 a true and correct copy of the above and foregoing document was addressed and delivered as indicated below:

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*T. Crawford*

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Deputy Clerk

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wsmith@hawleytroxell.com

Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-2015-587

AMENDED NOTICE OF APPEAL

TO: CALDWELL LAND & CATTLE, LLC, a/k/a CALDWELL LAND & CATTLE  
COMPANY, LLC AND THEIR COUNSEL OF RECORD IN THE ABOVE-CAPTIONED  
ACTION, STRONG AND HANNI, 102 South 200 East, STE 800, Salt Lake City, UT, 84111,  
AND THE CLERK OF THE ABOVE-ENTITLED COURT.



NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, JOHNSON THERMAL SYSTEMS, INC. (“**JTS**”), appeals against the Respondent, CALDWELL LAND & CATTLE, LLC (“**CLC**”), to the Idaho Supreme Court from: (1) the *Amended Judgment* entered in the above-entitled action on May 15, 2018; (2) the *Findings of Fact and Conclusions of Law* entered on January 5, 2018; (3) the *Order Denying Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment* entered on April 4, 2018; and (4) the *Order Awarding Costs and Attorney Fees to Plaintiff* entered on May 15, 2018, Honorable Chris Nye, District Judge presiding. Copies of the above are attached to this Notice of Appeal.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the judgment, decision, and order described in paragraph 1 above are appealable under Idaho Appellate Rule 11(a)(1).

3. A preliminary statement of the issues on appeal which the Appellant intends to assert in the appeal are:

- a. Whether the District Court committed error when it ruled that, under the plain language of the Lease and the Third Amendment, JTS did not successfully exercise its option to extend the lease for an additional six-month term.
- b. Whether the District Court committed error when it ruled that JTS and CLC’s predecessor-in-interest to the Lease were required to execute a written agreement to renew the Lease under the Third Amendment.

- c. Whether the District Court committed error when it ruled that JTS did not intend to renew or extend the Lease for an additional six-month term under the Third Amendment.
- d. Whether the District Court committed error when it ruled that JTS was a month-to-month or at-will tenant after October 15, 2014.
- e. Whether the District Court committed error when it ruled that CLC's predecessor-in-interest to the Lease did not waive the right to contest the six-month extension when it accepted rent payments at the six-month extension rate.
- f. Whether the District Court committed error when it ruled that the parties had not substantially performed the Lease extension.
- g. Whether the District Court committed error when it ruled that JTS was liable for unlawful detainer and breach of the Lease.
- h. Whether the District Court committed error when it ruled that CLC was entitled to damages related to the removal of the temporary 480V power transformer, even though JTS was required to remove the transformer under the terms of the Lease and the Notice of Termination letter sent at CLC's insistence.
- i. Whether the District Court committed error when it allowed CLC to recover damages on behalf of Caldwell Peterbilt, LLC, a non-party to the suit.
- j. Whether the District Court committed error when it found that JTS had breached the covenant of good faith and fair dealing.

- k. Whether the District Court committed error when it ruled that JTS did not properly exercise its six-month option to extend the Lease but then ruled that JTS was liable for the rent due under the six-month option to extend.
- l. Whether the District Court committed error when it ruled that CLC was entitled to recover damages, and specifically lost profit damages, under the Indemnification and Insurance Liability provisions of the Lease when the District Court had already ruled that the Lease had expired.
- m. Whether the District Court committed error when it ruled that JTS could not recover on any of its counterclaims.
- n. Whether the District Court committed error when it entered judgment in favor of CLC and against JTS.
- o. Whether the District Court committed error in awarding CLC damages in the amounts alleged.
- p. Whether the District Court committed error when it denied JTS' Combined Motion for Reconsideration and to Alter, Amend or Vacate Judgment.
- q. Whether the District Court committed error when it awarded costs and attorney fees to CLC and against JTS.
- r. Whether the District Court committed error when it found that CLC's request for fees was timely and properly filed.
- s. Whether the District Court committed error when it found that CLC's memorandum of fees and costs substantially complied with the Idaho Rules of Civil Procedure, and specifically Rule 54(d).

- t. Whether the amount of fees and costs awarded to CLC was reasonable in light of all the circumstances.

