

IN THE SUPREME COURT OF THE STATE OF IDAHO

GEM STATE ROOFING,
INCORPORATED,

Plaintiff-Appellant-
Cross Respondent,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant-Respondent-
Cross Appellant.

Supreme Court Case No. 47484

CLERK'S RECORD ON APPEAL

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

HONORABLE SAMUEL A. HOAGLAND

RYAN T. McFARLAND

ATTORNEY FOR APPELLANT

MERIDIAN, IDAHO

TERRI PICKENS MANWEILER

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

CASE SUMMARY
CASE NO. CV01-18-13437

Gem State Roofing, Incorporated
Plaintiff,
 vs.
United Components, Incorporated,
Defendant.

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Location: **Ada County District Court**
 Judicial Officer: **Hoagland, Samuel**
 Filed on: **07/20/2018**
 Appellate Case Number: **47484-2019**

CASE INFORMATION

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**
 Case Status: **10/07/2019 Appealed Case - Supreme Court Appeal**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	CV01-18-13437
Court	Ada County District Court
Date Assigned	07/20/2018
Judicial Officer	Hoagland, Samuel

PARTY INFORMATION

Plaintiff	Gem State Roofing, Incorporated	<i>Lead Attorneys</i> McFarland, Ryan Thomas <i>Retained</i> 208-895-1291(W)
Defendant	United Components, Incorporated,	Manweiler, Terri Pickens <i>Retained</i> 208-954-5090(W)


















DATE

EVENTS & ORDERS OF THE COURT

INDEX

07/20/2018	New Case - District Civil	
07/20/2018	 Complaint Filed	
07/20/2018	 Summons Issued <i>And Filed</i>	
07/20/2018	 Civil Case Information Sheet	
07/20/2018	Writ United Components, Incorporated, dba Gem State Roofing Unreserved	
08/08/2018	 Answer <i>to Plaintiff's Complaint</i>	
08/22/2018	 Request for Trial Setting	
08/27/2018	 Notice <i>of Scheduling Conference</i>	

CASE SUMMARY
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09/04/2018	 Notice of Service of Discovery Requests <i>Notice of Service of Discovery</i>
10/04/2018	 Notice of Service <i>Notice of Service of Discovery</i>
10/04/2018	 Stipulation for Scheduling and Planning
10/05/2018	CANCELED Scheduling Conference (3:00 PM) (Judicial Officer: Hoagland, Samuel) <i>Vacated</i>
10/08/2018	 Notice of Service of Discovery Requests
10/12/2018	 Scheduling Order
10/17/2018	 Notice of Service of Discovery Requests
11/05/2018	 Notice of Service <i>of Discovery</i>
11/06/2018	 Notice of Service <i>Notice of Service of Discovery</i>
11/07/2018	 Notice of Service of Discovery Requests
11/19/2018	 Notice of Service <i>of Discovery</i>
11/21/2018	 Notice of Service
11/28/2018	 Notice of Taking Deposition
12/06/2018	 Notice of Service <i>12/4/18</i>
12/11/2018	 Notice of Taking Deposition
12/12/2018	 Amended <i>Amended Notice of Deposition</i>
01/28/2019	 Motion to Compel
01/28/2019	 Memorandum In Support of Motion
01/28/2019	 Affidavit <i>of Ryan T. McFarland in Support of Motion</i>
01/28/2019	 Affidavit <i>of Lori A. Hickman in Support of Motion</i>


















CASE SUMMARY
CASE NO. CV01-18-13437

- 01/28/2019  Notice of Hearing
3/26/19 @ 4:00 PM
- 02/06/2019  Motion for Summary Judgment
Plaintiff's Motion for Partial Summary Judgment
- 02/06/2019  Memorandum In Support of Motion
Memorandum in Support of Plaintiff's Motion
- 02/06/2019  Affidavit
Affidavit of Ryan T. McFarland in Support of Motion
- 02/06/2019  Affidavit
Affidavit of Rick Silvia in Support of Motion
- 02/12/2019  Amended
Amended Notice of Hearing
- 02/12/2019  Notice of Hearing
3/19/2019 @ 4:00 pm
- 02/13/2019  Motion for Summary Judgment
- 02/13/2019  Memorandum In Support of Motion
for Summary Judgment
- 02/13/2019  Declaration
of Jeffrey Flynn in Support of Defendant's Cross Motion for Summary Judgment
- 02/13/2019  Declaration
of Terri Pickens Manweiler in Support of Defendant's Cross Motion for Summary Judgment
- 02/13/2019  Notice of Hearing
Notice of Hearing Re: Defendant's Cross Motion for Summary Judgment 03.19.2019 @ 4:00 PM
- 02/28/2019  Memorandum
Memorandum in Opposition to Cross Motion
- 02/28/2019  Affidavit
Affidavit of Ryan T. McFarland in Support of Memorandum
- 02/28/2019  Affidavit
Affidavit of Rick Silvia in Support of Memorandum
- 03/04/2019  Notice of Service
of Discovery
- 03/05/2019  Objection
Defendant's Objection to Plaintiff's Motion to Compel

CASE SUMMARY
CASE NO. CV01-18-13437

- 03/05/2019  Declaration
of Terri Pickens Manweiler in Support of Defendant's Objection to Plaintiff's Motion to Compel
- 03/05/2019  Opposition to
Plaintiff's Motion for Partial Summary Judgment
- 03/05/2019  Declaration
Supplemental Declaration of Jeffrey Flynn
- 03/05/2019  Declaration
Supplemental Declaration of Terri Pickens Manweiler
- 03/11/2019  Reply
in Support of Plaintiff's Motion for Partial Summary Judgment
- 03/11/2019  Affidavit
of Rick Silvia in Support of Reply
- 03/11/2019  Reply
in Further Support of Defendant's Cross Motion for Summary Judgment
- 03/12/2019  Motion
to Strike Affidavit of Rick Silvia in Support of Reply in Support of Plaintiff's Motion for Partial Summary Judgment
- 03/13/2019  Reply
Reply in Support of Plaintiff's Motion to Compel
- 03/13/2019  Affidavit
Affidavit of Ryan T. McFarland in Support of Reply
- 03/19/2019 **Motion to Compel (4:00 PM)** (Judicial Officer: Hoagland, Samuel)
- 03/19/2019  Court Minutes
- 03/25/2019  Order
Granting Plaintiff's on Motion to Compel
- 03/26/2019 **CANCELED Motion to Compel (4:00 PM)** (Judicial Officer: Hoagland, Samuel)
Vacated
- 04/03/2019  Order
Amended Order Granting Plaintiff's Motion to Compel
- 04/05/2019  Witness Disclosure
Plaintiff's Lay Witness Disclosure
- 04/17/2019  Notice of Service
- 04/26/2019  Order
Memo and Decision & Order

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV01-18-13437

- 05/06/2019  Witness Disclosure
Defendant's Lay Witness Disclosure
- 05/30/2019  Motion
for Sanctions - Gem State
- 05/30/2019  Memorandum In Support of Motion
for Sanctions - Gem State
- 05/30/2019  Affidavit in Support of Motion
Ryan T. McFarland
- 05/30/2019  Affidavit in Support of Motion
Rick Silvia
- 05/31/2019  Notice of Hearing
6/19/2019 @ 4:00 pm
- 06/11/2019  Objection
Objection to Motion for Sanctions
- 06/11/2019  Declaration
Declaration of Terri Pickens Manweiler
- 06/17/2019  Reply
in Support of Motion for Sanctions
- 06/17/2019  Affidavit
Corrected Affidavit of Ryan T. McFarland
- 06/19/2019 **Motion for Sanctions (4:00 PM) (Judicial Officer: Hoagland, Samuel)**
- 06/19/2019  Court Minutes (Judicial Officer: Hoagland, Samuel)
- 06/20/2019  Stipulation
Stipulation to Continue Pre-Trial Status Conference
- 06/24/2019  Order
Granting Pltf's Motion for Sanctions
- 06/24/2019  Motion for Reconsideration
And Protective Order
- 06/24/2019  Memorandum In Support of Motion
For Reconsideration
- 06/24/2019  Declaration
Of Terri Pickens Manweiler in support of motion
- 06/24/2019  Declaration

ADA COUNTY DISTRICT COURT
CASE SUMMARY
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Of Kerrie Kuhn in support of motion

- 06/24/2019  Notice of Hearing
On motion for reconsideration 7/10/19 @ 3:30 p.m.
- 06/25/2019 **Status Conference** (3:00 PM) (Judicial Officer: Hoagland, Samuel)
Informal PTC
- 06/25/2019  Order
Denying Stipulated Motion to Continue PTC
- 07/01/2019  Order
Resetting Def's Motion for Reconsideration
- 07/02/2019  Opposition to
Plaintiff's Memorandum in Opposition to Motion to Reconsider
- 07/02/2019  Affidavit
Affidavit of Ryan T. McFarland in Support of Opposition
- 07/03/2019  Motion
for Protective Order
- 07/03/2019  Memorandum In Support of Motion
for Protective Order
- 07/03/2019  Declaration
of Terri Pickens Manweiler in Support of Motion for Protective Order
- 07/03/2019  Motion
for Order Shortening Time
- 07/08/2019  Order
Shortening Time
- 07/08/2019  Opposition to
Plaintiff's Memorandum in Opposition to Defendant's Motion for Protective Order Regarding Third Party Subpoenas
- 07/08/2019  Affidavit
of Ryan T. McFarland in Support of Gem State Roofing, Incorporated's Opposition to Defendant's Motion for Protective Order Regarding Third Party Subpoenas
- 07/09/2019 **Motion for Reconsideration** (4:00 PM) (Judicial Officer: Hoagland, Samuel)
Mo for Protective Order Re: 3rd Party Subpoena
- 07/09/2019  Court Minutes (Judicial Officer: Hoagland, Samuel)
- 07/11/2019  Order
Protective Order
- 07/11/2019  Order
on Motion for Reconsideration

ADA COUNTY DISTRICT COURT
CASE SUMMARY
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07/16/2019  Brief Filed
Plaintiff's Trial Brief

07/16/2019  Brief Filed
Defendant's Trial Brief

07/16/2019  Request
Request for Judicial Notice

07/19/2019  Stipulation
Re: Undisputed Facts

07/23/2019 **Pre-trial Conference** (3:00 PM) (Judicial Officer: Hoagland, Samuel)

07/23/2019  Court Minutes (Judicial Officer: Hoagland, Samuel)

07/23/2019  Pretrial Order (Judicial Officer: Hoagland, Samuel)
Pretrial Conference Checklist, Memo and Order

07/23/2019  Exhibit List/Log
Defendants Exhibit List

07/23/2019  Witness List
Defendant's Trial Witness List

07/23/2019  Proposed Findings of Facts
Proposed Findings of Fact Conclusions of Law

07/23/2019  Witness and Exhibit List
Plaintiff's Witness List and Exhibit List

08/05/2019 **Court Trial - Civil** (9:00 AM) (Judicial Officer: Hoagland, Samuel)
3 days

08/05/2019  Court Minutes (Judicial Officer: Hoagland, Samuel)

08/05/2019  Exhibit List/Log
Court Trial

09/17/2019  Judgment

09/17/2019  Findings of Fact and Conclusions of Law

09/17/2019 **Final Judgment** (Judicial Officer: Hoagland, Samuel)

09/17/2019 Civil Disposition Entered

09/19/2019  Motion
Motion for Costs and Attorneys' Fees

09/19/2019  Memorandum of Costs & Attorney Fees

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV01-18-13437

09/19/2019  Affidavit in Support of Motion
Affidavit of Terri Pickens Manweiler

09/24/2019  Motion
for Attorneys' Fees and Costs

09/24/2019  Memorandum of Costs & Attorney Fees

09/24/2019  Affidavit
of Ryan T. McFarland in Support of Memorandum

09/24/2019  Opposition to
Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and Costs

09/26/2019  Opposition to
Defendant's Objection to Plaintiff's Motion for Attorneys' Fees and Costs

09/26/2019  Affidavit
Affidavit of Terri Pickens Manweiler re: Objection to Plaintiff's Motion for Attorneys' Fees and Costs

09/26/2019  Reply
Reply in Further Support of Defendant's Motion for Costs and Attorneys' Fees

10/02/2019  Notice of Hearing
Notice of Hearing re Defendant's Motion for Costs and Attorneys Fees

10/02/2019  Reply
in Support of Plaintiff's Motion for Attorneys' Fees

10/02/2019  Affidavit
of Ryan McFarland in Further Support of Memo

10/02/2019  Affidavit
of Lori Hickman in Support of Memo

10/02/2019  Notice of Hearing

10/07/2019  Notice of Appeal

10/07/2019 Appeal Filed in Supreme Court

10/15/2019  Request for Additional Clerk's Record
Request to Include Additional Documents on Appeal








11/12/2019 **Motion for Attorney Fees and Costs (3:00 PM)** (Judicial Officer: Hoagland, Samuel)

11/12/2019  Court Minutes (Judicial Officer: Hoagland, Samuel)

12/13/2019  Order

ADA COUNTY DISTRICT COURT
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Attorney Fees and Costs

12/17/2019	 Amended Notice of Appeal <i>Amended Notice of Appeal</i>
12/24/2019	 Notice <i>of Cross-Appeal</i>
01/06/2020	 Reporter's Notice of Transcript(s) Lodged <i>- Supreme Court No. 47484</i>
02/24/2020	 Order <i>Granting Court Reporter's Motion for Extension of Time - Supreme Court No. 47484</i>
04/06/2020	 Reporter's Notice of Transcript(s) Lodged <i>- Supreme Court No. 47484</i>
04/07/2020	 Order <i>Granting Court Reporter's Second Motion for Extension of Time - Supreme Court No. 47484</i>
05/04/2020	 Reporter's Notice of Transcript(s) Lodged <i>- Supreme Court No. 47484</i>

DATE

FINANCIAL INFORMATION

Attorney of Record Manweiler, Terri Pickens	
Total Charges	229.00
Total Payments and Credits	229.00
Balance Due as of 5/13/2020	0.00
Defendant United Components, Incorporated,	
Total Charges	136.00
Total Payments and Credits	136.00
Balance Due as of 5/13/2020	0.00
Plaintiff Gem State Roofing, Incorporated	
Total Charges	450.00
Total Payments and Credits	450.00
Balance Due as of 5/13/2020	0.00

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

Hoagland, Samuel

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

GEM STATE ROOFING, INCORPORATED,)	CV01-18-13437
Plaintiff,)	Case No. _____
vs.)	COMPLAINT
UNITED COMPONENTS,)	
INCORPORATED, dba GEM STATE)	
ROOFING,)	
Defendant.)	

Gem State Roofing, Incorporated (herein, "Gem State"), by and through its attorneys of record, McFarland Ritter PLLC, plead and complain as follows:

I. PARTIES

1. Plaintiff Gem State is an Idaho corporation with its principal place of business in Blaine County, Idaho.

2. Defendant United Components, Incorporated, dba Gem State Roofing (herein, "UCI") is an Idaho corporation with its principal place of business in Ada County, Idaho.

II. JURISDICTION AND VENUE

3. Subject matter jurisdiction in this Court is proper under Idaho Code section 1-705.

4. This Court has personal jurisdiction over Defendant because it is a resident of Ada County, Idaho and has purposefully availed itself of the privilege of conducting activities within Idaho by transacting business in Idaho, thus invoking the benefits and protections of the laws of Idaho and subjecting themselves to the jurisdiction of Idaho courts.

5. Venue is proper in Ada County under Idaho Code section 5-404.

III. GENERAL ALLEGATIONS

6. On August 12, 1997, Richard Silvia (“Mr. Silvia”) filed a Certificate of Assumed Business Name with the Idaho Secretary of State, publicly declaring that he was transacting business under the name “Gem State Roofing.”

7. On July 19, 1999, Gem State Roofing & Asphalt Maintenance, Inc. filed a Certificate of Assumed Business Name with the Idaho Secretary of State, publicly declaring that it was transacting business under the name “Gem State Roofing.” That Certificate was signed by Michelle Flynn, Secretary.

8. On December 18, 2000, Mr. Silvia filed Articles of Incorporation with the Idaho Secretary of State, forming Gem State Roofing Incorporated (Gem State, Plaintiff herein).

9. Mr. Silvia has, at all times since 2000, up to and including the present day, been the President of Gem State.

10. On December 29, 2004, Gem State Roofing & Asphalt Maintenance, Inc. filed an application for Trademark Registration with the Idaho Secretary of State in a design which incorporates the words “Gem State Roofing.” Jeffrey Flynn is listed as the Vice President of

Gem State Roofing & Asphalt Maintenance, Inc. on the application. The Certificate of Registration issued.

11. In October 2005, Gem State and Gem State Roofing & Asphalt Maintenance, Inc. settled a trademark dispute by entering into a Trademark Settlement Agreement (the “Settlement Agreement”), a true and correct copy of which is attached hereto as Exhibit A. Among the many things the parties agreed to were:

- a) The parties are each conducting business under the name – “Gem State Roofing” – and the simultaneous use of that name is likely to confuse customers.
- b) Gem State Roofing & Asphalt Maintenance, Inc., is prohibited from “advertis[ing] or solicit[ing] business in Blaine County;”
- c) Gem State Roofing & Asphalt Maintenance, Inc. is further prohibited from “perform[ing] any services in Blaine County” except warranty or maintenance work, repeat customer business, and work for public entities;
- d) Gem State Roofing & Asphalt Maintenance, Inc. is to direct all requests for work in Blaine County to Gem State; and
- e) The terms of the Settlement Agreement “shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, heirs, and legatees of the respective parties.”

12. The Agreement was signed by Michelle Flynn, President of Gem State Roofing & Asphalt Maintenance, Inc.

13. In Gem State Roofing & Asphalt Maintenance, Inc.'s 2011 annual report, filed March 16, 2011 with the Idaho Secretary of State, Michelle Flynn was listed as "President" and Jeff Flynn was listed as both "Director" and "Registered Agent."

14. On October 25, 2011, Jeff Flynn filed Articles of Incorporation with the Idaho Secretary of State forming UCI.

15. The next day, October 26, 2011, Jeff Flynn, acting as "President" of UCI, filed an Amendment of Certificate of Assumed Business Name, removing Gem State Roofing & Asphalt Maintenance, Inc. and adding UCI as the "true name[] . . . of the entity . . . doing business under the assumed business name" "Gem State Roofing." Importantly, Gem State Roofing & Asphalt Maintenance, Inc. did not cancel the Certificate of Assumed Business Name, which it could have done on the same form, which would have been notice that it "no longer claim[s] an interest in the . . . assumed business name."

16. On October 7, 2012, Gem State Roofing & Asphalt Maintenance, Inc. was administratively dissolved.

17. On December 1, 2014, UCI filed, with the Idaho Secretary of State, an Application of Registration of Assignment of the design mark containing the words "Gem State Roofing" from Gem State Roofing & Asphalt Maintenance, Inc. to UCI. Jeff Flynn signed the application as both assignor and assignee.

18. UCI's most recent annual filing with the Idaho Secretary of State, dated August 22, 2017, lists Jeff Flynn as "President" and "Registered Agent."

19. UCI is the successor and assignee of Gem State Roofing & Asphalt Maintenance, Inc., and as such is subject to all of Gem State Roofing & Asphalt Maintenance, Inc.'s rights and obligations as set forth in the Settlement Agreement.

20. Since at least 2016, UCI, acting under the name "Gem State Roofing" has bid on and performed numerous roofing jobs in Blaine County.

21. In or about June 2016, Mr. Silvia confronted a person (presumably a UCI employee) at a UCI job site (under the name "Gem State Roofing") in Blaine County. Rather than explain UCI's presence, that person tried to expose his genitals to Mr. Silvia.

22. The work UCI has been doing in Blaine County is substandard, to the detriment of Gem State's reputation. Customers and building authorities have mistakenly contacted Gem State with complaints about UCI's (acting under the name Gem State Roofing) work and requests for corrections of that substandard work.

