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Brockett Company, LLC v. Crain Respondent's Brief Dckt. 47138

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BROCKETT COMPANY, LLC an Idaho limited liability company, Plaintiff-Appellant, v. SCOTT CRAIN, an individual; and TEXOMA MANUFACTURING, LLC, an Oklahoma limited liability company, Defendants-Respondents.	Supreme Court No. 47138 Ada Co. Court No. CV01-17-12766

Respondents' Brief

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Deborah A. Bail Presiding.

James F. Jacobson
Residing at Boise, Idaho, for Plaintiff-Appellant

Matthew K. Taylor
Christian S. Martineau
Residing at Boise, Idaho, for Defendants-Respondents

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1. Whether the District Court erred in granting Respondents' *Motion to Set Aside Default* on the basis that the default judgment was void for lack of personal jurisdiction?

2. Whether Respondents should be awarded attorney's fee on appeal under Idaho Code § 12-120(3)?

Standard of Review

The Idaho Supreme Court has determined that when a judgment is found to be void, it is a question of law. *Eden v. State* (*In re SRBA Case No. 39576*), 164 Idaho 241, 248, 429 P.3d 129, 136 (2018). Questions of law will be reviewed de novo by the Idaho Supreme Court. *Id.*; *Fields v. State*, 155 Idaho 532, 314 P.3d 587 (2013).

Argument

I. THE DISTRICT COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION TO SET ASIDE DEFAULT ON THE BASIS THAT THE DEFAULT JUDGMENT WAS VOID FOR LACK OF PERSONAL JURISDICTION.

A. The District Court properly considered the Affidavit of James Scott Crain.

Idaho Rule of Civil Procedure, ("I.R.C.P."), 7(b)(3)(A) (B) govern when and how a party may submit affidavits in support of or in opposition to a motion. Although I.R.C.P. 7 requires such affidavits, if filed and served, to be submitted within a certain timeframe, there is nothing in I.R.C.P. 7 that requires an affidavit to be submitted contemporaneously with a motion. Moreover, *Local Rules of the District Court and Magistrate Division for the Fourth Judicial District*, Rule 8, addressing motion practice, does not require affidavits in support of or in opposition to a motion to be submitted with the motion or the responsive pleading. Even if an affidavit is not timely submitted, it is within the trial courts discretion whether to consider an untimely filed affidavit. *See Marek v. Hecla, Ltd.*, 161 Idaho 211, 222, 384 P.3d 975, 986 (2016); *see also, CUMIS Ins. Soc'y, Inc. v. Massey*, 155 Idaho 942, 946, 318 P.3d 932, 936 (2014).

While reply affidavits are not specifically addressed by I.R.C.P. 7, courts in Idaho have the discretion to consider such affidavits and will generally do so if the affidavit is submitted in response to new arguments, issues, or facts contained in the non-moving party's opposition. *See Stevens v. Brigham Young Univ.-Idaho, No.: 4:16-cv-00530-DCN*, 2018 U.S. Dist. LEXIS 100491, at *54 (D. Idaho June 11, 2018). In addition, the Idaho courts will consider whether the evidence contained in a reply affidavit should have been submitted with the opening brief and whether it

creates the element of surprise or prejudice. *See id.* Although not a direct analog to I.R.C.P. 7, F.R.C.P. 6 addresses motion practice at the federal level. At least one court has held that the ultimate objective of F.R.C.P. 6 is to resolve a motion on its merits. *See McGinnis v. Se. Anesthesia Assocs., P.A.*, 161 F.R.D. 41, 42 (W.D.N.C. 1995). Consistent with this holding, this Court has held that it will construe the provisions of the I.R.C.P. liberally in order to resolve cases on their merits instead of on technicalities. *Seiniger Law Off., P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 247-48, 178 P.3d 606, 612-13 (2008). Accordingly, I.R.C.P. 7 must be construed in light of I.R.C.P. 1(b), which requires that all I.R.C.P. rules "*shall be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.*" I.R.C.P. 1(b) (emphasis added).

Here, Respondents timely submitted the affidavit of Scott Crain (the "Crain Affidavit") within the fourteen-day time frame required by the rule. In addition, the District Court properly exercised its discretion in considering the Crain Affidavit because the affidavit was submitted in response to facts provided by Appellant in support of personal jurisdiction. Further, Appellant did not suffer prejudice or surprise from the Crain Affidavit because Appellant had already presented evidence in support of personal jurisdiction at the District Court's November 15, 2017 hearing as well as having the opportunity to address personal jurisdiction at the motion hearing on December 5, 2018. Had the District Court refused to consider the Crain Affidavit, the result would have been unjust, time consuming, and expensive when compared to deciding the issue on the merits at that stage. Therefore, the District Court properly considered the Crain Affidavit and this Court should affirm the lower court's decision to void and set aside default judgment.

1. The Crain Affidavit was submitted within the timeframe required by I.R.C.P. 7.

Appellant argues that the Crain Affidavit was untimely filed because it was not submitted concurrently with Respondents' motion. Appellant has cited two cases (*Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1517 (11th Cir. 1990) and *Tishcon Corp. v. Soundview Communications, Inc.*, No. CIV.A. 104CV524-JEC, 2005 WL 60,38743 (N.D. Ga. Feb. 15 2005)) to support his argument that the Crain Affidavit was untimely, neither of which are based on Idaho case law. *Appellant's Brief* p. 11, L. 11-13. Appellant relies upon these two cases to support the proposition that in order to prevent unfair prejudice, I.R.C.P. 7(b)(3)(A), (B), and (C) when "read in conjunction make clear the Rule intends for an affidavit to be filed with the motion." *Id.* at L. 10. In Appellants citation to these two cases, Appellant claims that those courts were "interpreting substantially similar F.R.C.P. 6(c)(2)", which states, in part, "[a]ny affidavit supporting a motion must be served with the motion". *Id.* at L. 14. In doing so, Appellant attempts to create a nexus between I.R.C.P. 7 and F.R.C.P. 6 based on the underlying principal that the rules of civil procedure are intended to provide the non-movant with a reasonable and meaningful opportunity to respond to the legal theories and facts asserted by the moving party.