**Appellant reserves the right to assert additional issues on appeal pursuant to Idaho**

**Appellate Rule 17(f).**

4. No order has been entered sealing all or any portion of the record.
5. Appellant requests the preparation of the reporter's transcripts in both hard copy and electronic format of the proceedings before the District Court. The date and title of the proceedings are:
  - a. August 23 – 25, 2017, Court Trial before the Honorable Christopher S. Nye. Reporter, Tamara A. Weber. The number of transcript pages estimated is 700.
  - b. August 2, 2017, hearing on Defendant's Motion in Limine. Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.
  - c. April 21, 2016, hearing on Defendant's Motion for Partial Summary Judgment. Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.
  - d. July 16, 2015, hearing on Plaintiff's Motion for Partial Summary Judgment. Reporter Tamara A. Weber. The number of transcript pages estimated is less than 100.
  - e. April 19, 2018, hearing on Motion to Disallow Fees and Costs. The number of transcript pages is less than 100.
6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under **Idaho Appellate Rule 28:**

- a. Plaintiff's Motion for Partial Summary Judgment (dated 4/30/2015);
- b. Memorandum in Support of Motion for Partial Summary Judgment (dated 4/30/2015);
- c. Memorandum in Opposition to Motion for Partial Summary Judgment (filed 7/02/2015);
- d. Affidavit of Darrell Gustaveson (filed 7/02/2015);
- e. Reply Memorandum in Support of Motion for Partial Summary Judgment (dated 7/09/2015);
- f. Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment (filed 8/14/2015);
- g. Defendant's Motion for Partial Summary Judgment (filed 2/12/2016);
- h. Memorandum in Support of Motion for Partial Summary Judgment (filed 2/12/2016);
- i. Affidavit of Rebecca A Rainey in Support of Motion for Partial Summary Judgment (filed 2/12/2016);
- j. Plaintiff's Cross-Motion for Partial Summary Judgment (dated 3/23/2016);
- k. Memorandum in Opposition to Plaintiff's [Defendant's] Motion for Partial Summary Judgment and in Support of Plaintiff's Cross-Motion (dated 3/23/2016);
- l. Affidavit of Ryan C. Bullock in Support of Opposition to Motion for Partial Summary Judgment and Cross-Motion (dated 3/23/2016);

- m. Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Cross-Motions for Summary Judgment (dated 4/7/2016);
- n. Plaintiff's Reply Memorandum in Support of Cross-Motion for Summary Judgment (dated 4/14/2016);
- o. Order Granting Motion for Leave to Add Third Party and Denying Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross Motion for Partial Summary Judgment (filed 4/26/2016);
- p. Plaintiff's Pretrial Brief (dated 6/15/2017);
- q. Defendant's Pretrial Brief (dated 6/15/2017);
- r. Motion in Limine Regarding Evidence of Damages Alleged by Entities Other than Plaintiff (filed 7/18/2017);
- s. Defendant Johnson Thermal Systems' Memorandum in Support of Motion in Limine Regarding Evidence of Damages Alleged by Entities Other than Plaintiff (filed 7/18/2017);
- t. Affidavit of Rebecca A. Rainey (filed 7/18/2017);
- u. Memorandum in Opposition to Defendant's Motion in Limine (dated 7/26/2017);
- v. Affidavit of Ryan C. Bullock in Support of Memorandum in Opposition to Defendant's Motion in Limine (dated 7/26/2017);
- w. Defendant's Reply in Support of Motion in Limine (dated 7/31/2017);
- x. Affidavit of Rebecca A. Rainey in Support of Reply to Plaintiff's Opposition to Defendant's Motion in Limine (dated 7/31/2017);

- y. Plaintiff's Closing Trial Brief (dated 11/20/2017);
- z. Defendant's Proposed Findings of Fact and Conclusions of Law (filed 11/20/2017);
- aa. Findings of Fact and Conclusions of Law and Order to Prepare Final Judgment (filed 1/5/2018);
- bb. Judgment (filed 1/24/2018);
- cc. Memorandum of Attorney fees and Costs (dated 1/17/2018)
- dd. Motion to Disallow Plaintiff's Costs and Fees (filed 1/31/2018);
- ee. Memorandum in Support of Defendant's Motion to Disallow Costs and Fees (filed 1/31/2018);
- ff. Reply in Support of Attorney Fees and Costs (dated 2/8/2018);
- gg. Supplemental Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees (filed 2/9/2018);
- hh. Response to Supplemental Memo regarding Fees and Costs (dated 2/20/2018);
- ii. Defendant's Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 3/15/2018);
- jj. Defendant's Memorandum in Support of Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 3/15/2018);
- kk. Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider (dated 3/30/2018);