IV. CLAIMS FOR RELIEF

Count I, Breach of Contract

23. Gem State realleges paragraphs 1 through 22 above and incorporates the same by reference herein as if set forth in full.

24. Gem State has fulfilled all of its obligations under the Settlement Agreement.

25. UCI breached the Settlement Agreement by advertising and soliciting roofing work in Blaine County, Idaho.

26. UCI breached the Settlement Agreement by bidding on and performing roofing work in Blaine County.

27. UCI breached the Settlement Agreement by failing to refer requests for work in Blaine County to Gem State.

28. Gem State has been damaged by UCI's breach of contract in an amount that exceeds \$10,000.00, the precise amount to be proven at trial.

Count II, Breach of Covenant of Good Faith and Fair Dealing

29. Gem State realleges paragraphs 1 through 28 above and incorporates the same by reference herein as if set forth in full.

30. Implied in every contract as a matter of law is a covenant of good faith and fair dealing.

31. UCI has a duty to perform its obligations under the Settlement Agreement, including refraining from advertising, soliciting, bidding on, and performing roofing services in Blaine County.

32. In failing to comply with their obligations under the Settlement Agreement, UCI breached the implied covenant of good faith and fair dealing.

33. Gem State has been damaged by UCI's breach of the implied covenant of good faith and fair dealing in an amount that exceeds \$10,000.00, the precise amount to be proven at trial.

Count III, Trademark Infringement (15 U.S.C. §1125)

34. Gem State realleges paragraphs 1 through 33 above and incorporates the same by reference herein as if set forth in full.

35. Gem State has a common law trademark in the mark GEM STATE ROOFING in Blain County, Idaho.

36. In the last two years, UCI has conducted business in Blaine County, Idaho under the name “Gem State Roofing.”

37. UCI’s use of the “Gem State Roofing” name is likely to cause, and has caused, confusion among consumers as to Gem State’s source, sponsorship, affiliation, or approval of UCI’s conduct, and is a violation of 15 U.S.C. §1125.

38. Gem State has been damaged and is currently being damaged by UCI’s infringement of Gem State’s trademark rights.

39. Gem State is entitled to recover the value of the services UCI has provided under Gem State’s name, which amount is no less than \$10,000.00, the precise amount to be proven at trial.

Count IV, Unjust Enrichment

40. Gem State realleges paragraphs 1 through 39 above and incorporates the same by reference herein as if set forth in full.

41. Gem State conferred a benefit on UCI by building a reputation for quality roofing services in Blaine County under the name “Gem State Roofing.”

42. UCI has appreciated, and currently is appreciating, the benefits of the reputation of the name “Gem State Roofing” in Blaine County.

43. It would be inequitable for UCI to retain the benefits of the reputation of the name “Gem State Roofing” in Blaine County, without paying for those benefits.

44. UCI has been unjustly enriched by Gem State, in an amount which exceeds \$10,000.00, the precise amount to be proven at trial.

Count V, Preliminary Injunction

45. Gem State realleges and incorporates paragraphs 1 through 44 above as if set forth herein in full.

46. UCI has been conducting business in Blaine County in violation of the Settlement Agreement for at least two (2) years. Despite written demand that they cease, UCI has refused to provide any assurance that they will stop their wrongful conduct, as alleged herein.

47. UCI's continued violation of the Settlement Agreement, unless and until enjoined and restrained by order of this Court, will cause substantial and irreparable harm to Gem State.

Count VI Permanent Injunction

48. Gem State realleges and incorporates paragraphs 1 through 47 above as if set forth herein in full.

49. UCI has been conducting business in Blaine County in violation of the Settlement Agreement for at least two (2) years. Despite written demand that they cease, UCI has refused to provide any assurance that they will stop their wrongful conduct, as alleged herein.

50. UCI's continued violation of the Settlement Agreement, unless and until enjoined and restrained by order of this Court, will cause substantial and irreparable harm to Gem State.

V. ATTORNEYS FEES AND COSTS

51. Gem State realleges paragraphs 1 through 50 above and incorporates the same by reference herein as if set forth in full.

52. Because of UCI's wrongful conduct alleged herein, refusal to account for income related thereto, and refusal to cease, Gem State has been required to file this Complaint. Under the terms of the Settlement Agreement, and pursuant to 15 U.S.C. §1117, and Idaho Code

sections 12-121, Gem State is entitled to recover its costs and reasonable attorneys' fees incurred for the prosecution of this action, which, in the event of default, will be no less than \$5,000.00, and in such additional amount as reasonably incurred if Defendants contest this action.

VI. PRAYER FOR RELIEF

WHEREFORE, Gem State prays for entry of judgment as follows:

As to Counts I, II, III, and IV:

1. For a money judgment against UCI in an amount to be proven at trial, which in any event exceeds \$10,000.00;

As to Count V:

2. For a preliminary injunction, restraining UCI from conducting business in Blaine County, Idaho, until this Court reaches a resolution of this case on the merits;

As to Count VI:

3. For a permanent injunction, permanently restraining UCI from conducting business in Blaine County, Idaho;

As to all Counts:

4. For an award of Gem State's costs and expenses, including reasonable attorneys' fees in the amount of \$5,000.00, in the event that judgment is entered by default, and in such greater sum as the Court may award if this action is contested;

5. For post-judgment interest to accrue at the legal rate on the entire amount of the judgment from the date judgment is entered herein;

6. For Gem State's costs and expenses, including reasonable attorneys' fees, incurred to pursue collection on the judgment; and

7. For such other and further relief as the Court deems just and proper.

DATED THIS 20th day of July 2018.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

EXHIBIT A

TRADEMARK SETTLEMENT AGREEMENT

THIS AGREEMENT, effective as of the date the last of the parties hereto executes this Agreement below, is entered into by and between Gem State Roofing & Asphalt Maintenance, Inc., and Gem State Roofing, Inc.

RECITALS

- A. Gem State Roofing & Asphalt Maintenance, Inc. is an Idaho Corporation in good standing duly organized on May 30, 1995 as Flynn, Inc., having amended its name to Gem State Roofing and Asphalt Maintenance, Inc., on December 28, 1998, and having filed a Certificate of Assumed Business Name as "Gem State Roofing" on July 19, 1999, and which provides roofing and asphalt services primarily in the Boise and Twin Falls areas.
- B. Gem State Roofing, Inc. is an Idaho Corporation in good standing duly organized on December 18, 2000, which is the successor in interest of Richard Silvia, who filed a Certificate of Assumed Business Name as "Gem State Roofing" on August 12, 1997, and which provides roofing services primarily in the Blaine County area.
- C. The parties' names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services.
- D. Gem State Roofing & Asphalt Maintenance, Inc., represents that it has not performed any work in Blaine County during the time period of May 26, 2002, to May 26, 2005, other than the jobs disclosed in the Affidavit of Michelle Flynn dated May 27, 2005, a true and correct copy of which and accompanying exhibits is attached hereto as Exhibit A and incorporated herein by this reference. Gem State Roofing & Asphalt Maintenance, Inc., further represents that from June 1, 2005, until the date of execution of this Agreement, it has not performed any work in Blaine County other than that which was disclosed in said Affidavit, and that it has not undertaken any efforts to solicit advertising directed toward the Blaine County market, including but not limited to soliciting advertising in the *Names and Numbers* and *Sun Valley Directory* telephone directories.
- E. Gem State Roofing & Asphalt Maintenance, Inc. represents that it has provided roofing and asphalt services in Valley County, Idaho for the customers identified on Exhibit B attached hereto and incorporated herein by this reference.
- F. Gem State Roofing, Inc., represents that it has not performed any work in any of those counties identified in subparagraph 2(a) below within the last three (3) years other than for those customers identified in subparagraph 4(a) below. Gem State Roofing, Inc.,

further represents that from June 1, 2005 until the date of execution of this Agreement, it has not undertaken any efforts to solicit advertising directed toward any of the counties listed in subparagraph 2(a).

- G. The parties wish to resolve this matter without litigation by agreeing not to do business or advertise in the other's primary market.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN, THE PARTIES AGREE AS FOLLOWS:

1. Commencing immediately upon execution of this Agreement, Gem State Roofing & Asphalt Maintenance, Inc., agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County. Radio or television advertising on a Boise or Twin Falls station that happens to reach Blaine County is permissible so long as it does not state or imply that Gem State Roofing & Asphalt Maintenance, Inc., performs services in Blaine County. Gem State Roofing & Asphalt Maintenance, Inc., may advertise in Twin Falls telephone directories which may be distributed in Blaine County so long as it is not listed under any cities in Blaine County, and does not state or imply that it performs services in Blaine County.
2. Commencing immediately upon execution of this Agreement, Gem State Roofing, Inc., agrees that it will not advertise or solicit business in the counties listed in subparagraph 2(a), including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in said counties. Radio or television advertising on a Blaine County station that happens to reach said counties set forth in subparagraph 2(a) is permissible so long as it does not state or imply that Gem State Roofing, Inc., performs services in said counties. Gem State Roofing, Inc., may advertise in the Twin Falls Yellow Book and the Qwest Dex Twin Falls directories so long as it is listed only under cities in Blaine County and does not state or imply that it performs services in the counties set forth in subparagraph 2(a).
 - a. Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.
3. Gem State Roofing & Asphalt Maintenance, Inc., shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is

put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing & Asphalt Maintenance, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the photographs of the service vehicles attached hereto as Exhibit C and incorporated herein by this reference.

- a. Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.
4. Gem State Roofing, Inc., shall not perform any services in the counties listed in paragraph 2(a) except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 4(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the attached Exhibit D.
 - a. Wells Fargo Bank (in Shoshone, Idaho only), Tonya White (Twin Falls County), Mike Blank (Twin Falls County), Mitch Matteson (Twin Falls County), and John Ward (Valley County).
 5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.
 6. It is understood and agreed that this Agreement affects the parties' respective rights only in Blaine County and the counties listed in subparagraph 2(a). No agreement is reached regarding the parties' respective rights outside these counties.
 7. Neither party shall oppose the other party's state of Idaho trademark registrations dated May 2, 2002 in the case of Gem State Roofing, Inc., and dated December 29, 2004 in the case of Gem State Roofing & Asphalt Maintenance, Inc. Gem State Roofing & Asphalt Maintenance, Inc., agrees and consents to Gem State Roofing, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in Blaine County; Gem State Roofing, Inc., agrees and consents to Gem State Roofing & Asphalt Maintenance, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in the counties listed in subparagraph 2(a).
 8. Except as otherwise provided in this Agreement, this Agreement is solely for the benefit of the parties hereto and no other person or entity is entitled to rely upon or benefit from this Agreement or any term herein, except by a writing signed by all of the parties hereto, or as stated in paragraph 13.

9. The waiver or failure to enforce any provision of this Agreement shall not operate as a waiver of any further breach of any such provision or any other provision herein.
10. This Agreement (including the Recitals, all Exhibits attached hereto, all of which are hereby expressly incorporated herein by this reference) constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all prior understandings, if any, with respect hereto.
11. If any litigation or proceeding is commenced between or among the parties or their representatives arising out of, or relating to, this Agreement, including, without limitation, a breach of any covenant, condition, representation, warranty, agreement, or provision of this Agreement, the prevailing party shall be entitled, in addition to such other relief as may be granted, to have and recover from the other party reasonable attorneys' fees and all costs of such action.
12. The terms of this Agreement may not be modified, amended, or otherwise changed in any manner, except by an instrument in writing executed by each of the parties.
13. This Agreement shall be binding upon and shall inure to the benefit of the successors, assigns, personal representatives, heirs, and legatees of the respective parties.
14. The provisions of this Agreement shall be construed and enforced in accordance with the laws of the State of Idaho. Any action for breach of this agreement shall be brought and litigated in the district court of the state of Idaho, in the county in which the alleged breach occurred. Time is of the essence. Each party hereby acknowledges, represents, and warrants that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the drafting, preparation, and negotiation of this Agreement; (iii) each party has been represented by its own legal counsel; and (iv) any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement, or any portion herein.
15. Each party to this Agreement warrants that it had independent counsel review the terms and conditions of this Agreement, and enters into this Agreement knowingly based on the advice of independent counsel. Each party further acknowledges and represents that it fully understands the meaning and ramifications of this Agreement, and no implication shall be drawn against any party by virtue of the drafting of this Agreement, since this Agreement was drafted by both parties. With regard to the drafting of this Agreement, each party shall bear its own attorney fees and costs.
16. Each party has the requisite power and authority to enter into this Agreement, to perform

its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any an all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this 20 day of October, 2005.


Michelle Flynn
President of Gem State Roofing &
Asphalt Maintenance, Inc.

DATED this _____ day of _____, 2005.

Rick Silvia
President of Gem State Roofing, Inc.

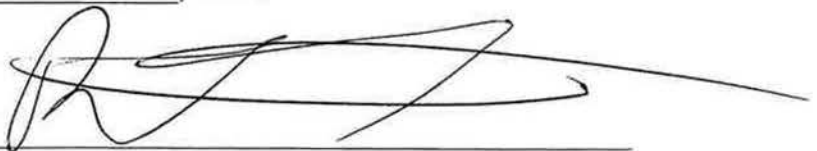
its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any an all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this _____ day of _____, 2005.

Michelle Flynn
President of Gem State Roofing &
Asphalt Maintenance, Inc.

DATED this 19th day of October, 2005.



Rick Silvia
President of Gem State Roofing, Inc.

EXHIBIT A – AFFIDAVIT OF MICHELLE FLYNN

TRADEMARK SETTLEMENT AGREEMENT - 6

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STATE OF IDAHO)
COUNTY OF ADA)

Michelle Flynn having been first duly sworn deposes and says:

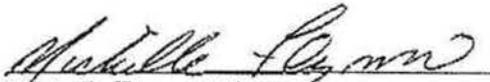
1. I am over the age of 18 and competent to testify and make the following statements based on my own personal knowledge.
2. I am the President of Gem State Roofing and Asphalt Maintenance, Inc., a duly incorporated Idaho Corporation.
3. I am the custodian of the business records for Gem State Roofing and Asphalt Maintenance, Inc.
4. I have conducted a review of the business records for Gem State Roofing and Asphalt Maintenance, Inc. for the purpose of ascertaining the extent of the work undertaken by Gem State Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho during the three (3) year period from May 26, 2002 through May 26, 2005.
5. I found the following documents that are attached hereto which reflect the jobs that Gem State Roofing and Asphalt Maintenance in fact performed during the aforesaid period. Said attached records reflect the profits that were made from said jobs.
6. After a search of my business records during this three year period, I am confident that there were no other jobs performed by Gem State

Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho.

- 7. At present I have one pending job in the Wood River Valley that has been estimated but no work has commenced. The anticipated profits from our \$ 13, 220 estimate is approximately \$ 3,000.


FURTHER YOUR AFFIANT SAITH NOT.

DATED this 27 day of May, 2005.


 Michelle Flynn, Affiant

Sworn to and subscribed before me this 27th day of May, 2005.




 Notary Public
 Residing At: Boise
 My Commission Expires: 9-18-09

DATED this 27th day of May, 2005.


 JOHN SULLIVAN

MICHELLE

Kelly Herrera, Called office I always answer the phone" Gem State Roofing and Asphalt Maintenance this is Michelle." Know mention of Rick was ever made and she new we were coming from Boise.

Material: \$220.00

Vehicle and Gas: \$100.00

Employee's: \$200.00 with taxes and insurance

Profit: \$120.00

HELLE

Estimate

DATE	ESTIMATE #
6/2/2004	3844

NAME / ADDRESS
Kelly Herrera P.O. Box 6436 Ketchikan Id 99340 720-4479 788-1392 Fax

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of 161 Spur Lane, Ketchikan Id:</p> <ol style="list-style-type: none"> 1. Drill pilot holes for installation of snow clips on front entry. 2. Install approximately ten snow clips to shake roof system. 3. Fasten with sinker screws set in caulk sealer at pilot holes. 4. Any other roof repairs at time and materials over snow clip price. <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gem State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be computed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	640.00

We look forward to doing business with you.	TOTAL \$540.00
---	-----------------------

SIGNATURE _____

ELLE

Mrs. Lipton, The same as Kelly Herera called office worked with her for a month to get scheduled so that her husband could be there.

Material: \$ 1,258.74
Payroll: \$2039.83
Taxes: \$699.04
Insurance: \$562.58
Vehicles: \$210.00
Subcontractor Foremen: \$875.00

Profit: \$743.81

LLC

20 38 461

Estimate

DATE	ESTIMATE #
5/4/2004	3822

NAME / ADDRESS
Mrs. Lipton 3960 Missie Valley Dr. Bloom Field Hills, MI 48302 248-642-6529 Hm. 248-514-5294 cell 208-726-2601 Ketchum

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of the roof system at 460 N. Washington, Ketchum Id Chester and Lakes</p> <ol style="list-style-type: none"> Tear off existing roof system to ply wood decking. Install 1/2 inch recovery board Install single ply mechanically fastened roof system. Use existing coping cap. Lower deck on back. Install single ply with custom metal around perimeter. Excluder: Ply wood decking that may need to be replaced. This will not be known until old roof is removed. Ply wood cost is \$55.00 per sheet over cost of estimate you will be notified first. <p>Ten year manufacture warranty. On single ply this is membrane roof system not hot tar. All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gem State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be accounted only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	6,200.00

We look forward to doing business with you.	TOTAL	\$6,200.00
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SIGNATURE _____

Spring Condo's

Material: 39,221.98
Ply wood and other: \$12,853.07
Subcontractors: \$9,550.00
Payroll: 11,451.12
Taxes: 4936.34
Perdium: 2,520.00
Hotel: 1,440.00
Other fee's dump: 1098.20
Vehicles: 2,500.00
Insurances: 2,817.75
Vehicle Insurance: 498.00
Liability: 700.00

Other business expenses: 3,000.00

Profit: 11,550.54 which pay other expense occurred over time.

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchum Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
We hereby propose to furnish all the materials and perform all the labor necessary for the completion of roof system at Springs Condo's located at 125 Howard Ketchum, Id 83340:	
1. Tear off tile roof to existing deck.	
2. Remove all existing tile roof nailer and curbs.	
3. Install ice and water shield to entire sub straight or ply wood deck.	
4. Rebuild cricket at chimney chase on large building where six pipes existing for fireplace area.	525.00
5. Remove and rebuild Boston to code all new product. Boston is roof ventilation system.	4,200.00
6. Install all new pipe flashings with caps. Plumbing pipes to be addressed by plumber.	
7. Envelope all counter flashings at skylights and eve areas with ice and water shield.	
8. Install drip edge around entire perimeter and at terminations.	
9. Apply fifty year architectural shingle either Elk or Certinteed to entire sub straight surface and Boston areas top and bottom.	64,975.00
10. Extra cost for upgrade to Presidential Shake TL Charcoal Black.	4,700.00
11. Roof system to be high wind nailed or six nailed.	
12. Job site safety high profile.	
13. Install five hundred snow clips to roof system. Five hundred should be sufficient. If 1,000 are installed price is \$6,000.00. For fifteen hundred \$9,000.00.	3,000.00
14. Roofing permit through city of Ketchum. Project to last approximately 14-31 days weather permitting.	1,062.00
Alternate to upgrade SBS High Profile Ridge to hips ridge and rakes verses metal drip edge. Deduct if not excepted on rake \$3,450.	1,725.00
Alternate on roof siding and corner trim. Remove and replace for proper installation of counter flashing and ice and water shield not to exceed.	10,275.00
Plumbing pipes, heating pipes, and exhaust pipe penetrating roof to be secured and rebuilt by heating and plumbing company. Gem State Roofing is not responsible for this phase of work.	
Any unforeseen circumstances under roof deck or metal will become an extra cost over contract.	