Although the guiding principal of Appellant's argument is not without merit, his argument is misguided for two reasons. First, F.R.C.P. 6(c)(2) is not substantially similar to the current I.R.C.P. 7 but *is* similar to the *former* I.R.C.P. 7 which was modified in 2016. Assuming that I.R.C.P. 7 should be construed to require affidavits to be submitted with a motion, the ultimate objective of F.R.C.P. 6 is to resolve a motion on its merits. *See McGinnis v. Se. Anesthesia Assocs., P.S.*, 161 F.R.D. 41, 42 (1995). Second, and directly related, Appellant fails to take into

consideration that changes to I.R.C.P. 7 appear to prevent the very same prejudice that Appellant claims to have suffered, which is the ability of a moving party to respond to facts and issues addressed by the non-moving party in its responsive pleadings.

The previous version of I.R.C.P. 7(b)(3)(B) states, "[w]hen a motion is supported by affidavit(s), the affidavit(s) *shall* be served with the motion, and any opposing affidavit(s) *shall be filed* with the court and served so that it is received by the parties no later than seven (7) days before the hearing." 2015 I.R.C.P. Rule 7(b)(3) (emphasis added). However, in its current amended form, I.R.C.P. 7 does not specifically require affidavits to be served with the motion when submitted in support of a motion. Rather, the committee's formed by this Court appear to have deliberately eliminated this requirement when the updated I.R.C.P. were adopted in 2016. As amended, the current form of I.R.C.P. 7(b)(3)(A), (B) and (C) state:

> (A) A written motion, affidavit(s) supporting the motion, memoranda or briefs supporting the motion, if any, and, if a hearing is requested, the notice of hearing for the motion, must be filed with the court and served so as to be received by the parties at least 14 days prior to the day designated for hearing.
>
> (B) Affidavit(s) opposing the motion and opposing memoranda or briefs, if any, must be filed with the court and served so as to be received by the parties at least 7 days before the hearing."
>
> (C) The moving party may file a reply brief or memorandum, which must be filed with the court and served so as to be received by the parties at least 2 days prior to the hearing.

Although Appellant argues that I.R.C.P. 7 "intends for affidavits to be filed with the motion", there is nothing in the rule that requires an affidavit, if submitted, to be done so contemporaneously with the motion. *Appellant's Brief* p. 11, L. 10. Rather, the updated I.R.C.P. 7 specifically excluded this requirement and instead provides specific timeframes in which

affidavits supporting or opposing a motion or must be filed and served. Accordingly, as Respondents' affidavit was filed and served fourteen days before the hearing, it satisfied the timing requirements set forth in the current rule. Thus, the District Court did not err in considering the Crain Affidavit.

2. The Crain Affidavit was submitted in response to Appellant's brief and it did not surprise or prejudice Appellant.

While it is true that I.R.C.P. 7 does not specifically address reply affidavits, Appellant's argument that affidavits must be submitted with the motion fails to consider established Idaho case law. Although it appears this is the first time this Court has considered the issue of reply affidavits, both lower Idaho courts and other state and circuit courts have addressed this issue and determined that "'[w]hile the Rules are silent as to timing matters with reply affidavits, precedent establishes that, in the face of new evidence, the court should permit the opposing party an opportunity to respond' so long as no element of surprise or prejudice is created by doing so." *Doolittle v. Structured Invs. Co.*, No. CV 07-356-S-EJL-CWD, 2008 U.S. Dist. LEXIS 98693, at *10 (D. Idaho Dec. 4, 2008) (quoting *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 477 (6th Cir. 2002)); *see also, Rayon-Terrell v. Contra Costa County*, 232 F. App'x 626 (9th Cir. 2007) (providing that reply evidence is not new where the reply brief addressed the same set of facts supplied in opposition to the motion but provides the full context to the opposing party's selected recitation of the facts).

Here, as the record reflects, the Crain Affidavit was submitted in response to facts contained in Appellant's responsive pleading which assumed the District Court had personal jurisdiction over Respondents. While Respondents did not address the personal jurisdiction issue

in their original briefing, Respondents had reserved those arguments for a subsequent motion to dismiss for lack of personal jurisdiction. However, Appellant devoted nearly two pages of facts in support of personal jurisdiction in its responsive pleading that required a substantial response by Respondents to rebut the erroneous allegations made by Appellant.

Examples found in Appellant's responsive pleading include statements that Brockett ". . . started communicating with Defendant Scott Crain about selling some of Texoma's tanks a couple of years prior to the hearing." R., p. 72, L. 3-4. And that "[t]he parties then entered into subsequent transactions." *Id.* at L. 10. That "[t]he parties communicated by telephone and text messages from July 2015 until October 2016 regarding Plaintiff selling an additional 22 tanks for Defendants." *Id.* at L. 10-12. Brockett claims that, "Plaintiff agreed to buy 22 tanks for $33,000, $15,000 per tank and [had] located another buyer. . ." *Id.* at L. 15-16. Lastly, that "Defendant then sold the tanks directly to Johnson and cut Plaintiff out of the deal." R., p. 73, L. 2-3.

Although Appellant did not illustrate how his alleged facts are applied to caselaw on personal jurisdiction, it is nonetheless evident the Appellant was using these alleged facts to bolster its position that the District Court had personal jurisdiction over Respondents.

It should come as no surprise that upon presenting such detailed and selective facts in support of personal jurisdiction, and essentially treating the issue as a forgone conclusion, Respondents would be obligated to address those facts and provide the court with a more comprehensive understanding of the interactions between the parties, rather than simply concede to the alleged facts presented in Appellant's opposition brief. Accordingly, Respondents filed and served the Crain Affidavit and briefed the issue of personal jurisdiction in its reply. The Crain

Affidavit directly addresses which party initiated communications when he states in paragraph 5: "[I]n 2015, Daniel Brockett reached out and initiated contact with me in regard to the purchase of five (5) round-bottom, 500 barrel tanks." He then states: "[N]early fifteen (15) months later, Brockett reached out to me requesting a quote for twenty-two (22) round-bottom, 500 barrel tanks I had for sale." R., p. 97, L. 9-10; 16-17.

The Crain Affidavit also provides context to the negotiations between the parties when he states in paragraph 9: "I told Mr. Brockett that the price for the twenty-two (22) tanks would be higher than the price I had sold him the five (5) tanks" and in paragraph 10: "[S]oon thereafter, the negotiations for the sale of the twenty-two (22) tanks to Brockett ended because we were unable to agree upon a mutually agreeable price." *Id.* at L. 18-21.