- ll. Plaintiff's Supplemental Memorandum of Attorney Fees and Costs, which included the Supplemental Affidavit of William Ingram and Schedule 2 of Additional Fees and Costs (dated 3/30/2018);
- mm. Order Denying Combined Motions for Reconsideration and to Alter, Amend, or Vacate Judgment (filed 4/4/2018);
- nn. Reply Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees and Opposition to Supplemental Memorandum of Attorney Fees and Costs (filed 4/11/2018);
- oo. Supplemental Reply Memorandum in Support of Motion to Disallow Plaintiff's Costs and Attorney Fees and Opposition to Supplemental Memorandum of Attorney Fees and Costs (filed 4/16/2018);
- pp. Order Awarding Costs and Attorney Fees to Plaintiff (filed 5/15/2018);
- qq. Amended Judgment (filed 5/15/2018).

7. The Appellant requests that ALL exhibits admitted at the Court Trial be copied and sent to the Supreme Court.

8. I certify:

- a. That a copy of this Notice of Appeal has been served on the reporter of whom a transcript has been requested as named below at the address:

Name and Address: Tamara A. Weber, 1115 Albany Street,  
Caldwell, ID 83605.




- b. That Appellant has paid the deposit required by the District Court for preparation of the reporter's transcripts and will pay any balance due once Appellant has received the final costs.
- c. That Appellant has paid the deposit required by the District Court for preparation of the clerk's record and will pay any balance due once Appellant has received the final costs.
- d. That Appellant has paid the filing fee.
- e. That service has been made upon all parties required to be served pursuant to

**Idaho Appellate Rule 20.**

DATED THIS 24<sup>th</sup> day of May, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Lynnette M. Davis, ISB No. 5263  
Attorneys for Defendant Johnson Thermal  
Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24<sup>th</sup> day of May, 2018, I caused to be served a true copy of the foregoing AMENDED NOTICE OF APPEAL by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
Graden P. Jackson (*Pro Hac Vice*)  
William B. Ingram (*Pro Hac Vice*)  
STRONG & HANNI  
102 South, 200 East, Ste. 800  
Salt Lake City, UT 84111  
(Attorneys for Plaintiff)

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- Hand Delivered
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- E-mail:  
rjanicki@strongandhanni.com  
gjackson@strongandhanni.com  
wingram@strongandhanni.com
- Facsimile: 801.596.1508
- iCourt

Clerk of the District Court  
Third Judicial District  
Canyon County  
1115 Albany Street  
Caldwell, ID 83605

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Facsimile:
- iCourt

Tamara A. Weber  
Court Reporter  
c/o Canyon County District Court  
1115 Albany Street  
Caldwell, ID 83605

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Facsimile:
- iCourt

  
\_\_\_\_\_  
Lynnette M. Davis

Lynnette M. Davis, ISB No. 5263  
William K. Smith, ISB No. 9769  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
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P.O. Box 1617  
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wsmith@hawleytroxell.com

Attorneys for Defendant Johnson Thermal Systems, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CALDWELL LAND & CATTLE, LLC, an  
Idaho limited liability company a/k/a  
CALDWELL LAND & CATTLE  
COMPANY, LLC,

Plaintiff,

vs.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

Case No. CV-15-587

AMENDED ORDER STAYING  
EXECUTION AND ENFORCMENT OF  
JUDGMENT PENDING APPEAL TO  
IDAHO SUPREME COURT

The Court, having reviewed the parties stipulation for the entry of this Order, and upon the posting of the *supersedeas* bond and rider that satisfy the requirements of Idaho Appellate Rule 13(b)(15), and upon the Court finding good cause;

IT IS HEREBY ORDERED that all actions to execute or enforce the Amended Judgment entered by this Court on May 15, 2018 (“Amended Judgment”), are stayed. Caldwell Land &

AMENDED ORDER STAYING EXECUTION AND ENFORCMENT OF  
JUDGMENT PENDING APPEAL TO IDAHO SUPREME COURT – PAGE 1

Cattle, LLC (“CLC”) is prohibited from executing or enforcing the Amended Judgment without first obtaining the permission of this Court.