We look forward to doing business with you.	TOTAL
---	--------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchum Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
Gem State Roofing to be in full contact with gutter contractor, electrical contract, or any subs as per heating and plumbing on roof system.	
Gem State Roofing scope of roof construction.	
All demo to roof system metal, existing snow bracing, tile roof, and siding for proper installation.	
All siding, trim, and Boston rebuild by Gem State Roofing. Any decking or structure damage unforeseen will also be executed by Gem State Roofing in writing of change order.	
Insulation of ice and water shield, counter flashing, drip edge, skylight flashings, wall flashings, valley metal, roofing product, Presidential TL Lifetime shingles, elevation ridge SBS modified high profile hip and ridge color Charcoal Black roof and ridge.	
Demo cricket behind large fireplace flue area. Rebuild cricket for proper drainage.	
Over build frame work above skylight on east building. West side of roof for proper construction of new roof system.	
Elevation ridge- on life time warrantee life of warrantee of roof system field.	
Any deck damage ply wood remove and replace \$50.00 per sheet 318 sheets worst case scenario, all new decking \$15,900.00.	12,600.00
Prep solarium metal on parapet walls. Pressure wash metal, primer seal acrylic sealer, and paint elastomeric paint. Twelve hours labor.	900.00
Plus paint. Not to exceed.	175.00

We look forward to doing business with you.	TOTAL
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SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchum Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
<p>Please keep in mind that this project is a complete roof rebuild any unforeseen damage to beams and trusses decking to be extra cost over contract.</p> <p>Exclusions: Deck damage, fascia damage, structure damage, siding, and parapets.</p> <p>Barricades: Ground monitor safety man at all time of work. Shovel for debris removal supplied by Gem State Roofing. Job site to be kept clean and organized at all times. All change orders in writing by Gem State Roofing and Representative for the Springs Condos should be readily available. All manufactures warranty information supplied by Gem State Roofing.</p> <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made 1/2 upon acceptance of contract due to special order of materials. Check to be written to supplier and Gem State Roofing. Lien release to be provided for materials at that time. Balance due upon completion of project. Lien release for full project to be signed at that time. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	

We look forward to doing business with you.	TOTAL \$104,137.00
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SIGNATURE _____

**EXHIBIT B – GEM STATE ROOFING & ASPHALT MAINTENANCE, INC. VALLEY
COUNTY JOBS**

TRADEMARK SETTLEMENT AGREEMENT - 7

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Brundage Realty, 118 N. Main, Donnelly, Idaho 83638 07/28/04 Invoice #1738

Norm & Robert Haliday, 180 Shadow Tailor Between Cascade and Donnelly, Id 09/10/04 and 10/27/03 Invoice #3956 &1606

Carl Thompson 365 Knights Rd., McCall, Id 09/30/02 Estimate #3558

Craig Mozkis 14135 Jefferson Rd. McCall Id 83638 06/29/04 Estimate #3874

Dick Darmody, Forest Hayes McCall, 09/28/04 Invoice #1774

Ellsworth Construction 254 McCall Id 10/19/03 Invoice # 1122

Dale Bergeson 1211 Boro's New Meadows, Id 05/17/04 Invoice #1693

Mike Churchill 300 Mission St. McCall Id 09/30/02 Estimate #3557

Richard Harvey 255 Brook Dr. McCall Id 10/15/03 Estimate #3712

Perception Construction, Rick Winkeller, 02/11/05 Off plans Estimate #4050

State Wide Construction, Brian Warner, 7/28/04 Invoice # 1740

Scott McDaniels, LarMac, McCall Id 07/01/04 Repeat Customer, Invoice #3885

Scott Jones, 4902 Blue Grass 04/30/05 Estimate # 4130

Rocky Mountain CTR, 3580 Warren Wagon Rd. 10/21/02 Invoice 3562

World Marc out of Washington Bid work in McCall 05/01/02 Estimate # 3477

John Dahl 2450 Sheri Lane McCall, Long time friend we have worked for in 03 and 04.

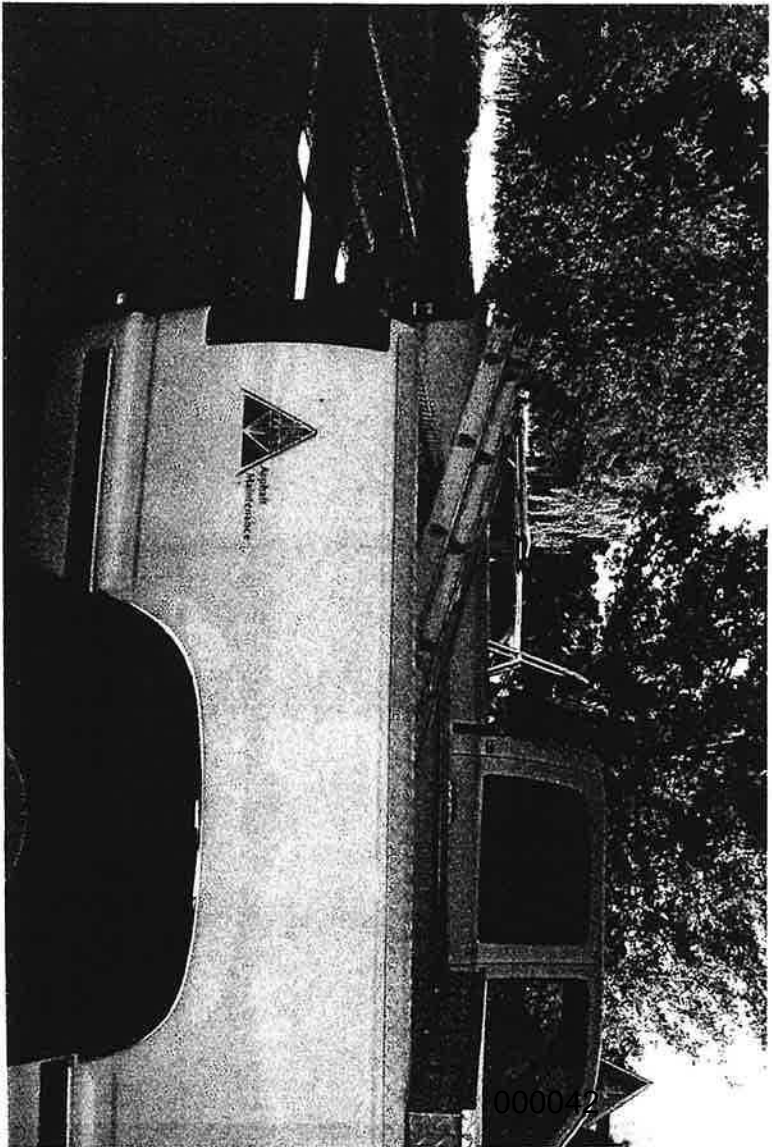
Berry Bloom Meadow Creed in 1998 under Ellsworth Construction different invoice than above.

Forrester's, Lynn Mitchell, long time friend off and on in 03 and 04

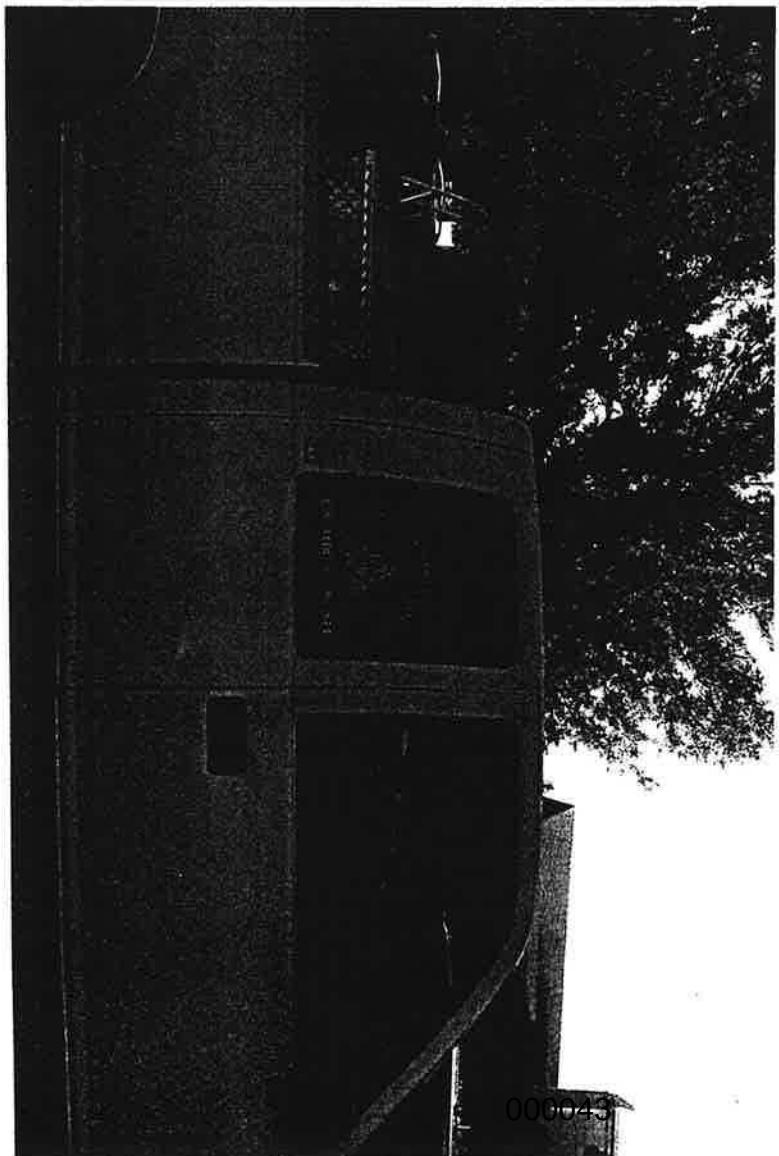
**EXHIBIT C – PHOTOGRAPH OF GEM STATE ROOFING & ASPHALT LOGO ON
SERVICE VEHICLES**

TRADEMARK SETTLEMENT AGREEMENT - 8

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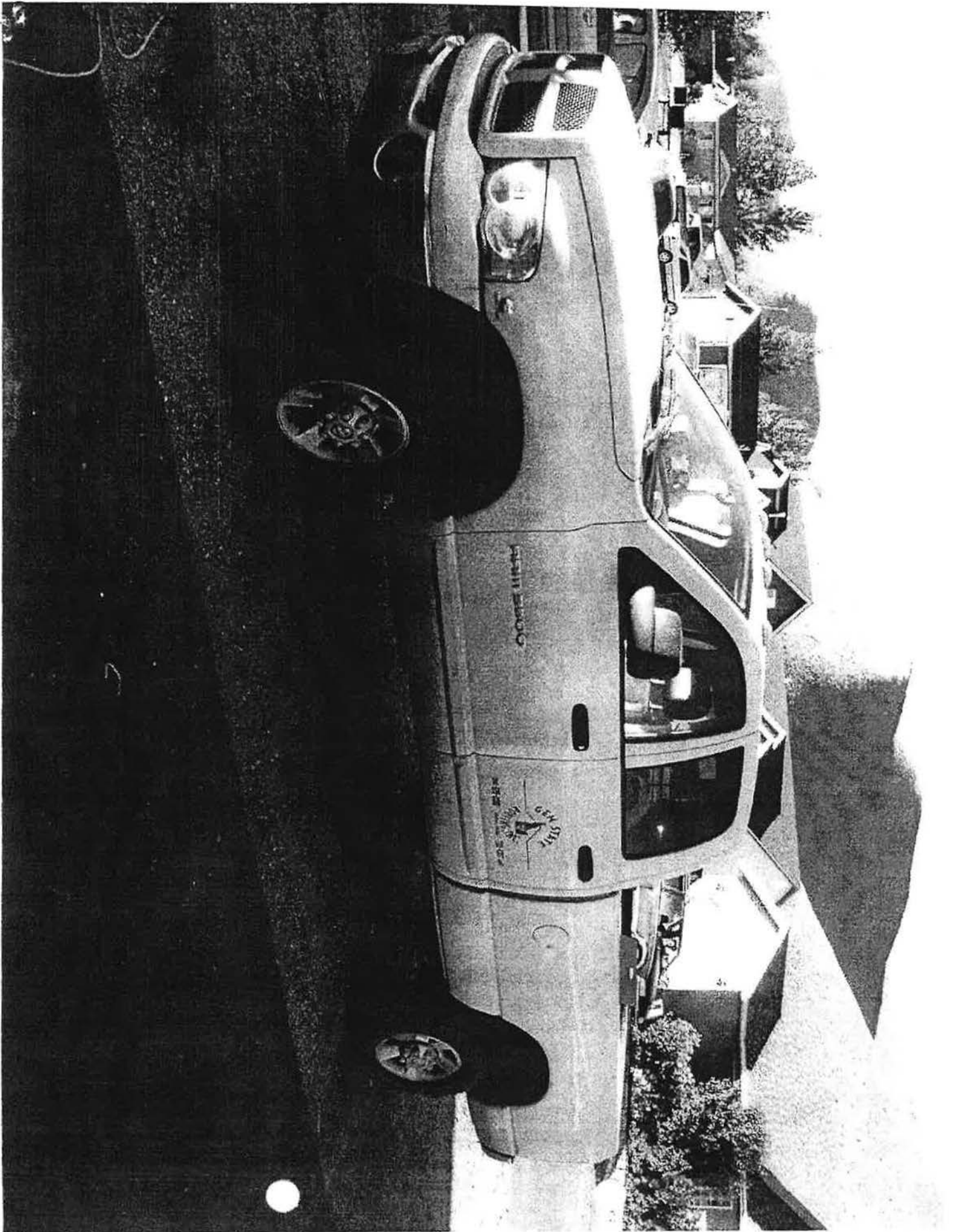
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**EXHIBIT D – PHOTOGRAPH OF GEM STATE ROOFING, INC. LOGO ON SERVICE
VEHICLE**

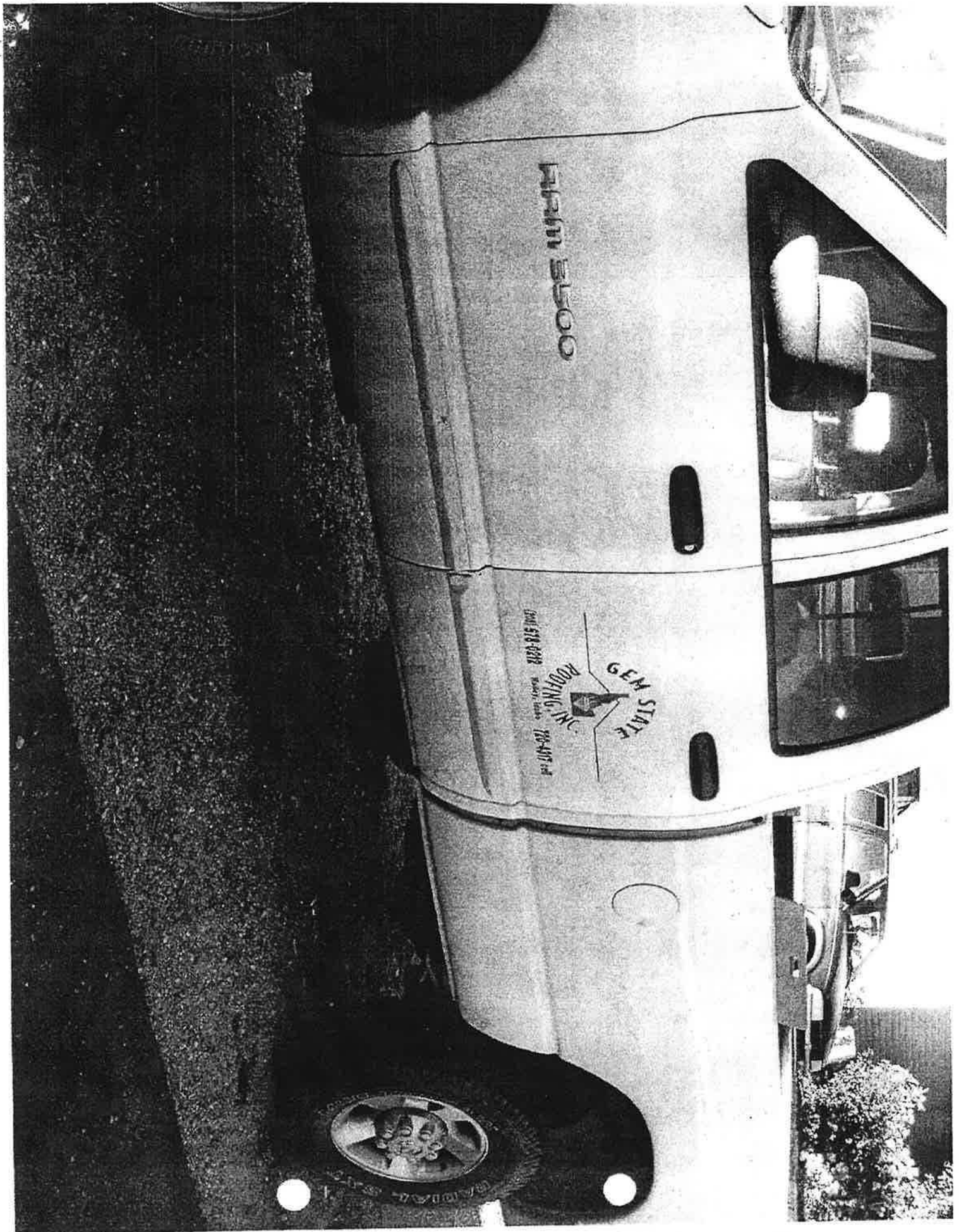
TRADEMARK SETTLEMENT AGREEMENT - 9

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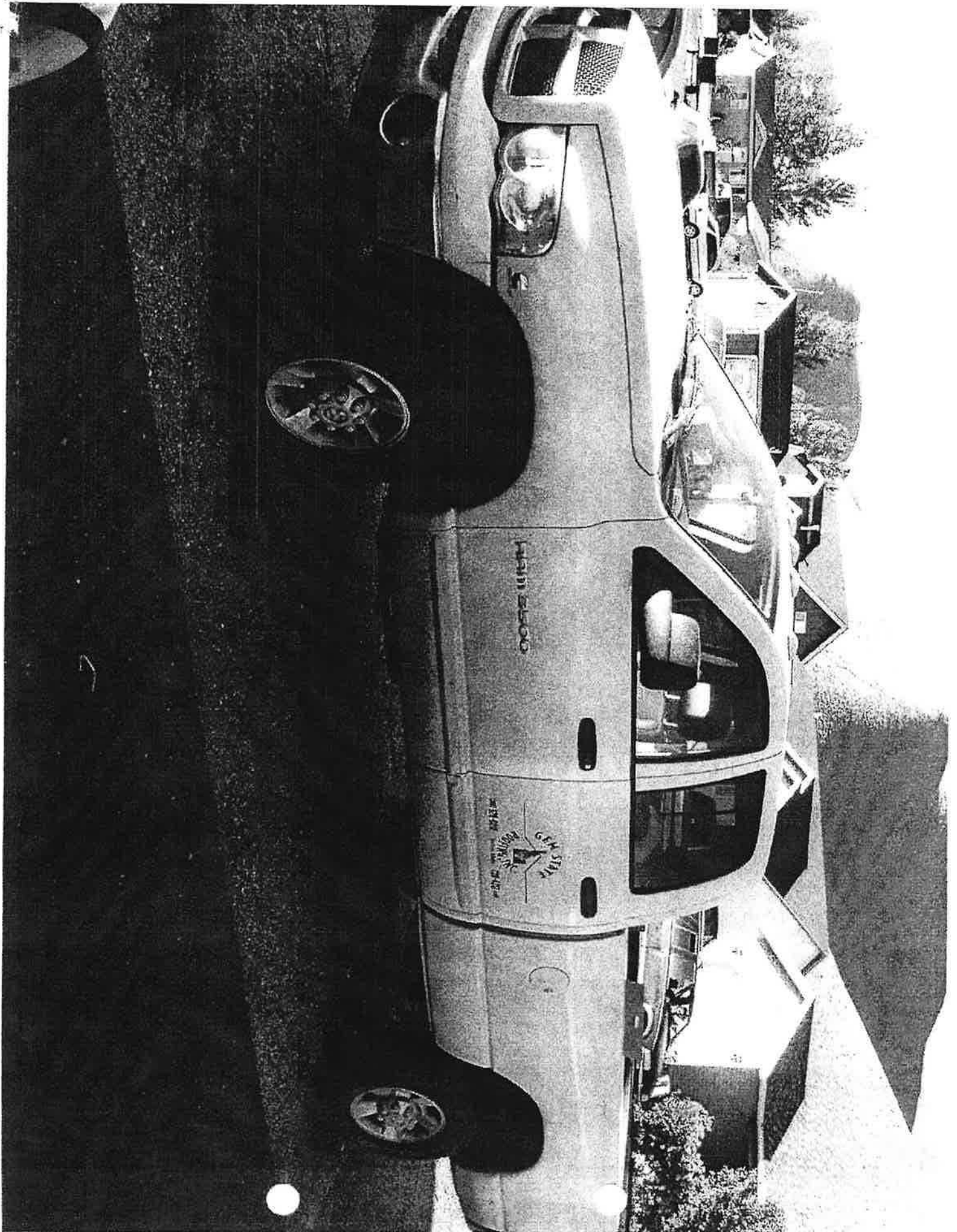
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Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING, INCORPORATED,

Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant.