Similar to the court's ruling in *Stevens v. Brigham Young Univ.-Idaho*, that court permitted the moving party to submit a declaration with its reply brief in order to combat conspiracy arguments that were raised for the first time in the opposition brief, here the District Court acted within its discretion and permitted Respondents to submit the Crain affidavit with its reply brief in order to combat the personal jurisdiction arguments raised by Appellant in its opposition brief. Therefore, the District Court properly considered the Crain Affidavit.

While Appellant appears to argue that it was prejudiced and surprised by the information contained in the Crain Affidavit, such arguments lack merit. Generally speaking, reply affidavits which contain new evidence are disfavored when they create prejudice or surprise to the non-moving party because the non-moving party is unable to contest such evidence. Here, however, Appellant addressed the issues of personal jurisdiction at the original hearing on its motion for

default judgment, within its responsive pleadings, and at the hearing on the motion to set aside default judgment. At the District Court's hearing on the motion to set aside default judgment, Appellant's counsel states:

> I remember very well standing at this very pulpit on November 15, 2017, and one of the first things that you said as we began that hearing is I'm concerned about the jurisdictional issue. And I said, well, Your Honor, let's go through this, and let's see if you are still concerned at the end. And we got to the end of the case or the end of the presentation of the evidence by Mr. Brockett, and I specially addressed with the Court the issue – or the Court specifically addressed the issue of personal jurisdiction and that there was a sufficient and appropriate record that had been made with regard to the Court's personal jurisdiction in this matter and that your initial concerns had been satisfied.
> . . .
> All of that then really leaves us with no basis for setting aside the default judgment as we stand here today. Everything's been done in a way and in a fashion to afford the defendants proper notice and an opportunity to be heard and *the jurisdictional issue addressed.*
>
> Tr., pp. 35-36; L. 9 -25; *1-5* (emphasis added).

Given that Appellant had the opportunity to address personal jurisdiction, and Appellant's counsel conveyed to the District Court that the jurisdictional issue was addressed, Appellant cannot in the same breath claim unfair surprise or prejudice when Respondents submitted the Crain Affidavit which provided a full context of the personal jurisdiction issue for the District Courts consideration.

In *Peters v. Lincoln Elec. Co.*, the Sixth Circuit Court of Appeals distinguished another case where an affidavit was filed on the day of the hearing:

> That case, however, is readily distinguishable from the instant case. The *Arco* case was concerned with the fairness of allowing defendants to file a reply brief with affidavits on the day of the motion hearing. The defendants in *Arco* could not show cause as to why the affidavits were not filed with their original motion for summary judgment. Compounding the problem was the fact that the material prejudiced the

> plaintiff by not allowing it the opportunity to rebut the defendants' new evidence.
> . . .
>
> Furthermore, seven days elapsed between the date Lincoln filed Smolik's declaration and the hearing date. The surprise and resulting prejudice addressed in Arco were the result of filing on the hearing date, which failed to allow the plaintiff to examine and reply to the moving party's papers.

285 F.3d 456, 476 (6th Cir. 2002) (citting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409-10 (1st Cir. 1985)).

Similar to the moving party in *Peters*, Respondent did not submit the Crain Affidavit because it had reserved the arguments of personal jurisdiction for a subsequent motion to dismiss for lack of personal jurisdiction. Also consistent with *Peters*, Appellant here had fourteen days to review the Crain Affidavit and an opportunity to address the affidavit at the hearing. Thus, there is no prejudice or surprise to Appellant from the defense producing the Crain Affidavit with its reply.

3. It was within the District Court's discretion to accept the Crain Affidavit, and doing so was in the spirit and purpose of the I.R.C.P.

Even if this Court should find that the Crain Affidavit was untimely filed, Idaho law provides the state courts with wide discretion in admitting untimely briefs and affidavits. This Court has held that it will review a district court decision to accept an untimely affidavit for an abuse of discretion. *CUMIS Ins. Soc'y, Inc. v. Massey*, 155 Idaho at 946, 318 P.3d at 936. More importantly, this Court has held that it is within the courts discretion to accept a brief and affidavit submitted in support of a motion, even if such papers were not timely, *see Marek*, 161 Idaho at 222, 384 P.3d at 986. The underlying reasoning behind these rules is based, in part, on I.R.C.P. (1)(b), which requires that all I.R.C.P. "be construed and administered to secure the *just, speedy*

and inexpensive determination of every action and proceeding." I.R.C.P. 1(b) (emphasis added).

Here, the Crain Affidavit was submitted fourteen days prior to the hearing, and the Court exercised its discretion to promote the substantive legal issues over a procedural technicality. *See, e.g., Seiniger Law Off., P.A.,* 145 Idaho at 247-48, 178 P.3d at 612-13 ("... this Court will construe the provisions of [I.R.C.P.] liberally in order to resolve cases on their merits instead of on technicalities."). In addition, even if this Court finds that there was some minor element of surprise or prejudice created by the Crain Affidavit, the District Court followed the spirit and purpose of the I.R.C.P. Had the Crain Affidavit been disregarded by the District Court, Respondent would have filed a subsequent motion to dismiss for lack of personal jurisdiction. While that motion would have resulted in drawn out and expensive litigation, the result would have been the same. Respondents believe the District Court recognized this fact when it stated in its order that "[t]he plaintiff has not contradicted the sworn testimony of Crain that it was the plaintiff who initiated contact with the defendants over the five barrel tanks" and "[f]ailed discussions over a future transaction by an out-of-state defendant who was contracted by an Idaho plaintiff is not sufficient to satisfy due process requirements which would justify the exercise of personal jurisdiction." R. pp. 112-13, L. 6-9. Accordingly, the District Court properly considered the Crain Affidavit.

B. The District Court's Decision and Order did not erroneously ignore the facts and evidence put into the record during the evidentiary hearing on November 15, 2017.

Appellant argues that the District Court erroneously ignored the facts and evidence put into the record during the evidentiary hearing on November 15, 2017. When a defendant moves to dismiss the plaintiff's complaint for lack of personal jurisdiction and the affidavits submitted by the parties in support of and in opposition to the motion reveal conflicting versions of the

jurisdictional facts, the trial court should construe the facts liberally in favor of the party opposing the motion. *See Marco Distrib. v. Biehl*, 97 Idaho 853, 857, 555 P.2d 393, 397 (1976). Accordingly, this Court will liberally construe any conflicting jurisdictional facts contained in the record in favor of the Appellant.