This Order shall automatically terminate on the 31st day after the filing of the remittitur from the Idaho Supreme Court. Should any portion of the Amended Judgment, as modified by any opinion, order, or remittitur from the Idaho Supreme Court, remain unsatisfied after the 31st day after the filing of the remittitur from the Idaho Supreme Court, CLC is permitted to take all lawful actions to execute upon and enforce the Amended Judgment, including filing a motion in this action to execute upon the *supersedeas* bond and rider attached as Exhibits A and B to the parties stipulation.

DATED: \_\_\_\_\_

Signed: 6/12/2018 09:42 AM

By \_\_\_\_\_

Hon. Christopher S. Nye  
District Judge



CERTIFICATE OF SERVICE

Signed: 6/13/2018 09:31 AM


I HEREBY CERTIFY that on this \_\_\_\_ day of June, 2018, I caused to be served a true copy of the foregoing AMENDED ORDER STAYING EXECUTION AND ENFORCMENT OF JUDGMENT PENDING APPEAL TO IDAHO SUPREME COURT by the method indicated below, and addressed to each of the following:

Robert L. Janicki  
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William B. Ingram (*Pro Hac Vice*)  
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Salt Lake City, UT 84111  
(Attorneys for Plaintiff)

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- iCourt

  
Clerk of the Court

Caldwell Land and Cattle  
vs.  
Johnson Thermal Systems, Colliers  
Paragon Llc

Case No. CV-2015-587  
Record on Appeal: Chronological Index  
Idaho Appellate Rule 28

<u>Date</u>	<u>Document</u>	<u>Page(s)</u>
11/07/2017	Transcript Filed Court Trial Day One, held 8-23-17	1 - 53
11/07/2017	Transcript Filed Court Trial Day Three, held 8-25-17	120 - 187
11/07/2017	Transcript Filed Court Trial Day Two, held 8-24-17	54 - 119



<b>226</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>233</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>235-241</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>248</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>250-251</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>253-255</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>258-260</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>269-270</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>272-273</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>278</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>282</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>284-285</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>
<b>286</b>	<b>Photograph</b>	<b>Admitted</b>	<b>Sent</b>
<b>287-290</b>	<b>Document</b>	<b>Admitted</b>	<b>Sent</b>

The following are also being sent as exhibits as requested in the Notice of Appeal:

**Transcript from 8-23, 24 & 25, 2017, filed 11-7-17**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of  
the said Court at Caldwell, Idaho on Signed: 9/19/2018 09:54 AM.

CHRIS YAMAMOTO, Clerk of the District  
Court of the Third Judicial  
District of the State of Idaho,  
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF EXHIBITS





TO: Clerk of the Court  
Idaho Supreme Court  
451 West State Street  
Boise, Idaho 83720

DOCKET NO. 46056 - 2018

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(Caldwell Land and Cattle  
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( vs.  
(  
(Johnson Thermal Systems  
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NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on August 9, 2018, I lodged the transcript(s) of 90 pages in length in the above-referenced appeal with the District Court Clerk of the County of Canyon in the Third Judicial District.

This transcript consists of hearings held on:

July 16, 2015  
April 21, 2016  
August 2, 2017  
April 19, 2018

/s/ Tamara A. Weber

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Tamara A. Weber, CSR No. 278  
Canyon County Courthouse  
1115 Albany  
Caldwell, ID 83605  
tammy@canyontranscription.com

Robert L. Janicki, ISB #8911  
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*Attorneys for Plaintiff*

---

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

---

CALDWELL LAND & CATTLE, LLC, an Idaho  
limited liability company a/k/a CALDWELL  
LAND & CATTLE COMPANY, LLC

Plaintiff,

v.

JOHNSON THERMAL SYSTEMS, INC., an  
Idaho corporation,

Defendant.