Case No. CV01-18-13437

**DEFENDANT'S ANSWER TO
PLAINTIFF'S COMPLAINT**

Defendant, United Components, Incorporated, dba Gem State Roofing ("Defendant"), by and through its counsel of record, Pickens Cozakos, P.A., hereby answers Plaintiff's Complaint as follows:

FIRST DEFENSE

Defendant denies each and every allegation not specifically admitted in this Answer.

SECOND DEFENSE

Plaintiff's Complaint fails to state a cause of action against Defendant in which relief can be granted.

RESPONSE TO ALLEGATIONS

1. In response to paragraph 1 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

2. In response to paragraph 2 of Plaintiff's Complaint, Defendant admits the allegations contained herein.

3. In response to paragraph 3 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

4. In response to paragraph 4 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

5. In response to paragraph 5 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

6. In response to paragraph 6 of Plaintiff's Complaint, Defendant admits the Idaho Secretary of State has record of a Certificate of Assumed Business Name being filed on August 12, 1997, deny remainder of allegations because Defendant is without knowledge as to who filed the Certificate of Assumed Business Name and the purpose for filing the Certificate of Assumed Business Name.

7. In response to paragraph 7 of Plaintiff's Complaint, Defendant neither admit nor denies, as the document speaks for itself.

8. In response to paragraph 8 of Plaintiff's Complaint, Defendant is without sufficient knowledge to either admit or deny, thus denied.

9. In response to paragraph 9 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

10. In response to paragraph 10 of Plaintiff's Complaint, Defendant is without sufficient knowledge to either admit or deny because it was not a party to the Settlement Agreement, notwithstanding the forgoing, the document speaks for itself.

11. In response to paragraph 11 of Plaintiff's Complaint and paragraphs 11(a)-(e) of Plaintiff's Complaint, Defendant is without sufficient knowledge to either admit or deny because it was not a party to the Settlement Agreement, notwithstanding the forgoing, the document speaks for itself.

12. In response to paragraph 12 of Plaintiff's Complaint, Defendant is without sufficient knowledge to either admit or deny because it was not a party to the Settlement Agreement, notwithstanding the forgoing, the document speaks for itself.

13. In response to paragraph 13 of Plaintiff's Complaint, Defendant neither admits nor denies, the document speaks for itself.

14. In response to paragraph 14 of Plaintiff's Complaint, Defendant neither admits nor denies, the document speaks for itself.

15. In response to paragraph 15 of Plaintiff's Complaint, Defendant states the Amendment of Certificate of Assumed Business Name speaks for itself, denies remainder of allegations contained therein.

16. In response to paragraph 16 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

17. In response to paragraph 17 of Plaintiff's Complaint, Defendant neither admits nor denies, the document speaks for itself.

18. In response to paragraph 18 of Plaintiff's Complaint, Defendant neither admits nor denies, the document speaks for itself.

19. In response to paragraph 19 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

20. In response to paragraph 20 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

21. In response to paragraph 21 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

22. In response to paragraph 22 of Plaintiff's Complaint, Defendant denies allegations contained therein.

23. In response to paragraph 23 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-22 as if fully set forth herein.

24. In response to paragraph 24 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

25. In response to paragraph 25 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

26. In response to paragraph 26 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

27. In response to paragraph 27 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

28. In response to paragraph 28 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

29. In response to paragraph 29 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-28 as if fully set forth herein.

30. In response to paragraph 30 of Plaintiff's Complaint, Defendant asserts that the allegation calls for a legal conclusion, thus Defendant denies the allegations contained therein.

31. In response to paragraph 31 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

32. In response to paragraph 32 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

33. In response to paragraph 33 of Plaintiff's Complaint, Defendant is not a party to the Settlement Agreement, thus deny the allegations.

34. In response to paragraph 34 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-33 as if fully set forth herein.

35. In response to paragraph 35 of Plaintiff's Complaint, Defendant denies the allegations contained therein, Plaintiff's common law trademark expired on May 2, 2012.

36. In response to paragraph 36 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

37. In response to paragraph 37 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

38. In response to paragraph 38 of Plaintiff's Complaint, Defendant denies the allegations contained therein, Plaintiff's trademark expired on May 2, 2012.

39. In response to paragraph 39 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

40. In response to paragraph 40 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-39 as if fully set forth herein.

41. In response to paragraph 41 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

42. In response to paragraph 42 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

43. In response to paragraph 43 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

44. In response to paragraph 44 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

45. In response to paragraph 45 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-44 as if fully set forth herein.

46. In response to paragraph 46 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

47. In response to paragraph 47 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

48. In response to paragraph 48 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

49. In response to paragraph 49 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

50. In response to paragraph 50 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

51. In response to paragraph 51 of Plaintiff's Complaint, Defendant restates its responses to paragraphs 1-50 as if fully set forth herein.

52. In response to paragraph 52 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

53. In response to the prayer for relief, to the extent that Plaintiff's prayer attempts to allege or state claims for relief against Defendant, Defendant denies the contents of the prayer in its entirety.

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, Defendant alleges that Plaintiff's claims are barred in whole or in part, by the doctrines of laches, waiver, estoppel, and/or unclean hands.

SECOND AFFIRMATIVE DEFENSE

As a second affirmative defense, Defendant alleges Plaintiff failed to mitigate its damages, if any.

THIRD AFFIRMATIVE DEFENSE

As a third affirmative defense, Defendant alleges Plaintiff's damages, if any, were caused by intervening, superseding, or other causes.

FOURTH AFFIRMATIVE DEFENSE

As a fourth affirmative defense, Defendant alleges it is not a party to the Settlement Agreement, thus Counts I, II, V, and VI do not apply to Defendant because Plaintiff has failed to name the real party in interest.

FIFTH AFFIRMATIVE DEFENSE

As a fifth affirmative defense, Defendant alleges Plaintiff's trademark expired on May 2, 2012, thus Plaintiff does not have a valid trademark and Count III cannot be sustained.

SIXTH AFFIRMATIVE DEFENSE

As a sixth affirmative defense, Defendant alleges its “First Use” of the trademark is prior to Plaintiff’s “First Use”, thus Defendant’s use of the trademark prevails.

SEVENTH AFFIRMATIVE DEFENSE

As a seventh affirmative defense, Defendant allege it has acted in good faith.

RESERVATION

Defendant reserves the right, after discovery, to amend its Answer to add additional affirmative defenses supported by the facts, and a failure to include all such defenses in this Answer shall not be deemed a waiver of any right to further amend this Answer.

REQUEST FOR ATTORNEY’S FEES

Defendant hereby requests that it be awarded attorney fees and costs incurred herein pursuant to Idaho Code §§ 12-120, 12-121, and Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE, having fully answered Plaintiff’s Complaint, Defendant prays as follows:

1. That the Complaint be dismissed with prejudice and Plaintiff takes nothing thereunder;
2. That Defendant be awarded its attorney fees and costs incurred herein; and
3. For such other and further relief as the Court may deem just and equitable.

DATED: August 8, 2018.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff,))	
vs. )	)	AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, )	)	MCFARLAND IN SUPPORT OF
INCORPORATED, DBA GEM STATE )	)	MOTION TO COMPEL
ROOFING;))	
Defendant.))	

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated (“Gem State”) in the above referenced matter. I make this Affidavit based upon my own personal knowledge.
2. Attached hereto as Exhibit A is a true and correct copy of a cease and desist letter I caused to be mailed to United Components, Incorporated (“UCI”) on or about June 22, 2018.
3. Attached hereto as Exhibit B is a portion of (as required by IRCP 33(c)(2)) Plaintiff Gem State Roofing, Incorporated’s First Set of Interrogatories, Requests for Production

of Documents, and Requests for Admission (“First Set of Discovery Requests”) that Gem State served on counsel for Defendant UCI on or about September 4, 2018.

4. Attached hereto as Exhibit C is a true and correct copy of a portion of (as required by IRCP 33(c)(2)) Defendant’s Answers and Responses to Gem State’s First Set of Discovery Requests (“First Discovery Responses”) served on me on or about October 4, 2018.

5. Attached hereto as Exhibit D is a portion of (as required by IRCP 33(c)(2)) Plaintiff Gem State Roofing, Incorporated’s Second Set of Interrogatories and Requests for Production of Documents (“Second Set of Discovery Requests”) that Gem State served on UCI’s counsel on or about October 17, 2018.

6. On October 24, 2018, my co-counsel Lori Hickman and I met and conferred with UCI’s counsel by telephone concerning UCI’s First Discovery Responses.

7. Attached hereto as Exhibit E is a true and correct copy of a portion of (as required by IRCP 33(c)(2)) Defendant’s First Supplemental Answers and Responses to Gem State’s First Set of Discovery Requests (“Supplemental Responses”), served on me on or about November 6, 2018.

8. Attached hereto as Exhibit F is a true and correct copy of a portion of (as required by IRCP 33(c)(2)) Defendant’s Answers and Responses to Gem State’s Second Set of Discovery Requests (“Second Discovery Responses”), served on me on or about November 19, 2018.

9. Attached hereto as Exhibit G is a true and correct copy of the Subpoena Duces Tecum I served upon third-party McAlvain Construction Inc.

10. Attached hereto as Exhibit H are true and correct copies of select pages from the deposition transcript of Jeffrey Flynn taken on December 20, 2018.

11. Attached hereto as Exhibit I are true and correct copies of exhibits from the deposition transcript of Jeffrey Flynn taken on December 20, 2018.

12. In addition to the subpoena served on McAlvain Construction, Inc., I caused ten (10) other subpoenas to be served on purported customers of Defendant, including Snow Mountain Apartments, Bruce Bothwell, Larry Isham, J. Shay Construction, Casino, Inc., Standard Plumbing Supply – Sun Valley, Pioneer West Property Management, Idaho Mountain Builders Inc., Brashears & Sons, and ESI Construction Management, LLC. In response, I received hundreds of pages of documents, including numerous emails and contracts between Defendant and customers regarding work in Blaine County.

Further your affiant sayeth naught.



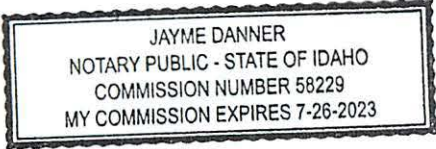
Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 28th day of January 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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

Jayme Danner



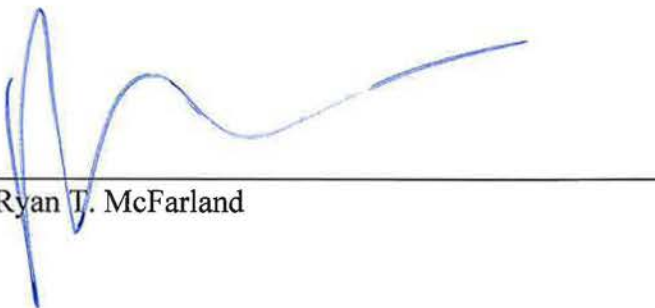
Notary Public for Idaho
Residing at: Nampa, Idaho
My commission expires: July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
Terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing



Ryan T. McFarland

EXHIBIT A



McFARLAND RITTER

22 June 2018

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED
VIA U.S. MAIL
VIA E-MAIL, gemstateroofing@gmail.com
VIA FAX, 208.388.8461

UNITED COMPONENTS, INCORPORATED, dba Gem State Roofing
Attn: Jeff Flynn, President and Registered Agent
417 Remington, Ste #2
Garden City, Idaho 83714

Re: Gem State-Hailey v. Gem State-Boise

Mr. Flynn,

This firm represents Gem State Roofing, Incorporated, an Idaho corporation having its principal place of business in Hailey, Idaho (referred to herein as "Gem State-Hailey"). I write in reference to that Trademark Settlement Agreement (the "Settlement Agreement") entered into between your company, United Components, Incorporated, dba Gem State Roofing (herein, "Gem State-Boise") and Gem State-Hailey, dated October 20, 2005.

Pursuant to the Settlement Agreement, Gem State-Boise is prohibited from "advertis[ing] or solicit[ing] business in Blaine County." Gem State-Boise is further prohibited from "perform[ing] any services in Blaine County" except warranty or maintenance work, repeat customer business, and work for a public entity. Gem State-Boise also agreed that if it receives a request for work in Blaine County that it will direct the work to Gem State-Hailey.

Gem State-Hailey has personal knowledge that Gem State-Boise has violated the terms of the Settlement Agreement, in that Gem State-Boise has bid on and performed numerous roofing jobs in Blaine County in recent months, including jobs that were almost immediately adjacent to Gem State-Hailey's offices. In or about June 2016, Mr. Silvia, President of Gem State-Hailey confronted a person (presumably a Gem State-Boise employee) at a Gem State-Boise job site in Blaine County; rather than explain Gem State-Boise's presence, that person tried to expose his genitals to Mr. Silvia. The message was received: Gem State-Boise is not concerned about Gem State-Hailey's rights under the Settlement Agreement.

Not only has Gem State-Boise been flaunting (figuratively and literally) its disregard of Gem State-Hailey's rights, but the work Gem State-Boise has been doing is substandard, to the detriment of Gem State-Hailey's reputation. Customers and building authorities have mistakenly contacted Gem State-Hailey with complaints about Gem State-Boise's work and requests for corrections of that substandard work.

Demand is hereby made that Gem State-Boise cease violating the Settlement Agreement, abide by the Settlement Agreement terms, and agree to make Gem State-Hailey whole. Specifically, Gem State-Hailey demands the following:

1. No later than July 2, 2018, Gem State-Boise cease, immediately and permanently, from all work in Blaine County, and manifest that it has permanently stopped by signing an affidavit under oath to that effect.
2. No later than July 2, 2018, Gem State-Boise provide Gem State-Hailey, via the undersigned, a copy of all invoices that relate in any way to work done by Gem State-Boise in Blaine County, since October 20, 2005, regardless of whether Gem State-Boise believes such work is authorized under the Settlement Agreement. Following review of this information, Gem State-Hailey will calculate its damages from Gem State-Boise's breach of the Settlement Agreement and from injuries to Gem State-Hailey's reputation, and will make further demand on Gem State-Boise accordingly.

Please be advised that if I have not heard from Gem State-Boise by July 2, 2018, Gem State-Hailey will assume that Gem State-Boise does not intend to comply and reserves the right to seek judicial assistance in this matter, without further notice to you. This letter is sent in an effort to resolve a dispute short of litigation, but Gem State-Hailey does not waive any of its rights hereby.

Sincerely,



Ryan T. McFarland
Legal Counsel

EXHIBIT B

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendant.)

Case No. CV01-18-13437

PLAINTIFF GEM STATE ROOFING,
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS FOR
PRODUCTION OF DOCUMENTS, AND
REQUESTS FOR ADMISSION

TO DEFENDANT UNITED COMPONENTS, INCORPORATED, dba GEM STATE
ROOFING:

Plaintiff GEM STATE ROOFING, INCORPORATED ("Plaintiff" or "Gem State"), by
and through its attorneys of record, McFarland Ritter PLLC, hereby require You to answer and
respond to the following Interrogatories, Requests for Production of Documents and Requests for
Admission under oath within thirty (30) days after service hereof, in the manner prescribed by
Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure.

PLAINTIFF GEM STATE ROOFING, INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND
REQUESTS FOR ADMISSION - 1

requires that a party may not give lack of information or knowledge as a reason for failing to admit or deny except under certain limited and specified conditions. Further, pursuant to Rule 36, Requests for Admission not answered under oath within thirty (30) days of service will be deemed admitted.

DEFINITIONS

As used throughout these Discovery Requests:

1. The term “documents” shall mean and include any and all:

(a) Tangible things or items, whether handwritten, typed, printed, tape recorded, electronically recorded, videotape recorded, visually reproduced, stenographically reproduced or reproduced in any other manner;

(b) Originals and all copies of any and all communications;

(c) Writings of any kind or type whatsoever;

(d) Books and pamphlets;

(e) Microtape, microfilm, photographs, movies, records, recordings, tape recordings, computer disks, and videotape recordings, stenographically or otherwise reproduced;

(f) Diaries and appointment books;

(g) Cables, wires, memoranda, reports, notes, minutes, e-mail and inter-office communications;

(h) Letters and correspondence;

(i) Drawings, blueprints, sketches and charts;

(j) Contracts or agreements;

(k) Other legal instruments or official documents;

(l) Published material of any kind;

- (m) Vouchers, receipts, invoices, bills, orders, billings and checks;
- (n) Investigation or incident reports;
- (o) Files and records;
- (p) Notes or summaries of conferences, meetings, discussions, interviews or telephone conversations or messages; and
- (q) Drafts or draft copies of any of the above.

2. The term “identify” when referring to an individual, corporation or other entity, shall mean to set forth:

- (a) The name;
- (b) Present or last known address and telephone number; and
- (c) If a corporation, the principal place of business.

3. The term “identify” when referring to a conversation means to state with respect to that conversation the date, the participants, the place and the substance of the conversation.

4. The term “identify” when referring to a document shall mean to set forth:

- (a) The name of the document;
- (b) The contents of the document;
- (c) The author of the document;
- (d) The date of the document;
- (e) The document’s present location and the name of its custodian;
- (f) The nature and substance of the document with sufficient particularity to

enable it to be subpoenaed; and

- (g) Whether it will be voluntarily made available for inspection and copying.

5. The term “Gem State” means and refers to Plaintiff herein, Gem State Roofing, Incorporated, and its officers, directors, agents, representatives, employees, attorneys, insurers and every person acting or purporting to act, or who has ever acted or purported to act, on Gem State’s behalf.

6. The term “You” means Defendant United Components, Incorporated (“UCI”), Your officers, directors, agents, representatives, employees, attorneys, insurers, and every person acting or purporting to act, or who has ever acted or purported to act on Your behalf (hereinafter, “Defendant” or “UCI”). “You” means also the person or persons responding to these requests. “Your” refers to the same persons to which “You” refers.

7. “Tangible things” means any object, property or thing of a corporeal nature which is not otherwise subsumed and included under the term “documents” as hereinabove defined.

8. “Persons” means and includes any natural person, partnership, corporation, joint venture, unincorporated association, governmental entity (or agency or board thereof), quasi-public entity or other form of entity, and any combinations thereof.

9. The term “Complaint” means the Complaint filed by Plaintiff on July 20, 2018, in the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. CV01-18-13437.

10. The term “Answer” means Defendant's Answer to Plaintiff's Complaint filed by You on or about August 8, 2018, in the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. CV01-18-13437.

11. The term “Settlement Agreement” means the Trademark Settlement Agreement entered into by and between Gem State and Gem State Roofing & Asphalt Maintenance, Inc. in October 2005.