Here, the uncontested jurisdictional facts are as follows: (i) when Appellant filed the complaint, it was an Idaho limited liability company; (ii) in 2015, Appellant reached out and initiated contact with Respondent with regard to the purchase and sale of five steel tanks and the parties entered into a transaction in which Appellant purchased five steel tanks from Respondent; the sale and purchase was completed with the appropriate paperwork being exchanged between the parties, i.e. Purchase Order, Invoice, etc.; and (iii) with regard to the subject transaction, there was no written agreement for the purchase and sale of the twenty-two tanks, there was no appropriate paperwork exchanged between the parties and the transaction was never completed.

When taking the Crain Affidavit into account, the contested jurisdictional facts are as follows: (i) Appellant states that the parties regularly communicated regarding the purchase and sale of the twenty-two steel tanks; (ii) Respondent states that Appellant did not reach out until fifteen months after the first transaction requesting a quote for the purchase of the twenty-two tanks; (iii) Appellant states that the parties agreed Respondents would sell Appellant twenty-two tanks for $15,000 per tank; and (iv) Respondents state that the parties never reached an agreement as they were unable to agree upon a mutually acceptable price.

1. The facts are insufficient to demonstrate a long-term business relationship between Respondent and Appellant.

Appellant claims that the Respondents and Appellant had "clearly" formed a long-term

business relationship, and that Idaho precedent provides that this business relationship is the "relevant fact" in determining if sufficient minimum contacts have been made by the Respondents to the forum state. *Appellant's Brief* pp. 16-17. Appellant relies upon the ruling in *Profits Plus Capital Mgmt., L.L.C. v. Podesta*,156 Idaho 873, 332 P.3d 785 (2014) (hereinafter "*Profits Plus*"), to support Appellant's claim; however, the comparison to this case is unfair and not applicable to the instant case. In *Profits Plus,* the two parties were business partners, and the amount of contact, communication, and services provided between the two parties was substantially greater than the contact that the Appellant and Respondents have ever had. *Id.* at 884, 332 P.3d at 796. There, the out of state party was a fifty percent owner of an Idaho company that stored precious metals exclusively in Idaho. *Id.* Further, the parties in *Profits Plus* did not dispute the fact that there was an agreement in which the out of state party would receive a fifty percent ownership of the Idaho company in exchange for providing services in Idaho for the company. It was after establishing these facts that this Court ruled that the parties in that case were indeed in a long-term business relationship and the out of state party had made sufficient contacts to the forum state and had purposely availed themselves. *See id.*

Here, unlike *Profits Plus Capital Mgmt., Ltd. Liab. Co.*, the Respondents and the Appellant were neither business partners in a common enterprise nor parties to a long-term business relationship. Rather, the only successful business dealing between the parties was limited to one isolated transaction in 2015, which was initiated by Appellant. Apart from the one isolated transaction in 2015, the only other communications between the parties failed to result in any written agreement, purchase order, invoice, wire transfer, or completed transaction. As the

evidence in this case shows, the relationship between Appellant and Respondents did not contain any similarities to the relationship that existed between the parties in *Profits Plus.* The communications between Appellant and Respondents, viewed in favor of the Appellant, amount to a few text messages and phone calls over a fifteen-month period which did not result in any meeting of the minds nor did it result in any valid written agreement or contract between the parties. In comparison to the amount of communication and collaborated work that was found in *Profits Plus,* the facts at hand are far below the threshold required to establish a long-term business relationship. It is clear that the District Court did not ignore Appellant's facts and testimony, but rather found Appellant's facts and testimony unconvincing when provided with a more comprehensive and accurate view of those facts contained in the Crain Affidavit.

2. The District Court properly recognized the significance of Appellant initiating communications with Respondents.

Appellant argues that neither the District Court's *Decision and Order* nor the Respondents provided any reason as to why it was significant that Appellant reached out to the Respondents, yet in the very case Appellant relies upon to make his argument in favor of the minimum contacts being met, it states, "where a party *reaches out* beyond one state and creates continuing relationships and obligations with citizens of another state, that party is subject to regulation and sanctions in the other state." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647, 70 S. Ct. 927, 94 L. Ed. 1154 (1950) (internal quotations and citations omitted).

Both cases support the discretion of the District Court by making it clear that courts regularly use the fact of which party had initiated communication to determine if an out of state party has attempted to avail themselves within the forum state. Here, based on the evidence in the

record and the clarification provided by the Crain Affidavit, it was determined that it was not Respondents, but rather the Appellant who initiated contact between the parties. When the District Court received clarification from Respondents in this regard, it properly determined that Respondents' responsive communications with Appellant did not amount to an attempt to avail themselves with the forum state.

3. The facts are insufficient to demonstrate that Appellant and Respondent entered into an Agreement for the purchase and sale of the twenty-two (22) steel tanks.

Appellant claims that the District Court erred in finding that the Appellant and Respondents never came to an agreement, and that this was a major reason in support of the District Court's finding that insufficient contacts to Idaho had been made. Although Appellant's version of the alleged facts state that the parties had reached an agreement for the purchase and sale of the twenty-two tanks, Appellant did not provide the District Court with any concrete evidence supporting this assertion. Rather, it is uncontested that the parties never executed a written contract for the purchase and sale of the twenty-two steel tanks.

Further, unlike the transaction for sale and purchase of the five tanks in 2015, the transaction for the twenty-two tanks was not evidenced by a purchase order, an invoice, or a wire transfer, which is standard practice in the industry. Accordingly, this Court cannot ignore Idaho's statute of frauds which states "[e]xcept as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . ." Idaho Code § 28-2-201. Without a written

contract, there was never a valid or enforceable agreement between the parties upon which a breach of contract claim could be based, and the District Court recognized and properly determined that fact.

However, in the event this Court finds Appellant's argument compelling and that there was an enforceable unwritten agreement between the parties, Idaho precedent states that a contract (or agreement) "does not automatically establish purposeful availment." *Profits Plus*, 156 Idaho at 884, 332 P.3d at 796. Instead, this Court has made it clear that it must evaluate "prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing" when determining if a party has purposefully established minimum contacts with the forum state. *Id.* With respect to prior negotiations, courts have also specified that establishing which of the parties initiated the negotiations will be given more weight than the actual negotiations and contracted terms between parties when determining if an out of state party availed themselves to the forum state. *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1023 (N.D. Cal. 2015); *see also Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (stating the"question of purposeful availment depends, in part, on which party initiated contact").