**REPLY BRIEF IN  
SUPPORT OF MEMORANDUM OF  
ATTORNEY FEES AND COSTS**

Case No. CV15-587

Judge Chris Nye

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Plaintiff Caldwell Land & Cattle, LLC (“CLC”), by and through its undersigned counsel Strong & Hanni law firm, submits this reply brief in response to the *Motion to Disallow Plaintiff’s Costs and Attorney Fees* filed by Defendant Johnson Thermal Systems, Inc. (“JTS”). For the reasons discussed more fully below, CLC respectfully requests that the Court reject JTS’s arguments and award CLC its attorney fees’ and costs as set forth in the *Affidavit of William B. Ingram*.

**INTRODUCTION**

In its motion, JTS concedes that CLC is the prevailing party pursuant to the Court’s

*Findings of Fact and Conclusions of Law* dated January 5, 2018 (the “Findings of Fact”), but argues that the parties’ lease agreement (the “Lease Agreement”) was not renewed on October 15, 2014, and therefore the fee shifting provision of the Lease Agreement does not apply to CLC’s request for attorney fees. JTS’s other arguments only attempt to reduce any attorneys’ fees awarded by the Court. Specifically, JTS argues that, even if fees are awarded, they should be apportioned only to those incurred litigating the unlawful detainer claim pursuant to Idaho Code § 6-324 and that the fees incurred by CLC were not reasonable and should therefore be reduced.

The Court should not be persuaded by these arguments. First, there is no legal support for JTS’s argument that because the Lease Agreement was not renewed after October 15, 2014, the fee provision does not apply. Second, both the Lease Agreement and Idaho Code § 6-324 require that the Court award attorney fees. Finally, JTS’s arguments regarding reasonableness are without merit. It is ironic that despite arguing this case did not present “novel” or “difficult” questions of law and that the amount in controversy and result obtained were disproportionate, JTS itself has actively employed at least five different attorneys throughout this litigation. In nearly every deposition and court appearance, JTS had at least two attorneys present. At mediation, JTS had three attorneys present. So, while claiming that the case was not “novel” or “difficult,” JTS itself has shown that the attorneys’ fees incurred by CLC have been reasonable. Therefore, JTS’s motion should be denied.

## **ARGUMENT**

### **A. The Fee Provision of the Lease Agreement is Applicable.**

JTS relies on *Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977), for its argument that the Court should disallow fees because the Lease Agreement was not renewed after

October 15, 2014. *Ellis* is inapplicable and distinguished from this case, which is conceded by JTS in its motion (“[w]hile the situation in *Ellis* is not factually identical, the rationale of *Ellis* is instructive.”) *JTS Motion* at 5. *Ellis* held that a party who has terminated a contract cannot later assert the attorney fee clause in it while defending against an action to reinstate the contract. *Ellis*, 98 Idaho at 650. Here, CLC never claimed to have “terminated” the Lease Agreement before it expired and before the notice to vacate, and JTS never asked to “reinstate” the contract. Rather, CLC argued, and the Court found, that JTS did not properly exercise the 6-month option to renew and carried on as a month-to-month tenant or at-will tenant after October 15, 2014. *Findings of Fact* at 5. By holding over after October 15, 2014, JTS continued to be bound by the terms and covenants of the Lease Agreement, including the fee provision. *See Lewiston Pre-Mix Concrete, Inc. v. Rhode*, 110 Idaho 640, 645, 718 P.2d 551, 556 (Idaho Ct. App. 1985) (“The terms of the original lease are usually carried over into the new tenancy” (citations omitted)); *See also Pearson v. Harper*, 87 Idaho 245, 255, 392 P.2d 687, 692 (1964) (the possession of a tenant, holding over after expiration of his lease, “was no more than a continuance of the original term”). The Court further determined that JTS had not exercised the 6-month option because the Lease Agreement required all modifications to be in writing and signed by the parties, and that JTS did not execute a written agreement to renew the Lease Agreement, and there was no evidence presented at trial that the writing requirement was waived. *Id.* at 6.