12. Masculine pronouns shall not connote any particular gender but shall be taken to mean masculine, feminine or neutral gender, as the appropriate case may be.

13. All requests for documents assume that the documents are either in Your possession or control as the term “You” and “Your” is defined.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify each person who has assisted in, participated in, prepared any information for, supplied any information for, or has been relied upon in preparing the responses given to these Discovery Requests.

INTERROGATORY NO. 2: Please identify each and every person known to You who has knowledge of, or who purports to have knowledge of, the facts in this case, including all facts related to the allegations and claims set forth in the Complaint and the answers and defenses set forth in the Answer. In answering this Interrogatory, please set forth the names, current employer(s), business and home address and telephone number of all persons identified, as well as a detailed account of what knowledge each such person has, or purports to have, with regard to the facts of the case.

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

INTERROGATORY NO. 4: Please describe in detail any and all communications You or Your agents have ever had with Gem State, whether said communications were written or oral or otherwise. For each communication, identify its date, all persons present at the time it occurred or was made, and the identities of all persons with knowledge or copies of such communications.

REQUEST FOR PRODUCTION NO. 6: Please produce all correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

REQUEST FOR PRODUCTION NO. 8: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 3.

REQUEST FOR PRODUCTION NO. 9: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 4.

REQUEST FOR PRODUCTION NO. 10: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 5.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 6.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 7.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 8.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 9.

REQUEST FOR ADMISSION NO. 9: Admit that Jeff Flynn is and has been the President of UCI since October 2011.

REQUEST FOR ADMISSION NO. 10: Admit that You are doing business under the assumed business name "Gem State Roofing."

REQUEST FOR ADMISSION NO. 11: Admit that You filed with the Idaho Secretary of State an Application of Registration of Assignment of a design mark with the words "Gem State Roofing", wherein Gem State Roofing & Asphalt Maintenance, Inc. is the assignor and UCI is the assignee.

REQUEST FOR ADMISSION NO. 12: Admit that since 2016, You have advertised, solicited, bid on, and performed roofing work in Blaine County under the assumed business name "Gem State Roofing."

REQUEST FOR ADMISSION NO. 13: Admit that customers in Blaine County have confused Your roofing work with Gem State's roofing work, and vice versa.

REQUEST FOR ADMISSION NO. 14: Admit that Gem State has a reputation for quality roofing services in Blaine County.

REQUEST FOR ADMISSION NO. 15: Admit that You have benefited and are continuing to benefit from the reputation of the name "Gem State Roofing" in Blaine County.

REQUEST FOR ADMISSION NO. 16: Admit that Gem State has demanded in writing that You cease conducting Your roofing business in Blaine County.

REQUEST FOR ADMISSION NO. 17: Admit that despite Gem State's written demands that You cease conducting Your roofing business in Blaine County, You continue to advertise, solicit, bid on, and perform roofing work in Blaine County.

REQUEST FOR ADMISSION NO. 24: Admit that Exhibit H attached hereto is a true and correct copy of Gem State Roofing & Asphalt Maintenance Inc.'s Annual Report Form filed with the Idaho Secretary of State on March 16, 2011, with Jeff Flynn identified as Director.

REQUEST FOR ADMISSION NO. 25: Admit that Exhibit I attached hereto is a true and correct copy of Cancellation or Amendment of Certificate of Assumed Business Name filed with the Idaho Secretary of State on October 26, 2011, which deletes Gem State Roofing & Asphalt Maintenance, Inc. as the entity doing business under the assumed business name "Gem State Roofing" and adds You as the entity doing business under that assumed business name.

REQUEST FOR ADMISSION NO. 26: Admit that Jeff Flynn, as President, signed Exhibit I (Amendment of Certificate of Assumed Business Name) on Your behalf.

REQUEST FOR ADMISSION NO. 27: Admit that Exhibit J attached hereto is a true and correct copy of Your Articles of Incorporation filed with the Idaho Secretary of State on October 25, 2011.

REQUEST FOR ADMISSION NO. 28: Admit that Exhibit K attached hereto is a true and correct copy of Idaho Secretary of State Business Entity status information for Gem State Roofing & Asphalt Maintenance, Inc, indicating that it was administratively dissolved August 7, 2012.

DATED THIS 4th day of September 2018.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorney for Plaintiffs

EXHIBIT C

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., answers and responds to *Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the "Discovery Requests"), to the extent

INTERROGATORY NO. 2: Please identify each and every person known to You who has knowledge of, or who purports to have knowledge of, the facts in this case, including all facts related to the allegations and claims set forth in the Complaint and the answers and defenses set forth in the Answer. In answering this Interrogatory, please set forth the names, current employer(s), business and home address and telephone number of all persons identified, as well as a detailed account of what knowledge each such person has, or purports to have, with regard to the facts of the case.

ANSWER TO INTERROGATORY NO. 2:

1. Kerri Kuhn, c/o Pickens Cozacos P.A. Ms. Kuhn is the Secretary for Defendant and as such, has knowledge as to the claims and defenses in this litigation.
2. Jeff Flynn, c/o Pickens Cozacos, P.A. Mr. Flynn is the current registered agent for Defendant and as such, has knowledge of the claims and defenses in this litigation.
3. Robert Hayden, c/o Pickens Cozacos, P.A. Mr. Hayden is the Vice President for Defendant and as such, has knowledge as to the claims and defenses in this litigation.
4. Richard Silvia, c/o McFarland Ritter, PLLC. Mr. Silvia is the President for Plaintiff Gem State Roofing, Incorporated and as such, is likely to have knowledge as to the claims and defenses in this litigation.

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

ANSWER TO INTERROGATORY NO. 3: These items do not exist. Defendant reserves the right to supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

INTERROGATORY NO. 4: Please describe in detail any and all communications You or Your agents have ever had with Gem State, whether said communications were written or oral or otherwise. For each communication, identify its date, all persons present at the time it occurred or was made, and the identities of all persons with knowledge or copies of such communications.

ANSWER TO INTERROGATORY NO. 4: Defendant objects to this Interrogatory on the grounds that it is overly broad in seeking every conversation between the parties. Defendant also objects on the grounds that this Interrogatory seeks information already in possession of Plaintiff, as Plaintiff would have been present for any conversations between Defendant and Plaintiff.

INTERROGATORY NO. 5: Please identify every fact which forms the basis of Your denial that Mr. Silvia has been President of Gem State since 2000, as set forth in paragraph 9 of Your Answer.

ANSWER TO INTERROGATORY NO. 5: Defendant is without sufficient knowledge to know if Mr. Silvia has been president of Gem State since 2000 as it is not a member of Gem State, does not attend any meetings of Gem State wherein a vote is taken as to who will be president.

INTERROGATORY NO. 6: Please identify every fact which forms the basis of Your responses in paragraphs 10-12 of Your Answer that "Defendant is without sufficient knowledge to either admit or deny because it was not a party to the Settlement Agreement."

ANSWER TO INTERROGATORY NO. 6: Defendant is not a named party to the settlement agreement; thus, it cannot admit nor deny.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Please see documents produced herewith bates stamped as DEFENDANT0001-0027.

REQUEST FOR PRODUCTION NO. 3: Please produce all correspondence or other documents or tangible things exchanged between You and Gem State.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: Please see documents produced herewith bates stamped as DEFENDANT0001-0027.

REQUEST FOR PRODUCTION NO. 4: Please produce all agreements or other documents or tangible things executed or exchanged between You and Gem State Roofing & Asphalt Maintenance, Inc.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: No documents exist.

REQUEST FOR PRODUCTION NO. 5: Please produce all applications, assignments, and/or registrations of any and all trademarks owned or used by UCI.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: Please see documents produced herewith bates stamped as DEFENDANT0001-0027.

REQUEST FOR PRODUCTION NO. 6: Please produce All correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: No documents exist.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have

ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: No documents exist.

REQUEST FOR PRODUCTION NO. 8: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 3.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: No documents exist.

REQUEST FOR PRODUCTION NO. 9: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 4.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: No documents exist.

REQUEST FOR PRODUCTION NO. 10: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 5.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: No documents exist.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 6.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: No documents exist.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 7.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: No documents exist.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 8.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: No documents exist.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents that support or relate in any manner to Your Response to Interrogatory No. 9.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Deny.

REQUEST FOR ADMISSION NO. 8: Admit that Jeff Flynn was an officer of Gem State Roofing & Asphalt Maintenance, Inc., including as Vice President in or about December 2004.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Deny. Defendant is a corporation and does not have knowledge of Gem State Roofing & Asphalt Maintenance, Inc.'s records.

REQUEST FOR ADMISSION NO. 9: Admit that Jeff Flynn is and has been the President of UCI since October 2011.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Admit.

REQUEST FOR ADMISSION NO. 10: Admit that You are doing business under the assumed business name "Gem State Roofing."

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Deny.

REQUEST FOR ADMISSION NO. 11: Admit that You filed with the Idaho Secretary of State an Application of Registration of Assignment of a design mark with the words "Gem State Roofing", wherein Gem State Roofing & Asphalt Maintenance, Inc. is the assignor and UCI is the assignee.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Deny, Defendant is a corporation and not capable of filing documents.

REQUEST FOR ADMISSION NO. 12: Admit that since 2016, You have advertised, solicited, bid on, and performed roofing work in Blaine County under the assumed business name "Gem State Roofing."

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Deny.

REQUEST FOR ADMISSION NO. 13: Admit that customers in Blaine County have confused Your roofing work with Gem State's roofing work, and vice versa.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Deny.

REQUEST FOR ADMISSION NO. 14: Admit that Gem State has a reputation for quality roofing services in Blaine County.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Deny, Defendant is without sufficient knowledge or ability to ask each resident of Blaine County what Gem State's reputation is.

REQUEST FOR ADMISSION NO. 15: Admit that You have benefited and are continuing to benefit from the reputation of the name "Gem State Roofing" in Blaine County.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Deny.

REQUEST FOR ADMISSION NO. 16: Admit that Gem State has demanded in writing that You cease conducting Your roofing business in Blaine County.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Deny.

REQUEST FOR ADMISSION NO. 17: Admit that despite Gem State's written demands that You cease conducting Your roofing business in Blaine County, You continue to advertise, solicit, bid on, and perform roofing work in Blaine County.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Deny.

REQUEST FOR ADMISSION NO. 18: Admit that Exhibit B attached hereto is a true and correct copy of the Application for Registration of Assignment of Trademark-Service Mark wherein Gem State Roofing & Asphalt Maintenance, Inc. is assignor and You are assignee of the design mark that includes the words "Gem State Roofing."

RESPONSE TO REQUEST FOR ADMISSION NO. 18: Admit an Application for

DATED: October 4, 2018.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 4, 2018, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT D

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING)
Defendant.)

Case No. CV01-18-13437

PLAINTIFF GEM STATE ROOFING,
INCORPORATED'S SECOND SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS

TO DEFENDANT UNITED COMPONENTS, INCORPORATED, dba GEM STATE
ROOFING:

Plaintiff GEM STATE ROOFING, INCORPORATED ("Plaintiff" or "Gem State"), by
and through its attorneys of record, McFarland Ritter PLLC, hereby require You to answer and
respond to the following Interrogatories and Requests for Production of Documents under oath
within thirty (30) days after service hereof, in the manner prescribed by Rules 33 and 34 of the
Idaho Rules of Civil Procedure.

PLAINTIFF GEM STATE ROOFING, INCORPORATED'S SECOND SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS - 1

000084

PRELIMINARY STATEMENT

A. When responding to the following Interrogatories and Requests for Production of Documents (“Discovery Requests”) You are requested to furnish all information available to You, including information in the possession of Your attorneys, investigators, employees, agents, representatives, or any other person or persons acting on Your behalf, and not merely such information as is known by You on personal knowledge.

B. If You cannot answer any of the following Discovery Requests in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying Your inability to answer the remainder, and stating whatever information or knowledge You have concerning the unanswered portions.

C. Each Discovery Request is intended to and does request that each and every, all and singular, and the particulars and parts thereof, be answered with the same force and effect as if each part and particular were the subject of and were asked by a separate Discovery Request.

D. These Discovery Requests are deemed continuing and Your answers thereto are to be supplemented, as additional information and knowledge becomes available or known to You.

E. If Your response to any of the following Discovery Requests involves the claim of privilege, please summarize Your response to the interrogatory or identify the document entitled to the claim of privilege to the fullest extent possible without violating said privilege, including the nature of the claim of privilege and the nature of the information upon which the privilege is claimed.

DEFINITIONS

As used throughout these Discovery Requests:

1. The term “documents” shall mean and include any and all:

(a) Tangible things or items, whether handwritten, typed, printed, tape recorded, electronically recorded, videotape recorded, visually reproduced, stenographically reproduced or reproduced in any other manner;

(b) Originals and all copies of any and all communications;

(c) Writings of any kind or type whatsoever;

(d) Books and pamphlets;

(e) Microtape, microfilm, photographs, movies, records, recordings, tape recordings, computer disks, and videotape recordings, stenographically or otherwise reproduced;

(f) Diaries and appointment books;

(g) Cables, wires, memoranda, reports, notes, minutes, e-mail and inter-office communications;

(h) Letters and correspondence;

(i) Drawings, blueprints, sketches and charts;

(j) Contracts or agreements;

(k) Other legal instruments or official documents;

(l) Published material of any kind;

(m) Vouchers, receipts, invoices, bills, orders, billings and checks;

(n) Investigation or incident reports;

(o) Files and records;

(p) Notes or summaries of conferences, meetings, discussions, interviews or telephone conversations or messages; and

(q) Drafts or draft copies of any of the above.

2. The term “identify” when referring to an individual, corporation or other entity, shall mean to set forth:

- (a) The name;
- (b) Present or last known address and telephone number; and
- (c) If a corporation, the principal place of business.

3. The term “identify” when referring to a conversation means to state with respect to that conversation the date, the participants, the place and the substance of the conversation.

4. The term “identify” when referring to a document shall mean to set forth:

- (a) The name of the document;
- (b) The contents of the document;
- (c) The author of the document;
- (d) The date of the document;
- (e) The document’s present location and the name of its custodian;
- (f) The nature and substance of the document with sufficient particularity to

enable it to be subpoenaed; and

- (g) Whether it will be voluntarily made available for inspection and copying.

5. The term “You” means Defendant United Components, Incorporated (“UCI”), Your officers, directors, agents, representatives, employees, attorneys, insurers, and every person acting or purporting to act, or who has ever acted or purported to act on Your behalf (hereinafter, “Defendant” or “UCI”). “You” means also the person or persons responding to these requests. “Your” refers to the same persons to which “You” refers.

6. “Tangible things” means any object, property or thing of a corporeal nature which is not otherwise subsumed and included under the term “documents” as hereinabove defined.

7. "Persons" means and includes any natural person, partnership, corporation, joint venture, unincorporated association, governmental entity (or agency or board thereof), quasi-public entity or other form of entity, and any combinations thereof.

8. Masculine pronouns shall not connote any particular gender but shall be taken to mean masculine, feminine or neutral gender, as the appropriate case may be.

9. All requests for documents assume that the documents are either in Your possession or control as the term "You" and "Your" is defined.

INTERROGATORIES

INTERROGATORY NO. 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;
- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

INTERROGATORY NO. 21: Please identify each and every business and/or trade name under which Defendant has conducted business in Blaine County between October 2005 and the date of these Discovery Requests.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20.

REQUEST FOR PRODUCTION NO. 25: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 21.

DATED THIS 17th day of October 2018.

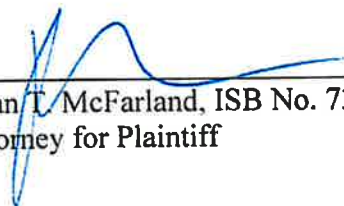
By  _____
Ryan T. McFarland, ISB No. 7347
Attorney for Plaintiff

EXHIBIT E

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING, INCORPORATED,	Plaintiff,
v.	
UNITED COMPONENTS, INCORPORATED, dba GEM STATE ROOFING,	Defendant.

Case No. CV01-18-13437

**DEFENDANT'S FIRST
SUPPLEMENTAL ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the "Discovery Requests"), to the extent that they are inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at

Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

ANSWER TO INTERROGATORY NO. 3: These items do not exist. Defendant reserves the right to supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI did not keep diaries, calendars, notes, journals, reports or other writings regarding work it did in Blaine County, Idaho. UCI kept invoices and statements, which have been provided previously as DEFENDANT00003-9.

INTERROGATORY NO. 4: Please describe in detail any and all communications You or Your agents have ever had with Gem State, whether said communications were written or oral or otherwise. For each communication, identify its date, all persons present at the time it occurred or was made, and the identities of all persons with knowledge or copies of such communications.

ANSWER TO INTERROGATORY NO. 4: Defendant objects to this Interrogatory on the grounds that it is overly broad in seeking every conversation between the parties. Defendant also objects on the grounds that this Interrogatory seeks information already in possession of Plaintiff, as Plaintiff would have been present for any conversations between Defendant and Plaintiff.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 4: UCI was made aware of allegations by Plaintiff that in June of 2016 there was a confrontation between employees of UCI and Gem State Roofing Hailey. UCI adamantly refutes the allegations. UCI is not aware of any other interactions between UCI and Gem State Roofing Hailey not already identified through documents produced herewith.

INTERROGATORY NO. 6: Please identify every fact which forms the basis of Your responses in paragraphs 10-12 of Your Answer that “Defendant is without sufficient knowledge to either admit or deny because it was not a party to the Settlement Agreement.”

ANSWER TO INTERROGATORY NO. 6: Defendant is not a named party to the settlement agreement; thus, it cannot admit nor deny.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 6: UCI is a wholly separate legal entity from Gem State Roofing & Asphalt Maintenance, Inc. A review of the records and documents attached hereto and previously establish that Gem State Roofing & Asphalt Maintenance, Inc. filed the Certificate of Registration of Trademark with Idaho Secretary of State. The document speaks for itself and is a public record, readily available to Plaintiff. In the Trademark Settlement Agreement, UCI was not yet formed, thus not a party to the Agreement, which also speaks for itself. The terms are set forth therein and need not be affirmed or denied by UCI. Thus, UCI stands by its original response, and reiterates that the documents referenced in paragraphs 10-12 of Plaintiff’s Complaint speak for themselves and UCI is not in a position to affirm or deny the contents of the documents, as UCI is not a party to them.

INTERROGATORY NO. 10: Please identify every fact which forms the basis of Your denial that You are not the successor and assignee of Gem State Roofing & Asphalt Maintenance, Inc. as set forth in paragraph 19 of Your Answer.

ANSWER TO INTERROGATORY NO. 10: Defendant is not a successor nor assignee of Gem State Roofing & Asphalt Maintenance because simply put, it is not a successor nor assignee.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 10: UCI was formed as a separate and distinct company, not under the umbrella of or in relation to Gem State Roofing & Asphalt Maintenance, Inc. See the formation documents attached hereto. While the companies

Admit that the documents filed with the Idaho Secretary of State's Office speak for themselves.

DATED: November 6, 2018.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 2018, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT F

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S SECOND SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., answers and responds to *Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and Requests for Production of Documents*, dated September 17, 2018, pursuant to Rules 26, 33 and 34 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents (hereafter, the "Discovery Requests"), to the extent that they are

inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;

- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

ANSWER TO INTERROGATORY NO. 20: Please see the Invoices, Estimates, and Work Orders from September 2010 to September 2018 provided herewith bates stamped as DEFENDANT000086 – 00113.

INTERROGATORY NO. 21: Please identify each and every business and/or trade name under which Defendant has conducted business in Blaine County between October 2005 and the date of these Discovery Requests.

ANSWER TO INTERROGATORY NO. 21: Gem State Roofing & Asphalt Maintenance, Inc. and United Components Incorporated, as identified on the documents provided herewith bates stamped as DEFENDANT000086-00113.