Here, the District Court, in its *Decision and Order,* concluded that the Appellant "ha[d] not contradicted the sworn testimony of Crain that it was the [Appellant] who initiated contact with the [Respondents]" regarding the transaction of the original five tanks. R., p. 112, L. 6-7. Accordingly, as there was not an established long-term business relationship between the parties, nor a written contract, and because Appellant initiated contact with Respondents, the District Court properly considered the relevant facts and determined that they were insufficient to establish

personal jurisdiction.

C. Respondents are not subject to personal jurisdiction as Idaho' long-arm statute is not satisfied, and the constitutional standards of due process are not met.

The proper exercise of personal jurisdiction over nonresident defendants by an Idaho court requires the court to find that: (1) the defendant's actions fall within the scope of Idaho's long-arm statute, and (2) the exercise of personal jurisdiction over the nonresident defendants comports with the Due Process Clause of the U.S. Constitution such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Blimka v. My Web Wholesaler, L.L.C.*, 143 Idaho 723, 726-27, 152 P.3d 594, 598 (2007). Here, Respondents' actions did not fall within the scope of Idaho's long arm statute and the exercise of personal jurisdiction over Respondents does not comport with the constitutional standards of due process.

1. Idaho's long-arm statute fails to provide personal jurisdiction over Respondents.

Idaho Code § 5-514 provides for the exercise of personal jurisdiction over claims arising out of a nonresident defendant's contacts with Idaho. *Id.* at 726. The exercise of personal jurisdiction over nonresident defendants who do any of the acts enumerated in Idaho Code § 5-514 extends only "as to any cause of action arising from the doing of any of said acts." *Houghland Farms v. Johnson*, 119 Idaho 72, 75, 803 P.2d 978, 981 (1990). In other words, a defendant is subject to specific personal jurisdiction in Idaho under the minimum contacts test if the court determines that the suit for which jurisdiction is sought "arise[s] out of or relate[s] to the defendant's contacts with Idaho." *Id.* However, the fact that a plaintiff's principal place of business is in Idaho has no significance in determining whether Idaho may exercise personal jurisdiction

over a defendant. *Id.* at 987, 803 P.2d at 981. Rather, it is the defendant's activities, not the plaintiff's location that must be considered. *Id.*

i. Respondents did not transact business in Idaho per I.C. § 5-14(a).

Section 5-514 of the Idaho Code defines what is and is not considered to be the act of transacting business in Idaho. The transaction of business is defined as "the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose of objective" of the nonresident defendant. I.C. § 5-514(a). In determining whether a nonresident defendant has transacted business within the meaning of I.C. 5-514(a), the Court reviews the specific facts of the case. *See Profits Plus*, 156 Idaho 876, 882, 332 P.3d 785, 794 (2014); *see also, Wachovia Tr. Co. v. Amin*, No. CV04-625-S-EJL, 2005 U.S. Dist. LEXIS 48709, at *11 (D. Idaho July 7, 2005) (holding that a nonresident defendant had transacted business in Idaho when it submitted a loan application to an Idaho finance company, sent numerous documents and other required information to the Idaho lender, and signed several documents relating to the loan, including a personal guaranty, containing Idaho choice-of-law provisions); *see also, Mann v. High Country Meats*, 125 Idaho 357, 358, 870 P.2d 1316, 1317 (1994) (holding that a nonresident defendant's personal guarantee for the payment for calves sold from an Idaho company to a Utah company, which was made during a business conference call initiated by the Utah company, was insufficient to establish that the shareholder transacted business in Idaho).

Here, viewed most favorably in light of the Appellant and completely disregarding any conflicting jurisdictional evidence provided to the contrary by the Crain Affidavit, the following

facts are insufficient to show that Respondent transacted business in Idaho:

- After the 2015 transaction, the parties communicated between July 2015 and October 2016 with regard to the sale and purchase of twenty-two steel tanks. Tr., p. 12, L. 3-10.
- The parties allegedly reached an agreement that Appellant would purchase the twenty-two steel tanks for $15,000 per tank. Tr., 13, L. 10-15.
- After allegedly agreeing on the purchase price of $15,000 for each of the twenty-two tanks, there is no evidence that Appellant sent Respondent a purchase order, that Respondents invoice Appellant, that Appellant wired any funds to Respondent, or that Appellant invoiced a third-party for the twenty-two tanks.
- The twenty-two steel tanks were never in Idaho. Tr. p. 8, L. 23-25; p. 9. L. 1-3.; *see also* R. p. 97, L. 14-23.
- Respondents were never in Idaho. R. p. 97, L. 6.
- Respondents sold the twenty-two tanks to a third-party in Texas. R. p. 98, L. 1-4.

Viewed favorably for the Appellant, the facts show that the 2015 deal between the parties was a typical industry transaction. *See Profits Plus* at 794 (stating that the facts shall be viewed in favor of party opposing dismissal). Appellant reached out to Respondents and negotiated the purchase price for five steel tanks in 2015. R. p. 97, L. 9-10. Upon agreeing on the purchase price, Appellant sent Respondents a purchase order, Respondents invoiced Appellant, and Appellant then wired funds to Respondents and invoiced a third party, thus completing the transaction. The entire 2015 transaction appears to have been completed within a very short time frame. Tr. p. 9, L. 14-23. However, the second transaction between the parties, which gave rise to Appellant claim, appears to be anything but typical.

Negotiations surrounding the purchase and sale of the twenty-two tanks took place over the course of fifteen months. Tr., pp. 10-11, L. 24-25; 1-21. After locating a third-party buyer,

Appellant claims that he reached an agreement with Respondent for the purchase price of the twenty-two tanks. Tr. p. 13, L. 10-20. However, instead of proceeding in the normal industry fashion, there is no evidence in the record of a purchase order from Appellant, an invoice from Respondent, a wire transfer of $330,000, or a third-party invoice related to the twenty-two tanks. Based on the evidence presented, or lack thereof, there is no indication that Respondents were transacting business in Idaho and the District Court properly recognized this when it said "defendants' actions of selling tanks they owned to another buyer in another state does not fall with Idaho's long-arm statute's reach." R. p. 112, L. 14-15.

ii. Respondent's conduct did not cause any injury in Idaho per I.C. § 5-514(b).