More importantly, the Court found that “[t]here is no dispute that the parties had a contract” and that JTS breached the contract “because it failed to vacate the Property after its term expired . . .” *Id.* at 8 (emphasis added). JTS’s attempt to now argue that there was no contract, and if there were, that it is no longer valid or binding is contrary to the Court’s Findings of Fact. Courts have

held that even when a contract is unenforceable, a court may award attorney fees under that contract. *See Bauchman-Kingston P'ship, LP v. Haroldson*, 149 Idaho 87, 94, 233 P.3d 18, 25 (2008) (holding that a provision granting attorney fees in a land contract that did not comply with the statute of frauds was enforceable). In this case, the Court found that there was an agreement, which JTS breached when it failed to vacate the property within the timeframe set forth in the notice to vacate. *Findings of Fact* at 7. Trying to rationalize JTS's argument would require this Court to find that there was no agreement at all between the parties and deny CLC the benefit of its bargain.<sup>1</sup> Accordingly, JTS's argument that attorneys' fee provision of the Lease Agreement is not applicable should be rejected.

**B. Idaho Code § 6-324 and the Lease Agreement require that the Court award attorneys' fees.**

Idaho Code § 6-324 provides that “[i]n any action brought under the provisions of this chapter . . . the prevailing party shall be entitled to an award of attorney fees.” Additionally, an award of attorney fees is mandatory under the terms of the Lease Agreement. *See, Lease Agreement* at 5. Notwithstanding, JTS argues that that fees incurred between January 31 and February 12, 2015 (the period of JTS's unlawful detainer) should be the only fees deemed recoverable or at best until March 9, 2015 (the date of the filing of the Amended Complaint). Such an argument is contrary to the terms of the Lease Agreement and well settled law.

The Lease Agreement provides as follows:

Enforcement Expenses. The losing party in any court action brought to enforce any of the provisions of or to collect any sums due under the

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<sup>1</sup> Notably, the Court found that other provisions of the Lease Agreement continued to apply, namely the indemnification provision. *Findings of Fact* at 9. JTS makes no argument why these provisions continue to apply, but the attorneys' fee provision may not.

terms of this Agreement shall pay the prevailing party in such action in all trial and appellate courts, a reasonable attorney's fee to be fixed by such court, in addition to the costs allowed by law.

*Lease Agreement* at 5.

With respect to contractual fee provisions, Idaho Courts have held that contractual terms which provide for the recovery of attorney fees arising from actions to enforce the contract demonstrate that the contracting parties chose to place the risk of litigation expenses on the unsuccessful party. *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595, 598 (Idaho Ct. App. 1994). So, while JTS appears to argue that Section 6-324 would only allow CLC to recover fees that were incurred to regain possession of the property, the fee provision of the Lease Agreement governs the relationship between the parties. Idaho law provides that where there may be a conflict between a statute and a parties' contractual provision, the contractual provision will prevail. *Zenner v. Holcomb*, 210 P.3d 553, 560, 147 Idaho 444, 452 (2009). Idaho courts give great deference to the bargained-for terms of an agreement between contracting parties. *Id.*

In *Zenner*, the Idaho Supreme Court explained that where the terms of a contract conflict with a statute, the terms of a contract will govern. The Court stated that “[t]his standard also promotes the freedom to contract, which is a ‘fundamental concept underlying the law of contracts and is an essential element to the free enterprise system.’ When faced with an action that could implicate both a contract and a statute, the contract will be the governing source of an attorney fee award.” *Id.*

This rule applies here. Because the Lease Agreement does not limit attorneys' fees to only the amount necessary to “regain possession,” and because JTS provides no support for this novel

argument<sup>2</sup>, the Court should award all fees.

**C. The Attorneys' Fees Sought by CLC are Reasonable.**

Pointedly absent from JTS's motion, is any argument that the rates charged by CLC's attorneys are unreasonable or that the work they performed was unnecessary. Rather, JTS merely asserts a collection of arguments in attempt to persuade the Court to reduce some of the fees.

For example, JTS avers that CLC's counsel has billed for duplicative work and sent multiple attorneys to cover trial and hearings when only one attorney would have sufficed. This assertion is ironic considering that JTS has itself employed at least five different attorneys throughout this action, and had two or more attorneys at nearly all depositions and court appearances. In particular, JTS was initially represented in this matter by Kristin Bjorkman Dunn of the law firm Bjorkman Dunn. Soon after her appearance, and when it appeared that litigation would be imminent, JTS retained the law firm of Fisher Rainey Hudson for additional representation. Representing JTS from that law firm were Rebecca Rainey, Angie Perkins and Vaughn Fisher. JTS had two attorneys present for 10 of the 13 depositions taken in this matter. *See Deposition Cover Sheets* attached hereto as **Exhibit A**. In contrast, CLC only had one attorney present for each of the depositions. *Id.* In addition, JTS also had two attorneys present at court appearances (i.e., summary judgment arguments, pre-trial conference, etc.) and sent three attorneys to mediation. CLC only had one attorney present, Graden P. Jackson, for all of these proceedings.