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: Please see the documents produced herewith bates stamped as DEFENDANT000086-00113.

REQUEST FOR PRODUCTION NO. 25: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 21.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25: See documents produced herewith bates stamped as DEFENDANT000086-000113.

EXHIBIT G

Ryan T. McFarland, ISB No. 7347
MCFARLAND RITTER PLLC
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendant.)

Case No. CV01-18-13437

SUBPOENA DUCES TECUM

MCALVAIN COMPANIES, INC. YOU ARE COMMANDED:

to appear in the Court at the place, date and time specified below to testify in the above case.

to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

to produce or permit inspection and copying of the documents including electronically stored information, set forth in the attached Exhibit A, at 2901 E. Pine Ave., Meridian, Idaho, on December 11, 2018.

to permit inspection of the following premises at the date and time specified below.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

By order of the court.

DATED THIS 26th day of November, 2018.

By



Ryan McFarland, ISB No. 7347
Attorneys for Plaintiff

Exhibit A

1. All correspondence, including without limitation, emails, bids, proposals, invoices, statements, payments or other documents or tangible things sent by you to, or received by you from, or exchanged between you and, United Components, Incorporated, d/b/a Gem State Roofing at any time.
2. All correspondence, including without limitation, emails, bids, proposals, invoices, statements, payments or other documents or tangible things sent by you to, or received by you from, or exchanged between you and, United Components, Incorporated, d/b/a Asphalt Maintenance & Paving at any time.
3. All correspondence, including without limitation, emails, bids, proposals, invoices, statements, payments or other documents or tangible things sent by you to, or received by you from, or exchanged between you and, Gem State Roofing & Asphalt Maintenance, Inc. at any time.
4. All correspondence, including without limitation emails, text messages, or other documents or tangible things sent by you to, or received by you from, or exchanged between you and, Jeffrey Flynn.
5. All correspondence, including without limitation emails, text messages, or other documents or tangible things sent by you to, or received by you from, or exchanged between you and, Michelle Flynn.

EXHIBIT H

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.) Case No. CV01-18-13437
UNITED COMPONENTS, INCORPORATED,)
dba GEM STATE ROOFING,)
Defendants.)
_____)

DEPOSITION OF JEFFREY FLYNN

DECEMBER 20, 2018

REPORTED BY:

MONICA M. FUHS, CSR NO. 471

NOTARY PUBLIC

Page 2

1 THE DEPOSITION OF JEFFREY FLYNN was taken on
2 behalf of the Plaintiff at the offices of Scentsy, Inc.,
3 2901 E. Pine Avenue, Meridian, Idaho, commencing at
4 9:00 a.m. on December 20, 2018, before Monica M. Fuhs,
5 Certified Shorthand Reporter and Notary Public within
6 and for the State of Idaho, in the above-entitled
7 matter.

8 APPEARANCES:

9 For the Plaintiff:

10 MCFARLAND RITTER, PLLC
11 BY: MR. RYAN T. MCFARLAND
12 MS. LORI HICKMAN
13 2901 E. Pine Avenue
14 P.O. Box 1335
15 Meridian, Idaho 83680
16 ryan@mcfarlandritter.com
17

18 For the Defendants:

19 PICKENS COZAKOS, P.A.
20 BY: MS. TERRI R. PICKENS MANWEILER
21 398 S. 9th Street, Suite 240
22 P.O. Box 915
23 Boise, Idaho 83701
24 terri@pickenslawboise.com
25 ALSO PRESENT: Rick Silvia

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1 Q. Any other lines of business?
 2 A. No.
 3 Q. When you formed Gem State Roofing & Asphalt
 4 Maintenance did you have employees?
 5 A. I had a couple guys that worked for me off and
 6 on throughout the years.
 7 Q. Do you remember their names?
 8 A. Jason Sanchez.
 9 Q. Who else?
 10 A. I had Dave Mayer.
 11 Q. Would you spell Mayer, if you can?
 12 A. I have a list of guys. How many do you want?
 13 Q. I want everyone you can remember.
 14 A. Okay.
 15 Q. Can you spell Mayer?
 16 A. M-a-y-e-r. Shane Brown. Tim Perkins. Do you
 17 want the guys I got now even?
 18 Q. Yes. Everyone you can remember that has
 19 worked for you.
 20 A. Donnie Brubaker.
 21 MS. PICKENS MANWEILER: Define which company,
 22 please?
 23 Q. (BY MR. MCFARLAND) Let's start with Gem State
 24 Roofing & Asphalt Maintenance. The last person I wrote
 25 down was Tim Perkins. You mentioned somebody else that

Page 23

1 I started to write.
 2 A. Donnie Brubaker. Bob Hayden. Which is now my
 3 business partner on United Components side. Kerrie
 4 Kuhn. She was employed by us, as well. And she is a
 5 business partner now. Tom Wilder. There was Stan
 6 Hamby. I think he has passed on. His brother, Gary
 7 Hamby. Several guys. I can't remember all of their
 8 names. Do you want my whole crew I got now?
 9 Q. I will in a minute. Let's start with Gem
 10 State Roofing & Asphalt Maintenance. Is there anyone
 11 else you can remember who was employed by that entity?
 12 A. Off the top of my head right now I can't
 13 remember everybody. It has been years. You are talking
 14 20, 25 years ago. I would have to go back and pull up a
 15 file.
 16 Q. If you think of others while we are talking
 17 just let me know, please.
 18 A. All right.
 19 Q. Does Jason Sanchez work for you currently?
 20 A. No, he does not.
 21 Q. When is the last time he worked for you?
 22 A. It has been several years. Actually, I think
 23 he did some part-time for us about three years ago.
 24 Maybe two-and-a-half years.
 25 Q. Would that have been UCI? Is it okay if I

Page 24

1 refer to it that way?
 2 A. Yes.
 3 Q. He was with both Gem State Roofing & Asphalt
 4 Maintenance and with UCI?
 5 A. Yes. Jason worked for me when I first
 6 originally started here in the Boise Valley. I believe
 7 in '87, '88 he started working for us. He was actually
 8 one of my first employees.
 9 Q. Same question regarding Dave Mayer?
 10 A. Same deal. He was my nephew's buddy from
 11 Colorado. He came out and worked for us for a summer.
 12 I think he is in Nashville or something now.
 13 Q. When is the last time he has worked for you?
 14 A. Twenty-five years ago.
 15 Q. Did he ever do work for UCI?
 16 A. No, never.
 17 Q. How about Shane Brown?
 18 A. That is my nephew.
 19 Q. Has he done work for you UCI?
 20 A. No.
 21 Q. And how long did he last work for you?
 22 A. Probably '87, '88.
 23 Q. How about Tim Perkins? When did he last work
 24 for you?
 25 A. He worked for us way back 25 years ago. And

Page 25

1 then he worked for us again about 12 years. And he owns
 2 his own company now in the valley.
 3 Q. Did he do work for UCI?
 4 A. No.
 5 Q. Or was that before UCI?
 6 A. That is before UCI.
 7 Q. Donnie Brubaker?
 8 A. He has been with us about 13 years. He was
 9 with Gem State Roofing.
 10 Q. Did he also work for UCI?
 11 A. Yes. He currently works for us.
 12 Q. And he has been with you you say about 12
 13 years?
 14 A. Roughly 12, 13 years. Carlos Guzman was
 15 another guy that worked for me.
 16 Q. And that was -- can I just call it GSR and
 17 UCI?
 18 A. That's fine.
 19 Q. Carlos Guzman?
 20 A. Yes.
 21 Q. And he worked for GSR?
 22 A. Yes. And United both.
 23 Q. When did he last work for you?
 24 A. Two years ago. He worked for us for about 20
 25 years.

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1 Q. I think you mentioned that Bob Hayden was an
2 employee for GSR and is now with you at UCI?
3 A. Correct.
4 Q. What was his role with GSR?
5 A. Sales. Sales and maintenance.
6 Q. And just to be clear. You are talking roof
7 maintenance? Not like shop maintenance?
8 A. He did everything. He kind of became a
9 general manager type guy.
10 Q. Is that his role today?
11 A. He is a business partner now.
12 Q. Does he still do sales today?
13 A. Yes, he does.
14 Q. Does he still do roof maintenance?
15 A. He does.
16 Q. Do you do any actual maintenance? Are you
17 climbing up on the roofs yourself?
18 A. Yes.
19 Q. Do you do any office work?
20 A. Not much. I'm not in the office much. I'm
21 out in the field.
22 Q. Are you doing estimates?
23 A. I do estimates, yes.
24 Q. Is there anybody else who does estimates?
25 A. Bob.

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1 Q. Anybody else?
2 A. Donnie does. We are getting him in the
3 estimating side now. And Andrew Hayden works with us,
4 as well. That is Bob's son.
5 Q. And he works for UCI now?
6 A. Yes.
7 Q. Did he ever do work for GSR?
8 A. He did.
9 Q. Kerrie Kuhn. I think you mentioned she was
10 with GSR?
11 A. Yes.
12 Q. And is now with UCI?
13 A. That's correct.
14 Q. What was her role with GSR?
15 A. She did office/clerical.
16 Q. Is that her role today?
17 A. Yes.
18 Q. Has it changed?
19 A. She is a business partner.
20 Q. Has her role changed between GSR and UCI?
21 A. She pretty much does the same thing other than
22 she is a business partner.
23 Q. Was she a business partner in GSR?
24 A. No.
25 Q. Was Bob Hayden a business partner in GSR?

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1 A. No.
2 Q. Let me ask the same question for each of them.
3 Did Bob have to do something different in order to
4 become a business partner? For example, did he have to
5 contribute money in order to become a business partner?
6 A. No. They contributed time. My daughter come
7 down very ill and I was traveling back and forth to
8 California quite a bit and needed somebody there that
9 could take care of things without running it into the
10 ground. So I brought them in as business partners.
11 Q. Same question with Kerrie. Did Kerrie have to
12 contribute money? Or just time?
13 A. Just basically time.
14 Q. But in that transition from GSR to UCI did
15 Bob's role change other than you made him a partner?
16 A. Just made him a partner.
17 Q. Same question with Kerrie? Did her role
18 change? Or did she just become a partner?
19 A. Same thing.
20 Q. Thomas Wilder. When did he last work for you?
21 A. It's probably been three-and-a-half, four
22 years ago, maybe.
23 Q. Did he do work for UCI at that time?
24 A. Yes, he did.
25 Q. And was he doing work for GSR before that?

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1 A. Yeah, he has worked for me off and on for 20
2 plus years, as well.
3 Q. Stan Hamby. When did he last work for you?
4 A. '87, '88.
5 Q. So Stan never did work for UCI; is that right?
6 A. No.
7 Q. And -- was it Gary Hamby?
8 A. Yes.
9 Q. Same question. When did he last work for you?
10 A. Roughly the same time.
11 Q. So he never did work for UCI?
12 A. No.
13 Q. And you have already answered about Carlos
14 Guzman. He was with --
15 A. For both, yes. And then there is Alex. I
16 can't remember Alex's last name. I would have to get it
17 for you. He worked for Gem State Roofing; GSR. He
18 never worked for United.
19 Q. How long ago did he work for GSR, do you
20 recall?
21 A. It's been probably 12 years, roughly. I'm
22 just guesstimating.
23 Q. Anybody else you can recall from either
24 company?
25 A. I got Tony Pineda. He is currently employed

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1 McEwen. And I worked for him in Twin Falls through my
 2 junior high and high school days. When I moved to Boise
 3 he told me to get some business cards and start passing
 4 them out. We started getting big right away. And he
 5 didn't want to do that. He wanted to be a little
 6 independent guy and that was it. But that is the
 7 gentleman who started the Gem State Roofing originally in Twin
 8 Falls. And that was in probably '84.
 9 Q. And then when you moved to Nampa in about
 10 '87 --
 11 A. '83, '84.
 12 Q. When you moved to Nampa in the early '80s you
 13 started putting that name Gem State Roofing on business
 14 cards?
 15 A. Yes.
 16 Q. Did you put it on letterhead like for invoices
 17 and estimates?
 18 A. Phone books.
 19 Q. Trucks?
 20 A. Yep.
 21 Q. Anywhere else? Did you have other equipment
 22 that --
 23 A. We put them on flyers. Did a lot of door
 24 knocking.
 25 Q. I know you have had at least a couple

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1 businesses. GSR and UCI. You have consistently
 2 operated under Gem State Roofing throughout that time?
 3 A. Yes.
 4 Q. Is there any other name you operated under?
 5 A. Just Gem State Roofing & Asphalt Maintenance.
 6 Q. Was Michelle ever a part of UCI?
 7 A. No.
 8 Q. She was a part of GSR?
 9 A. Correct.
 10 Q. When did she part ways with GSR?
 11 A. We split up roughly ten years ago. And she
 12 hasn't been active in the company since then.
 13 Q. When you say split up. You are talking
 14 about --
 15 A. We had a separation.
 16 Q. Are you still married today?
 17 A. No.
 18 Q. Did the separation of your marriage happen at
 19 the same time as her separation from GSR?
 20 A. Yes. Roughly around the same time.
 21 Q. And that was ten years ago?
 22 A. Yeah, roughly ten years ago. She was taking
 23 care of my daughter in California. She was terminal.
 24 Q. Sorry to hear that.
 25 A. She is surviving now. She is in remission.

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1 Q. I know that is a sensitive topic. I do need
 2 to ask questions and I want to do it respectfully. Was
 3 your daughter's health condition the reason for the
 4 separation? Or were there marital problems generally?
 5 A. Just a separation. Just had differences of
 6 opinions. A lot going on.
 7 Q. When Michelle left GSR did she receive any
 8 kind of severance or payment?
 9 A. No.
 10 Q. What happened to her stock in GSR? Was it
 11 assigned to you?
 12 A. That company was dissolved.
 13 Q. Did you dissolve that company?
 14 A. The IRS dissolved that company.
 15 Q. What did the IRS do to dissolve the company?
 16 A. They put major liens on me that are still
 17 active.
 18 Q. Are you paying on those liens today?
 19 A. Yes. We still are. We are actually in a
 20 compromise right now. OIC. Offers in compromise.
 21 Q. I'm not familiar with that term.
 22 A. It is called an OIC. Offers in compromise.
 23 Q. So you have agreed to some kind of payment --
 24 A. We are in an offers in compromise now.
 25 Q. Are you making payments currently?

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1 A. It is an offers in compromise. Everything is
 2 at a standstill until there is some sort of agreement.
 3 We are still waiting to hear back from them. They
 4 stopped everything. They won't take any money. When
 5 you are in an OIC they stop everything. They freeze it.
 6 They hold it. They don't take anything until we get
 7 through the offers in compromise.
 8 Q. During this period are you negotiating with
 9 them?
 10 A. As soon as they get back, yeah, with us. We
 11 are waiting for them. The ball is in their court right
 12 now.
 13 Q. I'm just not familiar with that process.
 14 A. It was seven figures to start with. Now it is
 15 six figures. In the \$350,000 range.
 16 Q. Usually when a company is dissolved someone
 17 needs to file Articles of Dissolution. Does that term
 18 mean anything to you, sir?
 19 A. Yeah, it does.
 20 Q. Do you recall filing those Articles of
 21 Dissolution?
 22 A. I do believe my tax lawyer at that point, and
 23 the accountant that I had, took and handled that. Gem
 24 State Roofing -- that side of the corporation is
 25 completely dissolved. That is why they told us we could

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1 Q. What other equipment?
2 A. It had trucks, an old paver, roller. And that
3 was part of the Asphalt Maintenance side. The two
4 companies pretty much were combined. They are under one
5 veil. We run the same crew. Some of the roofing guys
6 worked on the paving side. Some of the paving guys
7 worked on the roofing side. We had equipment. The IRS
8 made us buy the equipment back. And we had to pay
9 roughly 40-some-thousand-dollars to buy our old
10 equipment back that was old and delapidated. It was
11 junk basically. We had to purchase it to stay in
12 business at that point.
13 Q. You purchased it back from the IRS?
14 A. That's correct.
15 Q. They took it and you purchased it back?
16 A. They never took it. But they liened it. We
17 purchased it back through the United Components side.
18 Q. UCI purchased it back?
19 A. That's correct.
20 Q. So if I understand you right the IRS took the
21 equipment from GSR --
22 A. They never took it.
23 Q. Sorry. They put a lien on it when it was
24 under GSR's name?
25 A. That's correct.

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1 Q. You closed GSR's doors. At the same time you
2 opened UCI doors. And you paid 40-some-thousand-
3 dollars --
4 A. They let us purchase it back.
5 Q. And the lien was gone?
6 A. Yes.
7 Q. And you continued to use the same equipment?
8 A. Yes.
9 Q. How many trucks did you have?
10 A. Roughly four or five trucks at that point.
11 Just guesstimating.
12 Q. And just one paver?
13 A. At that point I had just the one paver.
14 Q. And just one roller?
15 A. One roller. No, I believe we had two. We
16 probably had two at that point. They were old. '90s.
17 Early '90s.
18 Q. And the trucks all had your logo on them?
19 A. Yes.
20 Q. You didn't have to change the logo when you
21 opened UCI's doors; did you?
22 A. No.
23 Q. Did the paver or the rollers have the logo on
24 them?
25 A. Yes.

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1 Q. And you didn't have to change those logos; did
2 you?
3 A. We have repainted them since then. Just
4 cleaned them up.
5 Q. At the time you opened UCI's doors you didn't
6 have to change the logos, though; right?
7 A. Not that I recall.
8 Q. At the time that GSR closed its doors I assume
9 you had a book of business? You had a list of clients?
10 A. That's correct.
11 Q. Did you notify any of your clients that GSR
12 was closing its door and that UCI was opening its doors?
13 A. No. At that point the economy had turned
14 down. And we lost a lot of our clientele like everybody
15 else did in the construction industry. And then it has
16 just come back over time. A lot of customers I have
17 worked for for 25, 30 years they are all back onboard
18 with us. We still continue to do work for them today.
19 Q. And I should have asked. And maybe you said
20 and I missed it. This closing of the GSR and opening of
21 UCI this all happened in '09?
22 A. Probably somewhere around '09, 2010.
23 Q. The heart of the recession?
24 A. Yeah. Right through it.
25 Q. So you lost clients like a lot of people?

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1 A. We lost 90 percent of our clientele like
2 everybody else did. Trying to make ends meet.
3 Q. But it had nothing to do with the IRS problem;
4 right?
5 A. Well, we owed taxes at that point. You know,
6 like everybody else most of it was the downturn of the
7 economy. My daughter got sick. I was going through a
8 divorce. I got sort of the tri-effect.
9 Q. What percentage of your book of business today
10 would you estimate were clients of yours before GSR
11 closed its door?
12 A. That we have today?
13 Q. Sure.
14 A. Pretty much all of our clientele is back. The
15 upswing of the economy has kind of kicked everything
16 back into gear.
17 Q. Would you say there was any break in
18 operations between GSR and UCI? You just kept working
19 under different corporate names?
20 A. Pounding doors. Pounding the pavement.
21 Keeping things alive. Can't sit in an office and wait
22 for the phone to ring in construction.
23 Q. I think you described Kerrie Kuhn's role as
24 officer manager?
25 A. Yes.