Idaho's long-arm statute also extends jurisdiction to "[t]he commission of a tortious act within this state." I.C. § 5-514(b). This Court has held that "an allegation that an injury has occurred in Idaho in a tortious manner is sufficient to invoke the tortious act language of I.C. § 5-514(b)." *Saint Alphonsus Reg'l Med. Ctr. v. Wash.*, 123 Idaho 739, 743, 852 P.2d 491, 493 (1993).

In *Blimka v. My Web Wholesaler, LLC*, this Court held that despite defendants' argument that they were never physically in Idaho and could not have acted within the state, the allegedly fraudulent representations were directed at an Idaho resident and the injury occurred in Idaho. 143 Idaho 723, 726, 152 P.3d 594, 597 (2007). Accordingly, it appears that this Court's main focus in determining whether the commission of a tortious act subjects a nonresident defendant to personal jurisdiction under Idaho's long-arm statute is whether the allegedly tortious act was directed at an Idaho resident and whether the injury occurred in Idaho. *Id.*

Here, however, there is insufficient evidence in the record to support Appellant's claims that Respondent directed a tortious act to Appellant or that an injury occurred in Idaho. Unlike *Blimka*, in which the fraudulent misrepresentations were made in regard to an actual contract for the purchase of goods that were shipped to Idaho, there is no evidence in the record to support a finding that Respondents had agreed to not quote or sell the twenty-two tanks to Johnson Specialty Tools in Texas instead of to Appellant. Further, unlike *Blimka* in which there was an email to support the fraudulent misrepresentations made in regard to the quality of goods, here there is nothing in the record to support Appellant's claim that Respondent made any fraudulent misrepresentations. Finally, although Appellant claims that Respondents interfered with Appellants economic expectancy, there is no evidence in the record that establishes Respondents intent.

Appellant alleges that Respondents intentionally interfered with and made fraudulent misrepresentations to the Appellant regarding the twenty-two tanks transaction. However, the only evidence that could potentially support an intentional interference or fraud claim comes from a single text message from Appellant in 2015, when the parties were negotiating the sale of the five tanks. In that text message, Appellant states "[p]erfect thanks. Hey I'm going to give you the name of my customer and his customer so that if either of them ever try to go around me to you, you have to do me a favor and not quote them" to which the Respondents replied "You bet! Thx for the trust!" Tr. Exh. 1, p.2. Apart from this single isolated text in 2015 that was related to a third-party buyer for the five tanks, not the twenty two tanks at issue, Appellant does not offer any evidence that Respondent intentionally interfered with its prospective economic advantage in 2016

or that any such interference was "wrongful by some measure beyond the fact of the interference itself." *Idaho First Nat'l Bk. v. Bliss Valley Foods*, 121 Idaho 266, 286 (1992). Further, Appellant does not offer any evidence that Respondent represented that they would neither quote nor sell the twenty-two (22) tanks to Johnson Specialty Tools. The party alleging intentional misrepresentation or fraud has the burden of proving the elements of fraud by clear and convincing evidence. *Lindberg v. Roseth*, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002). Although Appellant was not required to provide clear and convincing evidence in its allegations, and Respondents are not arguing that it should have done so, it is important to note that the record is void of any evidence that Respondents made any representation to Appellant in regard to the twenty-two tanks.

Respondents recognize that Idaho's long-arm statute is far reaching and construed liberally. However, "[b]ecause Idaho's long-arm statute ... allows a broader application of personal jurisdiction than the Due Process Clause, the Court need look only to the Due Process Clause to determine personal jurisdiction." *Wells Cargo, Inc. v. Transp. Ins. Co.*, 676 F. Supp. 2d 1114, 1119 (D. Idaho 2009).

2. Respondents' contacts with Idaho are insufficient under the Due Process Clause of the U.S. Constitution to permit personal jurisdiction.

The second step in Idaho's two-part test for resolving personal jurisdiction questions requires considering "whether exercising jurisdiction would comport with the *Due Process Clause*." *Wheaton Equip. Co. v. Franmar, Inc.*, No. CV 08-276-S-EJL, 2009 U.S. Dist. LEXIS 127456, at *10 (D. Idaho Feb. 4, 2009) (emphasis added). While Idaho's long-arm statute provides a great deal of reaching power, the Due Process Clause of the Constitution functions as a backstop

to ensure that the traditional notions of fair play and substantial justice are not offended.

Due process requires that, for personal jurisdiction to be properly exercised over a nonresident defendant, the defendant must have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "The relationship between the defendant and the forum must be such that it is reasonable . . . to require the [defendant] corporation to defend the particular suit which is being brought there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228 (1958). Furthermore, "the defendant's conduct and connection with the forum State must be such that the defendant should reasonably anticipate being haled into court there." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). "For a State to exercise jurisdiction consistent with due process, that relationship must arise out of contacts that the defendant himself creates with the forum, and must be analyzed with regard to the defendant's contacts with the forum itself, not with persons residing there. The plaintiff cannot be the only link between the defendant and the forum. These same principles apply when intentional torts are involved." *Walden v. Fiore*, 571 U.S. 277, 277 (2014) (internal citations and quotations omitted).

"Unless a defendant's contacts with a forum are so substantial, continuous , and systematic that the defendant can be deemed to be present in that forum for all purposes, a forum may exercise

only specific jurisdiction-that is, jurisdiction based on the relationship between the defendant's forum contacts and the plaintiffs claim." *Yahoo! Inc. v. La. Ligue Contre Le Racisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).

When a plaintiff asks a court to exercise specific jurisdiction over a defendant, the plaintiff must show that: "(1) the nonresident defendant purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987). Appellant has the burden of satisfying the first two prongs. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). Once Appellant makes a prima facie showing on the first two prongs, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

i. Purposeful Availment and Direction.

As this case involves both contract and tort claims, the proper analysis of the first prong requires looking at two different tests. In contract cases, courts will "typically inquire whether the defendant 'purposefully avails itself of the privilege of conducting activities' or 'consummates a transaction' in the forum, focusing on activities such as delivering goods or executing a contract."