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<sup>2</sup> Significantly, JTS cites no authority for its interpretation of Idaho Code §§ 6-303(1) and 6-324, that their language only allows for recovery of attorneys' fees related to regaining possession. *JTS Motion* at 6-7. Conveniently, JTS omits reference to Idaho Code § 6-316, under which the Court awarded CLC damages. *Findings of Fact* at 7. It is nonsensical to argue that Section 6-234 is limited only to fees incurred in regaining possession, where "the *provisions of [the] chapter*" expressly allowed CLC to assert a claim for damages in which it has prevailed. Idaho Code § 6-324 (emphasis added).



Furthermore, as it relates to trial, JTS argues that Graden Jackson was present at trial but did not actively participate and did not handle a single witness. However, JTS fails to mention that it also had two attorneys present at trial (Rebecca Rainey and Angie Perkins) and, more significantly, that JTS intended to call Mr. Jackson as a witness! *See, Defendant's Amended Disclosure of Lay Witness* attached hereto as **Exhibit B**.

Addressing JTS' block billing argument, block billing would only be an issue if JTS were arguing that some of the fees incurred were recoverable and others were not. Here, there is no distinction between recoverable and non-recoverable fees as all fees incurred by CLC are recoverable pursuant to the express terms of the Lease Agreement ( "[JTS]" shall pay [CLC] . . . a reasonable attorney's fee to be fixed by [the] court, in addition to the costs allowed by law"). *Lease Agreement* at 5.

Furthermore, JTS does not provide any context to their claim that CLC's counsel spent an unreasonable amount of time completing tasks. JTS's counsel did not provide any comparisons on how long it took its own attorneys to prepare or complete tasks; for example, their closing statement or the total amount of fees they incurred in defending against CLC's claim and prosecuting JTS's affirmative counterclaims. Without this context, there is no support for JTS to assert that the time spent by CLC's counsel working this case was unreasonable. Moreover, CLC's attorneys wrote off time for trial (hence only 10 hours for each day of trial) and preparing the closing statement required review of trial transcripts and testimony to prepare the statement. This has been a factually complex case as evidenced by the number of attorneys engaged by the parties,

the number of exhibits prepared and offered at trial,<sup>3</sup> and the several trial witnesses.

Finally, and very significantly, JTS also fails to mention that CLC was the prevailing party on both its own claims and on JTS's counterclaims. JTS sought recovery of its attorneys' fees as part of its counterclaims and, in fact, had a specific claim under the very same statute, rule, and contractual provision, which it now argues against; specifically, JTS sought recovery of "all reasonable attorney fees, costs, and disbursements herein, pursuant to Idaho Code §§ 12-120(3), 12-121, 6-324, Idaho Rule of Civil Procedure 54, and the express terms of the Lease at page 5 "Enforcement Expenses." See *Answer to Amended Complaint and Counterclaim* at ¶ 47 (emphasis added). The Lease Agreement expressly provides the prevailing party shall be awarded attorneys' fees, and CLC has prevailed on both its affirmative claims and on JTS's counterclaims.

Therefore, the Court should reject JTS's arguments and award CLC all of its attorneys' fees.

### **CONCLUSION**

For the reasons set forth above, and those stated in its principal memorandum, CLC should be awarded attorneys' fees in the amount of \$178,734.72 and costs in the amount of \$10,726.40

DATED this 8th day of February, 2018.

STRONG & HANNI

*/s/ William B. Ingram*

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Graden P. Jackson  
William B. Ingram  
*Attorneys for Plaintiff*

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<sup>3</sup> JTS alone identified 89 exhibits for trial.

**CERTIFICATE OF SERVICE**

I hereby certify I caused a true and accurate copy of foregoing **REPLY BRIEF IN SUPPORT OF MEMORANDUM OF ATTORNEY FEES AND COSTS** to be delivered via email, to the following counsel of record this 8th day of February, 2018.

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*/s/ William B. Ingram*

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