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1 Q. Does she have any other title besides business
2 partner?
3 A. She is in charge. She runs people pretty
4 good.
5 Q. Do you refer to her as vice-president or
6 corporate secretary, for example?
7 A. She's corporate secretary.
8 Q. How about Bob Hayden? Does he have any title?
9 A. He's vice-president.
10 Q. And you are the president; right?
11 A. Yes.
12 Q. Earlier when you were running through the list
13 of employees you identified all of the current UCI
14 employees you can think of; right?
15 A. Oh, no.
16 Q. You have others?
17 A. Yes. Andrew Hayden. Justin Fruzziel.
18 Q. Can you spell the last name?
19 A. F-r-u-z-z-i-e-l, I do believe. We have Mark
20 Kucura that was working for us. He is not working for
21 us now. He is terminal with cancer.
22 Q. How do you spell his last name?
23 A. K-u-c-u-r-a, I do believe. And then we have
24 Bruce. I'll have to get you his last name. It is a
25 different last name. I have another Mark that works for

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1 us now that -- he works on the asphalt paving side.
2 Q. What was his name?
3 A. Mark. We have another guy Jeff. I don't have
4 his last name off the top of my head, either. We have
5 got some new guys. That is pretty much our current guys
6 that I can think of right now off the top of my head.
7 Q. How long has Justin been with you guys?
8 A. He has been with us off and on for about
9 three, four years.
10 Q. So he was never with GSR?
11 A. No.
12 Q. How about Mark Kucura?
13 A. He worked for us probably 15 years ago.
14 Q. He was with both GSR and UCI?
15 A. Correct.
16 Q. How about Bruce?
17 A. Just United.
18 Q. How about Mark?
19 A. The new Mark is just United.
20 Q. And Jeff?
21 A. United. And I'm sure there is a ton more guys
22 in there. There is a list of guys. In the roofing
23 world you turn a lot of guys over the years.
24 Q. In the roughly nine, ten years that UCI has
25 had its doors open have you acquired additional trucks?

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1 A. Yes, we have.
2 Q. How many trucks do you have today?
3 A. Between trucks and dump trucks we have got a
4 ten-wheeler and probably five or six new trucks that we
5 are running. Not all brand new. A few of them are.
6 Q. Any of those five or six trucks the same
7 trucks that transferred from GSR to UCI?
8 A. Yes. We have some trucks that transferred
9 over.
10 Q. You still have some of the same?
11 A. Yes.
12 Q. How about the paver that you had that
13 transferred? Do you still have that paver today?
14 A. Yes.
15 Q. Do you have additional pavers now?
16 A. Yes.
17 Q. How many pavers total?
18 A. I think we have got three total. That is on
19 the asphalt paving side.
20 Q. And the one or two rollers that you had at the
21 time of transition do you still have those rollers, too?
22 A. Yes.
23 Q. Do you have additional rollers today?
24 A. No. I mean, you can get a list of this from
25 the state.

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1 Q. At the time you were at the Remington
2 office -- you were in the Remington office at the time
3 of this transition from GSR to UCI; right?
4 A. That's correct.
5 Q. Did you have computers then?
6 A. Yes.
7 Q. Miscellaneous office equipment, I guess?
8 A. Yes.
9 Q. Did you have to turn that stuff over to the
10 IRS?
11 A. No.
12 Q. You kept using it for UCI?
13 A. Yes.
14 Q. You didn't have to get a new phone number when
15 you changed businesses; right?
16 A. No.
17 Q. We talked about Michelle's stock in GSR. Did
18 your stock in GSR ever get transferred to anybody? Or
19 did it disappear when the company dissolved?
20 A. It just disappeared. There was nothing there.
21 Q. Do you know whether UCI took on any debts that
22 GSR had?
23 A. Yeah, several.
24 Q. What debts? Do you recall?
25 A. Phone ads. Miscellaneous material accounts.

1 behalf of your company, which we have referred to here
2 as UCI.
3 A. Okay.
4 Q. I invite you to turn to page seven of that
5 document. There is a heading there that says First
6 Affirmative Defense. Do you see that?
7 A. Yes, sir.
8 Q. And the first part of that paragraph reads,
9 "As a first affirmative defense defendant alleges that
10 plaintiff's claims are barred in whole or in part, by
11 the doctrines of laches." Do you see that?
12 A. I do see that.
13 Q. Do you know what that means? Doctrines of
14 laches?
15 A. I do not.
16 Q. The next word is waiver. Do you understand
17 what that word means in the context of this lawsuit?
18 A. I could assume.
19 MS. PICKENS MANWEILER: I ask you not to
20 assume.
21 THE WITNESS: I'm not clear on it.
22 Q. (BY MR. MCFARLAND) The next word is estoppel.
23 Do you know what that word means in the context of this
24 document?
25 A. I do not.

1 Q. And then the last words are and/or unclean
2 hands. Do you see that?
3 A. Yes, I do.
4 Q. Do you know what the term unclean hands means
5 in the context of this document?
6 A. I do not.
7 Q. The next heading is Second Affirmative
8 Defense. Do you see that?
9 A. Yes.
10 Q. Second Affirmative Defense, "Defendant alleges
11 plaintiff failed to mitigate its damages, if any." Do
12 you see that?
13 A. Yes, I do.
14 Q. Do you have any opinion, sir, as to how the
15 plaintiff may have failed to mitigate its damages?
16 MS. PICKENS MANWEILER: If you don't know, you
17 don't know.
18 THE WITNESS: I don't know.
19 Q. (BY MR. MCFARLAND) The next section says,
20 Third Affirmative Defense. Do you see that?
21 A. Yes.
22 Q. The Third Affirmative, "Defense alleges
23 Plaintiff's damages, if any, were caused by intervening,
24 superseding, or other causes." Do you see that?
25 A. Yes, sir.

1 Q. Did I read that accurately?
2 A. Yes.
3 Q. Do you know of any intervening, superseding or
4 other causes to plaintiff's damages?
5 A. No. This is all foreign language to me.
6 Q. That's fine. I simply want to know if you
7 have an opinion as to what they mean. It sounds like
8 you don't. That is all I need to know.
9 (Exhibit 2 marked.)
10 Q. (BY MR. MCFARLAND) You have been handed, sir,
11 what has been marked as Exhibit 2 to this deposition.
12 Do you have that in front of you?
13 A. Yes, sir.
14 Q. Do you recall seeing that document before
15 today?
16 A. I have not.
17 Q. I'll represent to you that those are written
18 discovery responses that your attorney provided to me on
19 your behalf.
20 MS. PICKENS MANWEILER: Actually, I'm going --
21 you need to clear the record up. When you say "on your
22 behalf." You are deposing Jeff Flynn. You are not
23 deposing United Components, Incorporated, which is the
24 party in this lawsuit. So you need to clarify when you
25 say "on your behalf" what you mean. This is not filed

1 on behalf of Jeff Flynn.
2 MR. MCFARLAND: That is a fair point.
3 Q. (BY MR. MCFARLAND) These are discovery
4 responses that your attorney filed on behalf of the
5 defendant in this case, United Components, Incorporated.
6 And you are the president of United Components,
7 Incorporated today; correct?
8 A. Yes.
9 Q. And you were the president on October 4, 2018;
10 is that correct?
11 A. Yes.
12 Q. I would like you to turn page 16 of the
13 document. And I'm citing to the middle of page 16 where
14 it says Request for Admission No. 10. Do you see that,
15 sir?
16 A. I do.
17 Q. The language there says, "Admit that you are
18 doing business under the assumed business name 'Gem
19 State Roofing.'" Do you see that?
20 A. Yes.
21 Q. And the answer below that is "Denied." Do you
22 see that?
23 A. I do see that.
24 Q. But your testimony, if I understand it today,
25 is that you, Jeff Flynn, had been conducting business

<p style="text-align: right;">Page 58</p> <p>1 under the name Gem State Roofing -- you along with 2 various other corporate entities -- since the 1980s; 3 isn't that correct, sir? 4 A. Yes. 5 Q. On that same page, Request for Admission 6 No. 12, near the bottom of the page, do you see that? 7 A. Yes. 8 Q. It states, "Admit that since 2016 --" so in 9 roughly the last three years "-- you have advertised, 10 solicited, bid on, and performed roofing work in Blaine 11 County under the assumed business name 'Gem State 12 Roofing.'" Do you see that? 13 A. Yes, I do. 14 Q. And is that a correct statement? Have you 15 solicited work in Blaine County since 2016 under the 16 name Gem State Roofing? 17 A. I have not solicited work there. We do have 18 advertised ads in the phonebooks that run concurrent 19 with the Twin Falls phonebooks. But I have not 20 solicited work there. 21 Q. Have you bid on work in Blaine County since 22 2016? 23 A. Personally I have not. 24 Q. Has your company UCI, acting under the name of 25 Gem State Roofing, bid on work in Blaine County?</p>	<p style="text-align: right;">Page 60</p> <p>1 A. Yes, it does. 2 Q. But your testimony is you have not seen this 3 document before? 4 A. I have not. 5 Q. Do you know whether Kerrie Kuhn ever talked 6 with you about discovery responses in this lawsuit? 7 A. Just in passing. Nothing to this magnitude, 8 no. 9 Q. Did you discuss any of the specific questions 10 with Kerrie Kuhn? 11 A. Specific questions as in? 12 Q. That are written here in this document? 13 A. I have not reviewed these. 14 Q. I didn't know if maybe she had, without 15 reviewing it, had just spoken to you about the specific 16 questions or not? 17 A. I have no idea what is in here. 18 Q. I'm going to direct you to the bottom of page 19 four. I'm looking at the last three words on page four. 20 It states "While the companies." Do you see that? 21 A. Yes. 22 Q. So reading, "While the companies --" and 23 turning to the next page "-- share directors and 24 shareholders." We are talking GSR and UCI. They share 25 some of the same directors and shareholders; right?</p>
<p style="text-align: right;">Page 59</p> <p>1 A. Yes, I have. 2 Q. Have you, Jeff Flynn, performed any roofing 3 work in Blaine County under the name Gem State Roofing 4 in the last three years? 5 A. Yes. 6 Q. And has your company UCI performed work in 7 Blaine County under the name Gem State Roofing in the 8 last three years? 9 A. Yes. 10 (Exhibit 3 marked.) 11 Q. (BY MR. MCFARLAND) You have been handed what 12 has been marked as Exhibit 3 to this deposition, sir. 13 Have you seen this before? 14 A. No, I have not. 15 Q. I'll represent to you that it is supplemental 16 answers to discovery questions that your attorney has 17 provided to me on behalf of the named defendant, United 18 Components, Incorporated. I would invite you to turn to 19 the end of the document to page eight. 20 A. Okay. 21 Q. You'll see a signature for a Kerrie Kuhn on 22 there. Do you see that? 23 A. Yes, I do. 24 Q. Does that appear to you to be Kerrie Kuhn's 25 signature?</p>	<p style="text-align: right;">Page 61</p> <p>1 A. Excuse me? Repeat that? 2 Q. No problem. The companies GSR and UCI, as we 3 have referred to them in this deposition, they have some 4 of the same shareholders; correct? 5 A. Yes, they do. 6 Q. That would be you; correct? 7 A. Yes. 8 Q. Anyone else? 9 A. Bob Hayden and Kerrie Kuhn. 10 Q. But those guys weren't shareholders in GSR; 11 were they? 12 A. You are talking old GSR? Or are you talking 13 United? You said UCI. So, yes, as far as UCI as Gem 14 State Roofing, yes, we do share. Before, no. 15 Q. I think I understand that. 16 A. Present time, yes. 17 Q. The two companies do not share bank accounts. 18 We talked about that. Right? GSR and UCI do not share 19 bank accounts? 20 A. Yes, they do. It's all tied together. 21 MS. PICKENS MANWEILER: Gem State Roofing & 22 Asphalt Maintenance, Inc. is dissolved. He is talking 23 about a different company than you are talking about. 24 THE WITNESS: I need you to clarify. You keep 25 saying UCI. So when you say UCI. UCI, and Gem State,</p>

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1 and Asphalt Maintenance is all one account now. Before,
2 no, because UCI didn't exist then. Am I not catching
3 that?
4 Q. (BY MR. MCFARLAND) You're fine. I want to
5 make sure you and I are speaking the same language. And
6 I think we are not. Let me try to clarify. So when I
7 refer to GSR I'm talking about the corporate entity Gem
8 State Roofing & Asphalt Maintenance that was dissolved
9 based on the IRS action.
10 A. Yes. That had nothing to do with UCI.
11 Q. And UCI, United Components, Inc., came after
12 GSR?
13 A. Yes. Correct.
14 Q. And both companies operated under the name Gem
15 State Roofing or did business under --
16 A. Now, yes. At the present time, yes. Is that
17 clear?
18 Q. I think so. I'll try to make clear in my
19 questions. I think you testified earlier that some of
20 the clients of UCI were clients at Gem State Roofing
21 before it closed its doors; correct?
22 A. Yes. Correct.
23 Q. And some of the employees of UCI were formerly
24 employees of GSR before it closed its doors?
25 A. That's correct.

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1 Q. And some of the equipment that UCI owns was
2 owned by GSR before it closed its doors?
3 A. That's correct.
4 Q. And UCI has assumed some of the liabilities
5 that GSR had before it closed its doors; correct?
6 A. Yes.
7 (Exhibit 4 marked.)
8 Q. (BY MR. MCFARLAND) Sir, you have been handed
9 what has been marked as Exhibit 4 to this deposition.
10 Do you see that in front of you?
11 A. I do.
12 Q. Do you know what it is? Or have you seen it
13 before today?
14 A. I don't recall.
15 Q. I'm going to invite you to turn to the second
16 page of that document. It names a couple individuals as
17 the initial directors of Gem State Roofing, Inc.
18 Michael S. Lenzi and Joe Coelho. Do you know those
19 individuals?
20 A. I do know Joe. And I met Michael a couple
21 times over the years.
22 Q. Is Joe the guy that you said had the Twin
23 Falls business and --
24 A. No. This was another Gem State Roofing,
25 Incorporated, is what he was at that point.

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1 Q. Have you ever been employed by these guys?
2 A. Never.
3 Q. Done work for them?
4 A. No.
5 Q. Done projects with them?
6 A. No. Just acquaintances.
7 Q. Are they friends of yours? How did you meet?
8 A. I met Joe from the roofing world. And just in
9 passing. I don't believe he is alive anymore. I'm not
10 sure. I heard he passed. I can't confirm that.
11 Q. But your Gem State Roofing was never
12 associated with this Gem State Roofing?
13 A. No, never.
14 (Exhibit 5 marked.)
15 Q. (BY MR. MCFARLAND) Sir, you have been handed
16 what has been marked as Exhibit 5 to this deposition.
17 Do you see that in front of you?
18 A. I do.
19 Q. Have you seen this document before today, sir?
20 A. I don't recall.
21 Q. Are you familiar with that entity, Flynn,
22 Inc.?
23 A. Yes, sir.
24 Q. Is that a company that you owned?
25 A. Yes.

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1 Q. Is that a company that you founded?
2 A. Yes.
3 Q. If you turn to page two of that document
4 you'll see the names Jeff Flynn and Michelle Flynn with
5 a Longmont address. Do you see that?
6 A. Yes.
7 Q. Does that refer to you and your ex-wife?
8 A. Yes.
9 Q. Do you recall starting this company?
10 A. Yes.
11 Q. Did Flynn, Inc. also operate under the name
12 Gem State Roofing?
13 A. Flynn Incorporated, doing business as; yes.
14 Q. Was it also doing roofing and asphalt work?
15 A. Yes.
16 Q. Was there any other kind of work Flynn Inc.
17 was doing?
18 A. Insulation, roofing, and asphalt maintenance.
19 Q. Essentially the same kind of work you are
20 doing today; right?
21 A. Correct.
22 Q. Is Flynn Inc. still in operation today?
23 A. No.
24 Q. Do you know why?
25 A. We just changed the name.

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1 Do you recognize those?
2 A. Yes.
3 Q. Do those signatures of Jeff Flynn, Robert
4 Hayden and Kerrie Kuhn appear authentic to you?
5 A. Yes.
6 Q. On page four of Exhibit 21 near the top of the
7 document it states, "The business affairs of the
8 corporation shall be managed by its board of directors."
9 Do you see that?
10 A. Yes.
11 Q. Does UCI have a board of directors?
12 A. We are the board. I'm the president. Bob is
13 the vice-president. They are my business partners. So
14 what is your question?
15 Q. I'm asking whether -- so you have identified
16 your business partners as both business partners and
17 also as a vice-president and corporate secretary;
18 correct?
19 A. Yes.
20 Q. Do you also have a board of directors?
21 A. No.
22 Q. Under the heading "Annual Meetings," do you
23 see that?
24 A. Yes.
25 Q. It says, "The annual meeting of the board of

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1 directors may be held at such places and such time as
2 the board may from time to time determine by
3 resolution." Do you see that?
4 A. Yes.
5 Q. When is the last time that there was a board
6 of directors meeting for UCI?
7 A. Last fall sometime. I don't recall what time
8 or day. We have it all documented.
9 Q. Do you recall where you met?
10 A. At our office with our accountant.
11 Q. And did you have a board of directors at that
12 time?
13 A. No. We just handle it inhouse. We don't have
14 a board. President, vice-president, and secretary.
15 That's it.
16 Q. But you had a board of director's meeting?
17 MS. PICKENS MANWEILER: I think there is a
18 miscommunication here. He is identifying the president,
19 vice-president, and secretary as the board of directors.
20 MR. MCFARLAND: That is contrary to his
21 testimony. And I am trying to understand.
22 Q. (BY MR. MCFARLAND) Your testimony a moment
23 ago is you don't have a board of directors.
24 A. No. Other than us. We are the corporate
25 officers. That's it.

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1 Q. Is it your testimony that the officers and
2 board of directors are the same persons? I'm not asking
3 you to guess. If you don't know, you don't know.
4 A. I don't know. We have three business
5 partners. That's it. We are on our own board. We run
6 our own stuff. Nobody comes in and mediates for us.
7 Q. When was the last time you had a formal
8 meeting between the business partners? Is it that fall
9 meeting you referred to last fall?
10 A. We have meetings all of the time.
11 Q. The last annual meeting you said I think was
12 in the fall. Did you mean the fall of 2018 or fall of
13 2017?
14 A. As far as minutes is what I meant for our
15 corporation. We have those regular. We have to by law.
16 Q. The fall meeting you referenced a few minutes
17 ago --
18 A. I don't recollect when we did it.
19 Q. You don't know if it was '18 or '17?
20 A. We do it yearly. I know that. I don't know
21 what days.
22 Q. Do you have custody of those minutes?
23 A. Not on my person.
24 Q. But they are in your office somewhere?
25 A. Yes.