Menken v. Emm, 503 F.3d 1050, 1057 (9th Cir. 2007) (quoting Schwarzenegger, 374 F.3d at 802.) "The purposeful availment requirement is based on the presumption that it is not unreasonable to require a defendant who purposefully conducts business in a state, thereby using the benefits and protections of the forum state's laws, 'to submit to the burdens of litigation in that forum as well.'" *Lake v. Lake, 817 F.2d* 1416, 1421 (9th Cir. 1987) (quoting Burger King, 471 U.S. at 476.) In tort cases, on the other hand, the plaintiff must make a prima facia showing that the nonresident defendant purposefully directs its activities at the forum state and that the nonresident defendant knew that its allegedly wrongful acts were aimed at a resident of the forum state. *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1072 (9th Cir. 2001).

Here, Appellant has failed to meet its burden to show that Respondents purposefully availed themselves to the privilege of conducting activities in Idaho or that they consummated a transaction with Appellant in Idaho for the twenty-two tanks. Further, Appellant has failed to make a prima facie showing that Respondents knew that their allegedly wrongful acts were aimed at an Idaho resident.

First, Respondents did not initiate contact with the Appellant in regard to the original purchase and sale of the five tanks. Rather, it was Appellant that reached out to Respondent and offered to purchase the tanks. The fact that the parties engaged in one isolated transaction fifteen months prior to an alleged breach of contract is insufficient to demonstrate minimum contacts with regard to the twenty-two tanks. Nonetheless, Appellant claims that the parties were in a "business relationship" that lasted for fifteen months and that Respondent engaged and communicated with Appellant on a "nearly regular" basis. These claims, however, are simply not supported by the

evidence.

The text messages provided by Appellant make it clear that it was the Appellant, not the Respondents, who sporadically initiated communications whenever he thought he might want to purchase the other twenty-two tanks. Nowhere in text messages provided by Appellant is it demonstrated that Respondent reached out to Appellant. Rather, the text messages unequivocally demonstrate that the Appellant initiated all conversations between the parties.

In addition, the text messages provided by Appellant demonstrate that communications between the parties in regard to the twenty-two tanks was not "nearly regular" but isolated to three short conversations spread out over a six-month period. Further, Appellant does not offer any evidence that the parties had ever reached an agreement in regard to the purchase and sale of the twenty-two tanks or an agreement that Respondent would not sell the twenty-two tanks to a third-party. In fact, the only evidence provided by the Appellant in support of his claim of an agreement is a handful of text messages between the parties, which appear to contradict the very existence of any agreement between the parties in regard to the twenty-two tanks. In one series of text messages from July of 2015, the Appellant states, "Perfect thanks. Hey I'm going to give you the name of my customer and his customer so if either of them ever try to go around me to you, you have to do me a favor and not quote them" to which Respondents replied "You bet! Thx for the trust!" Tr. Exh. 1, p.2. In another series of text messages from October of 2016, Appellant states "I'll have my customer look at them tomorrow if you are willing to show him at 8AM and I'll see how flexible he is on price after he has seen them [.] [W]ould that work for you?" to which Respondents replied "I've got them quoted to a guy in OKC. Let me see what happens." Tr. Exh. 1, p. 4. To

summarize, Appellant offers a handful of text messages, one of which is unrelated to the twenty-two (22) tanks and another inquires about Respondents schedule, in order to satisfy its burden under the first prong of the purposeful availment test. To hold that the Respondents purposefully availed themselves to the privilege of conducting business in Idaho based on handful of communications initiated by the Appellant which did not lead to any agreement or written contract between the parties would be a gross miscarriage of justice.

Second, Appellant has failed to make a prima facie showing that Respondent knew that its allegedly wrongful acts were aimed at an Idaho resident. Although Appellant claims that ". . . at all times Respondents were aware that Brockett was an Idaho company", there is nothing within the cited testimony or the record that establishes Respondents knowledge of this fact. In *H2O Env't. Inc. v. Proimtu MMI, LLC*, this Court found that a nonresident defendants receipt of: (i) a W-9 form with a Boise address for the plaintiff; (ii) a form indicating that wages for the defendants employees would be paid by the plaintiff through the Boise branch of a national bank; and (iii) a request that the defendant send reimbursement checks to the plaintiff's Boise office for those wages indicated that the nonresident defendant knew it would be conducting business in Idaho. *H2O Env't. Inc. v. Proimtu MMI, L.L.C.*, 162 Idaho 368 (2017). Similarly, in *Blimka v. My Web Wholesaler LLC*, this Court held that the nonresident defendants knew, at all times, that the plaintiff resided in Idaho. 143 Idaho at 728, 152 P.3d at 599. Here, unlike *H2O Env't. Inc* and *Blimka*, there is nothing in the record to show the Respondents knew they were negotiating with an Idaho company, let alone directing a wrongful act to an Idaho party. Although Appellant may try to argue that the purchase order and a wire transfer sent to Respondents in 2015 establishes

Respondents' knowledge, such an argument is unsupported by the record and would be conjecture at best.

The District Court properly held, "the defendants' actions of selling tanks they owned to another buyer in another state does not fall within Idaho's long-arm statute's reach." R. p. 112, L. 17-19. Given that Appellant has failed to show that Respondents' contacts with Idaho are nothing more that attenuated contacts initiated by the Appellant or that Respondents even knew they were dealing with an Idaho company, the District Court properly determined that Idaho could not exercise personal jurisdiction over Respondents.

ii. Forum-Related Conduct

Appellant has also failed to show that his claims arose out of, or were related to, any of the Respondents' Idaho related activities. In determining whether a plaintiff's claims arise out of a nonresident defendants forum-related conduct, the Ninth Circuit follows the "but for" test and requires the plaintiff to show that they would not have suffered an injury "but for" the defendants forum-related conduct. *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1075 (9th Cir. 2001).

Here, the only Idaho related activity of Respondents that could potentially support specific personal jurisdiction is limited to the initial transaction between the parties in 2015, which is not at issue. In regard to the twenty-two tanks at issue, the Appellant cannot show that he would not have suffered an injury but for Respondents' Idaho related conduct because Respondents did not engage in any forum related conduct. Appellant did not provide the District Court with any evidence of an agreement between the parties because there was no agreement between the parties. The reason Appellant is unable to show that its contract and tort claims arose out of or were related

to Respondents' Idaho related activities is because Respondent did not engage in any Idaho related activities. Absent any readily identifiable Idaho related activities by Respondents that were knowingly directed at Idaho, Appellant is unable to satisfy the second prong of the test.

Based on these facts, the District Court properly determined that " [t]he glaring problem with the exercise of personal jurisdiction in Idaho is that the defendants did not avail themselves to the 'privilege of conducting activities' in Idaho–they were contacted in another state by an Idaho resident on behalf of a party in Texas on one completed transaction. On the other transaction, the sale of the remaining tanks, no agreement was entered into and there is no showing of any activity in Idaho which would justify the exercise of jurisdiction in Idaho over this dispute." R. p. 113, L. 12-17. It follows that Respondents could not reasonably anticipate being haled into an Idaho court based on its connection with Idaho, or lack thereof. However, even if this Court determines that the District Court erred in its decision and Appellant has satisfied its burden, there is a compelling case that the exercise of jurisdiction over Respondents would be unreasonable.

iii. Due Process

When determining whether the exercise of jurisdiction over a nonresident defendant would be so unreasonable as to violate due process, the Ninth Circuit Court of Appeals looks at nine factors: (1) the extent of the [defendant's] purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternate forum.

Fighter's Mkt., Inc. v. Champion Courage L.L.C., 207 F. Supp. 3d 1145, 1156 (S.D. Cal. 2016).

Here, the totality of Respondents alleged interjections into Idaho amount to a few text messages over the course of fifteen months, and this factor therefore weighs in favor of the Respondents. The burden on Respondents, who would be required to litigate a case in Idaho during an unprecedented national pandemic, involving property, evidence, and witnesses located in multiple other states, would also be unreasonable. Thus, the second factor weighs in favor of Respondents. In regard to the issue of sovereignty, Respondents home state of Oklahoma has a strong interest in determining what type of conduct, initiated by an out of state party towards an Oklahoma company, would be sufficient to create a binding contractual relationship or tortious conduct. Depriving Oklahoma of the ability to determine fundamental issues of contract formation and tortious conduct in the age of digital communications in also unreasonable. Therefore, the third factor also weighs in favor of Respondents.

Although Idaho does have an interest in protecting its citizens from tortious actions, there is no evidence that Respondents knew they were dealing with an Idaho company and Appellant no longer lives in Idaho. The Ninth Circuit Court of Appeals has stated that the most efficient judicial resolution of a controversy is "no longer weighed heavily given the modern advances in communication and transportation." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998). Accordingly, this factor is neutral. The Ninth Circuit Court of Appeals has also stated that "[i]n evaluating the convenience and effectiveness of relief for the plaintiff, we have given little weight to the plaintiff's inconvenience." *Id.* at 1324. Considering that Appellant no longer lives in Idaho, it would be neither convenient nor effective to litigate the case here in Idaho and

this factor weighs in favor of Respondents. Finally, given that Oklahoma is the location of Respondents' business, the location where the steel tanks were located, and the location where Respondents entered into the third party transaction that gave rise to this dispute, an alternative forum that would have personal jurisdiction over the Respondents exists.

When considered as a whole, it would be an unreasonable violation of due process to hale a nonresident defendant into an Idaho court with a now nonresident plaintiff to litigate a transaction that occurred in another state and tortious acts that have not been shown to have been directed at an Idaho resident. Accordingly, should this Court reach this portion of the personal jurisdiction analysis, it should hold that Respondents have carried their burden and presented a compelling case that exercising specific personal jurisdiction over Respondents would be unreasonable.

II. CONCLUSION

Because the Crain Affidavit was timely submitted in response to facts put at issue by the Appellant, and the Appellant was neither prejudiced nor surprised by its admission, the District Court properly considered the Crain Affidavit and the void judgment should be upheld.

Further, when viewing the record in a light most favorable to Appellant, it is an inescapable conclusion that Respondents' contacts with Idaho, if any, are less than what is required to establish a statutory basis for personal jurisdiction under Idaho's long-arm statute and Respondents could not have anticipated being haled into court here. Moreover, Appellant has failed to meet his burden to show that the exercise of personal jurisdiction over Respondents would satisfy constitutional compliance with due process. Accordingly, the void judgment for lack of personal jurisdiction should be upheld and Appellant's claims should be dismissed with prejudice.

III. ATTORNEY FEES ON APPEAL

Idaho Appellate Rule 41 states that "[a]ny party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal *in the first appellate brief filed by such party* as provided by Rules 35(a) and 35(b)(5). Appellant's brief contains no mention of seeking attorney fees on appeal and makes no assertion that Appellant is entitled to an award of attorney fees. Respondents, however, respectfully request an award of attorneys' fees and costs on appeal under Idaho Code § 12-120(3). In *Blimka v. My Web Wholesaler LLC*, this Court determined that,

> [f]rom time to time the Court has denied fees under I.C. § 12-120(3) on the commercial transaction ground either because the claim sounded in tort or because no contract was involved. The commercial transaction ground in I.C. § 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct (*see Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 109 P.3d 1104 (2005)), nor does it require that there be a contract. Any previous holdings to the contrary are overruled.

143 Idaho at 728. Moreover, the Court of Appeals of Idaho has stated that,

> an award of attorney fees will be made if an appeal does no more than simply invite the appellate court to second-guess a trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or -- on review of discretionary decisions -- no cogent challenge is presented with regard to the trial judge's exercise of discretion.

Pass v. Kenny, 118 Idaho 445, 449 (Idaho Ct. App. August 31, 1990); *see also, McPherson v. McPherson*, 112 Idaho 402, 407, 732 P.2d 371, 376 (Ct. App. 1987).

Here, as there was no contract between the parties and I.C. § 12-120(3) does not require there to be a contract, an award of attorney fees is permitted. Further, because Appellant's appeal appears to be nothing more than an invitation to second-guess the district court decision based on law that is well settled in regard to reply affidavits and personal jurisdiction, an award of attorney's

fees would be proper. Accordingly, because the District Court's order voiding the default judgment and setting it aside for lack of personal jurisdiction was proper, and Appellant has presented no persuasive argument or shown any evidence in the record that the District Court abused its discretion or misapplied the law, Respondents respectfully request that this Court affirm the District Court's ruling and award attorney fees and costs on appeal to Respondents in an amount to be determined as provided by I.A.R. 41(d).

RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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