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1 Q. Can you provide those to your counsel?
2 A. Yes.
3 MR. MCFARLAND: And, Counsel, can you provide
4 those to me?
5 MS. PICKENS MANWEILER: I will take a look.
6 (Exhibit 22 marked.)
7 MS. PICKENS MANWEILER: It looks like we
8 already have.
9 Q. (BY MR. MCFARLAND) Sir, you have been handed
10 what has been marked as Exhibit 22 in this deposition.
11 Do you see that?
12 A. Yes.
13 Q. Have you seen that document before?
14 A. I don't recall.
15 Q. The last page of that document contains
16 signature of Kerrie Kuhn, Jeff Flynn, and Robert Hayden.
17 Do you see that?
18 A. Yes.
19 Q. Do you recognize those signatures?
20 A. Yes.
21 Q. Do those appear accurate to you? Or authentic
22 to you?
23 A. Yes.
24 Q. The first page of that document references a
25 first meeting of the board of directors at 10:50 o'clock

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1 Q. Do you remember what years those were?
2 A. I don't recall.
3 Q. Do you know whether anybody from your company
4 sent any Standard Plumbing Supply work over to my
5 client, Gem State, in Blaine County?
6 A. Is he in the paving industry?
7 Q. My question is, do you know whether any of
8 your crew or anybody from your company sent work to him?
9 A. No.
10 (Exhibit 32 marked.)
11 Q. (BY MR. MCFARLAND) Sir, you have been handed
12 a document which has been identified as Exhibit 32 to
13 this deposition. Do you have that in front of you?
14 A. Yes.
15 Q. Do you recall ever seeing that document
16 before?
17 A. I recall, yes.
18 Q. You do recall?
19 A. Yes.
20 Q. What is it?
21 A. It is a request of projects that we did for
22 Mr. Reese on our asphalt side. Once again, my question
23 is, what does my asphalt have anything to do with the
24 roofing side? This is all done with my paving side.
25 Q. Is this an e-mail that was received by your

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1 that would be responsive to discovery requests in this
2 case?
3 A. I don't know.
4 Q. Do you know whether your office provided any
5 e-mails to your attorney to produce in this case?
6 A. I don't recall.
7 Q. Counsel, I'm going to represent to you this is
8 a document that is not Bates numbered and was not
9 produced to me through your office.
10 MS. PICKENS MANWEILER: And I can assure you
11 that anything that dealt with Gem State Roofing and the
12 Trademark Settlement Agreement was produced. This does
13 not relate to that and would not have been produced.
14 MR. MCFARLAND: Well, it does relate to my
15 discovery request which is the applicable question.
16 MS. PICKENS MANWEILER: We can discuss that at
17 a later time. I disagree. Unless you can point in the
18 Trademark Settlement Agreement where he is not allowed
19 to do asphalt jobs in Blaine County.
20 MR. MCFARLAND: We'll handle that in a meet
21 and confer and a motion to compel. Because what is
22 applicable is not the trademark agreement. It is my
23 discovery request.
24 (Exhibit 33 marked.)
25 Q. (BY MR. MCFARLAND) Sir, you have been handed

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1 company?
2 A. To our company, yes.
3 Q. I see in the "To" line there is Gem State
4 Roofing. Do you see that?
5 A. Yes. Gem State Roofing/Asphalt Maintenance
6 and Paving.
7 Q. It doesn't say Asphalt Maintenance & Paving;
8 does it?
9 MS. PICKENS MANWEILER: I'm going to object.
10 The document speaks for itself. Gem State Roofing/
11 Asphalt Maintenance and Paving.
12 Q. (BY MR. MCFARLAND) My question is in the "To"
13 line. In the header of the e-mail. The last name on
14 there is Gem State Roofing. Do you see that?
15 A. Gem State Roofing. Asphalt projects.
16 Q. That is the subject line. The asphalt
17 projects part is.
18 A. Yes, Gem State Roofing.
19 Q. My question is, do you know what e-mail
20 address that Gem State Roofing is tied to?
21 A. I would say our Gem State Roofing e-mail.
22 Q. What is the e-mail address?
23 A. Gemstateroofing@aol.com.
24 Q. Do you know whether you or anyone from your
25 office searched your aol.com e-mail address for e-mails

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1 what has been marked as Exhibit 33 to this deposition.
2 Do you recognize that document?
3 A. I don't, no.
4 Q. You don't recall ever seeing that before
5 today?
6 A. No. It is pertaining to the Warm Springs
7 project, I do believe.
8 Q. Are you familiar with the customer or
9 potential customer Pioneer West Property Management?
10 A. No, I'm not familiar with them. But I think
11 they took over for the other company that used to run
12 the Warm Springs project.
13 Q. I don't know what you mean by Warm Springs
14 project. Can you explain that?
15 A. The one where we did the job up in Warm
16 Springs, Sun Valley area. I do believe it has to do
17 with that same project.
18 Q. Was this a house? A business?
19 A. It was condos. Multi-tenant facility. This
20 is a project we worked on years ago. And this is a new
21 company, I do believe.
22 Q. Under the description there is a reference to
23 an address at 125 Howard, Boise.
24 A. Excuse me?
25 Q. Under the word "Description."

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1 A. It is for blacktop work.
2 Q. How do you determine that?
3 A. Because it says repave at the bottom. It is
4 sent from United Components. It looks like all asphalt
5 work.
6 Q. This e-mail appears to be an exchange between
7 UCI and standardplumbing.com. Did you do only asphalt
8 work for Standard Plumbing?
9 A. Yeah. We just do asphalt for them.
10 Q. At the top of the document there is the
11 "From," "Sent," "To" blocks. Do you see that?
12 A. Yes.
13 Q. And then below that block is another what I'll
14 call an e-mail header.
15 A. Yes.
16 Q. The "From" says Kerrie Kuhn mailed to
17 gemstateroofing@aol.com. Do you see that?
18 A. Yes.
19 Q. Is that the same e-mail address we talked
20 about earlier?
21 A. Yes.
22 Q. Is Kerrie Kuhn the only one that monitors that
23 e-mail box?
24 A. For the most part.
25 Q. Are there other folks who monitor that e-mail

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1 box?
2 A. Bob and I look at them once in a while if
3 there is interactions with us. But she handles the
4 office/clerical.
5 Q. Would you say that is the primary business
6 e-mail address?
7 A. It one of the primaries, yes.
8 Q. Do you have your own separate business e-mail
9 address?
10 A. I'm set up as Asphalt Maintenance.
11 Q. You have an Asphalt Maintenance e-mail
12 address?
13 A. Yes.
14 Q. Do you know whether Kerrie Kuhn has another
15 business e-mail address?
16 A. We have United Components and Gem State
17 Roofing. And then we have Asphalt Maintenance and
18 Paving.
19 Q. Are those both .com e-mail addresses?
20 A. Gmail.
21 Q. So Gem State Roofing is aol. And United
22 Components and Asphalt Paving are both Gmail?
23 A. Yes.
24 Q. Do you know whether you or anyone else from
25 your company searched those e-mail boxes for documents

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1 responsive to discovery in this case?
2 A. I haven't.
3 Q. Do you know whether you provided any e-mails
4 to your attorney to be turned over in this case?
5 A. No, I have not.
6 MS. PICKENS MANWEILER: I just want the record
7 to be clear. When you say your attorney you are
8 referring to -- I represent United Components, Inc. Not
9 Mr. Flynn in his individual capacity. I want this
10 record to be clear.
11 MR. MCFARLAND: Let me ask a question then.
12 Q. (BY MR. MCFARLAND) Did you personally search
13 any of your business e-mail addresses and turn over
14 e-mails to the attorney for United Components, Inc., Ms.
15 Manweiler, to your right?
16 A. No.
17 Q. Sir, I'll ask you to turn back to Exhibit 37
18 for just a moment. Do you have that in front of you?
19 A. Yes.
20 Q. At the very bottom of that document there is
21 an e-mail address that states gemstateroofing@gmail.com.
22 Do you see that?
23 A. Yes.
24 Q. Do you know who monitors that e-mail box?
25 A. Yes. Kerrie.

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1 Q. Anybody else?
2 A. Once in a while I look at the computer. But I
3 don't really go through it all. I am in the field all
4 of the time. She handles all of the stuff that comes
5 in.
6 (Exhibit 39 marked.)
7 Q. (BY MR. MCFARLAND) You have been handed what
8 is marked as Exhibit 39 to this deposition. Do you have
9 that in front of you?
10 A. Yes.
11 Q. What is it?
12 A. It is an e-mail from Richard for us to proceed
13 on the project.
14 Q. Richard is from Standard Plumbing; right?
15 A. Yes.
16 Q. So this would have been an asphalt job; right?
17 A. Yes.
18 Q. Can you tell from this document whether this
19 was an asphalt job in Blaine County or elsewhere?
20 A. Twin Falls store.
21 Q. Twin Falls and not in Blaine County; correct?
22 A. Yes.
23 Q. And do you recall doing work at a Twin
24 Falls -- this would have been a Standard Plumbing store
25 in Twin Falls?

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1 A. Yes.
2 Q. Have you seen that document before?
3 A. I have not.
4 Q. Is this a form that you recognize?
5 A. Yes. It is a work order.
6 Q. Is a work order different than an estimate?
7 A. Yes.
8 Q. What is the difference?
9 A. It just tells what we did on the job.
10 Q. Do you see the name Jamie Briscoe?
11 A. Yes.
12 Q. Is Jamie Briscoe an employee? Or is that a
13 customer?
14 A. It must be a customer. It is who it is billed
15 to.
16 Q. There is also a name Kerry Armstrong. Do you
17 see that?
18 A. Yes.
19 Q. And do you know who Kerry Armstrong is?
20 A. I don't.
21 Q. Is there anything on this document that would
22 allow you to identify what job this relates to?
23 A. The address.
24 Q. Do you recall that address?
25 A. No, I don't.

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1 (Exhibit 48 marked.)
2 Q. (BY MR. MCFARLAND) Sir, you have been handed
3 what has been marked as Exhibit 48 to this deposition.
4 Do you see that?
5 A. Yes.
6 Q. It appears to be an e-mail from Tracey Felix.
7 Do you see that?
8 A. Yes.
9 Q. Do you know who Tracey Felix is?
10 A. Not personally, no.
11 Q. Do you know who it is?
12 A. A McAlvain employee. I think it is a female.
13 I have never dealt with her.
14 Q. There is a reference to Hailey, Idaho roofing
15 work on a 25,000 square foot building. Do you know what
16 project that is in reference to?
17 A. I do believe it is the veterinarian clinic.
18 Q. Is that a project that your company worked on?
19 A. Yes.
20 Q. Did you bid that job?
21 A. I did not.
22 Q. Did you personally do work on that job?
23 A. I did not.
24 Q. This e-mail is written to Kerrie. I assume
25 that is Kerrie Kuhn?

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1 A. Yes.
2 Q. Is it accurate to say that Kerrie has the
3 closest relationship to McAlvain?
4 A. Yes.
5 Q. Do you know how that came about? Is it merely
6 because of her role as the office manager? Or some
7 other way?
8 A. We have done work for them in McCall. And
9 they had another contractor on this. And they went
10 sideways. That is what they told me what was going on.
11 And they ended up giving us the job to do.
12 Q. Why is it that Kerrie has the closest
13 relationship to the McAlvain folks? Do you know?
14 A. She runs the office/clerical. Bob is the one
15 who actually dealt directly with McAlvain.
16 Q. And did you ever refer McAlvain to Gem
17 State -- I'm going to refer to my client as Gem State -
18 Hailey. Is that okay?
19 A. That's fine.
20 Q. Did you ever refer any McAlvain work to Gem
21 State - Hailey?
22 A. I have not.
23 Q. Do you know if anybody did in your company?
24 A. I have no idea.
25 Q. Same question regarding ESI?

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1 A. I don't recall.
2 Q. You didn't do it yourself?
3 A. I did not.
4 Q. And you are not aware of anybody in your
5 company having done it?
6 A. No.
7 (Exhibit 49 marked.)
8 Q. (BY MR. MCFARLAND) You have been handed what
9 has been marked as Exhibit 49. Do you have that in
10 front of you?
11 A. Yes.
12 Q. This is an e-mail referencing an animal
13 shelter. Is that the same thing as the veterinary
14 clinic you mentioned a moment ago?
15 A. Yes.
16 Q. It is not two different jobs; is it?
17 A. No.
18 Q. Have you seen this e-mail before today?
19 A. I have not.
20 Q. I invite you to turn to the second page of
21 that document. Do you know what that is a photograph
22 of?
23 A. It looks like a job site to me.
24 Q. Can you tell whether that is this
25 veterinary --

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1 A. I have never been to the project. I have no
2 idea.
3 (Exhibit 50 marked.)
4 Q. (BY MR. MCFARLAND) Sir, you have been handed
5 what is marked as Exhibit 50. Do you see that in front
6 of you?
7 A. Yes.
8 Q. What is it?
9 A. It's a contract.
10 Q. Is this for the same animal shelter we have
11 been talking about?
12 A. It seems to be.
13 Q. Do you know who prepared the estimate?
14 A. Kerrie.
15 Q. Do you know generally when Kerrie prepares the
16 estimates whether she goes out to the job site? Or is
17 it all done over the phone?
18 A. It is all done by phone and e-mail.
19 (Exhibit 51 marked.)
20 Q. (BY MR. MCFARLAND) Sir, you have been handed
21 what has been marked as Exhibit 51 to this deposition.
22 A. Yes.
23 Q. What is it?
24 A. Subcontract Letter of Acknowledgment.
25 Q. Do you recall ever seeing this document before

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1 today?
2 A. No.
3 Q. Do you know whether that is Kerrie Kuhn's
4 digital signature at the bottom of that document?
5 A. It appears to be.
6 Q. Do you know whether this document is in your
7 company records?
8 A. I would assume so.
9 Q. Do you know whether this document was produced
10 or was provided to UCI's counsel to be produced in this
11 litigation?
12 A. Was it provided to you guys? It is right
13 here.
14 Q. Do you know whether the document was provided
15 by your company to your company's attorney for it to be
16 produced in this case?
17 A. No, I don't know that.
18 (Exhibit 52 marked.)
19 Q. (BY MR. MCFARLAND) Sir, you have been handed
20 what has been marked as Exhibit 52 to this deposition.
21 Do you recognize that document?
22 A. No, I do not.
23 Q. Have you ever seen it before?
24 A. No.
25 Q. I'll represent to you that it is a Subcontract

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1 Agreement unsigned related to the same animal shelter we
2 have been talking about. Do you know whether this
3 document is within UCI's corporate records?
4 A. I would assume so.
5 (Exhibit 53 marked.)
6 Q. (BY MR. MCFARLAND) Sir, you have been handed
7 what has been marked as Exhibit 53 to this deposition.
8 I would like you to compare it to Exhibit 50, if you
9 would, please. Does Exhibit 50 and Exhibit 53 relate to
10 the same job? Can you tell?
11 A. Same address, yes.
12 Q. Do you see that the amounts on 50 and 53 are
13 different? Exhibit 50 is for \$250,000? And Exhibit 53
14 is for \$256,000?
15 A. Yes.
16 Q. Do you know why the amount has increased? I
17 don't want you to guess. I'm just asking if you know.
18 A. Well, it says on line one they wanted a
19 temporary synthetic installed. So that would change the
20 pricing.
21 Q. Well, am I reading this right? Both 50 and
22 53, line one, refers to install synthetic underlay. Am
23 I missing something?
24 A. This is where the emergency temporary ice and
25 water shields are supposed to be.

Page 137

1 Q. Are you looking at the bottom of Exhibit 53?
2 A. Correct.
3 Q. That \$6,100 line item?
4 A. Yes.
5 Q. I understand now. Does Kerrie Kuhn have
6 authority to sign documents on behalf of UCI?
7 A. Yes.
8 Q. Sign contracts?
9 A. Yes.
10 Q. Estimates?
11 A. Yes.
12 Q. That is something she routinely does as part
13 of her work?
14 A. Yes.
15 (Exhibit 54 marked.)
16 Q. (BY MR. MCFARLAND) Sir, you have been handed
17 what is marked as Exhibit 54 to this deposition. Do you
18 see that?
19 A. Yes.
20 Q. Have you ever seen this e-mail before?
21 A. I have not.
22 Q. In your experience do Blaine County customers
23 ask for data regarding whether materials or work is
24 purchased elsewhere or purchased in Blaine County? Have
25 you ever seen something like that before?

EXHIBIT I

CANCELLATION OR AMENDMENT OF CERTIFICATE OF ASSUMED BUSINESS NAME

(Please type or print legibly. Instructions are included on the back of the application.)

RECEIVED
OCT 26 AM 10:03
SECRETARY OF STATE
STATE OF IDAHO

To the SECRETARY OF STATE, STATE OF IDAHO
Pursuant to Section 53-507 and 53-508, Idaho Code, the undersigned gives notice
of the action(s) indicated below:

1. The assumed business name is: GEM STATE ROOFING
2. The assumed business name was filed with the Secretary of State's Office
on 16 JUL 1999 as file number D27679
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 checked="" type="checkbox"/>	<input type="checkbox"/>	<u>(C192636) United Components, Incorporated</u>	<u>417 Remington #2, Garden City, ID 83714</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<u>(C110802) Gem State Roofing &</u>	<u>2270 S. Longmont, Boise, ID 83706</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<u>Asphalt Maintenance Inc.</u>	_____

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"/> Finance, Insurance, and Real Estate
<input checked="" type="checkbox"/> Services	<input type="checkbox"/> Construction	<input type="checkbox"/> Mining

7. The name and address to which future correspondence should be addressed
is changed to read:
United Components, Incorporated, 417 Remington Suite #2, Garden City, ID 83714

8. Name and address for this acknowledgment copy is:
United Components, Incorporated
417 Remington Suite #2
Garden City, ID 83714

Secretary of State use only

Signature: Jeff Flynn

Printed Name: Jeff Flynn

Capacity: President

Signature: _____

Printed Name: _____

Capacity: _____

Exh. No. 24
Date _____
Name J. Flynn

IDAHO SECRETARY OF STATE
10/26/2011 05:00
CK: 14096 CT: 225015 BH: 1295725
1 @ 10.00 = 10.00 ASSUM AMEN # 3

D 27679

DEFENDANT000084

From: Richard Reese <rreese@standardplumbing.com>
Sent: Saturday, June 04, 2016 11:09 PM
To: Romney Miles; bo.manager@standardplumbing.com; tf@standardplumbing.com; sv@standardplumbing.com; bu@standardplumbing.com; Gem State Roofing
Subject: Asphalt Projects to Begin per bid

Gem State Roofing/Asphalt Maintenance and Paving:

Please begin on the following jobs per estimates 2817 at Standard Plumbing Supply Locations:

Yes - 145 North Curtis. Boise, ID 69020 Square feet.

Note: Please advise if this includes the fenced tenant area in the 69,020 square feet

Yes - 167 Eastland Drive. Twin Falls, ID. 32,250 Square Feet

Note: Please confirm with Miles Romney that the square footage is for our property.

Yes - 4319 Glenbrook Drive, Hailey, ID

Yes - 336 Overland Drive, Burley, ID

Completed projects will be paid with 10 business days.

Standard Plumbing Supply
P.O. Box 708490
Sandy, Ut 84070

Miles Romney miles.romney@standardplumbing.com 801-233-2197 will assist in coordinating with the stores.

Thank you very much for your quotes and best wishes in successfully completing the projects.

Kind Regards,

Richard N. Reese
President
Standard Plumbing Supply Company.

Sent from my iPad



From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Wednesday, August 24, 2016 5:57 PM
To: 'Miles Romney'
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Drawing.pdf

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Thursday, August 11, 2016 9:53 AM
To: richard.reese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

Thank you,

Kerrie

-----Original Message-----

From: Richard Reese <richard.reese@standardplumbing.com>
To: 'Kerrie Kuhn' <gemstateroofing@aol.com>
Sent: Wed, Aug 10, 2016 9:29 am
Subject: RE: Estimate 2973 from United Components Incorporated

Can you send me a diagram of where the repair would be?

Richard

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Wednesday, August 10, 2016 9:25 AM
To: rreese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

I corrected the estimate and resent to you. installed at 2-1/2" and compacted

Thank you,

Kerrie

-----Original Message-----

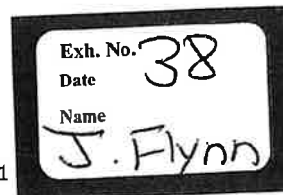
From: Richard Reese <rreese@standardplumbing.com>
To: GEMSTATEROOFING <GEMSTATEROOFING@AOL.COM>
Sent: Tue, Aug 9, 2016 5:45 pm
Subject: Re: Estimate 2973 from United Components Incorporated

What thickness on the remove and repave?

Sent from my iPhone

Richard Reese

801-209-2800 mobile
801-233-4090 office direct



From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Thursday, August 25, 2016 10:32 AM
To: 'Miles Romney'; 'TF Store'
Cc: gemstateroofing@gmail.com
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Est_2973_from_United_Components_Incorporated_4456.pdf

Please proceed at the lower bid price. Work with the store with as little disruption as possible and advise when completed.

Thanks
Richard

From: United Components Incorporated [mailto:replyTo@intuit.com]
Sent: Thursday, August 25, 2016 8:29 AM
To: rreese@standardplumbing.com
Subject: Estimate 2973 from United Components Incorporated

Dear Customer :

Please review the attached estimate. Feel free to contact us if you have any questions.

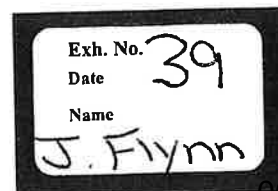
We look forward to working with you.

Sincerely,

United Components Incorporated
208-338-9318

To view your estimate

Open the attached PDF file. You must have Acrobat® Reader® installed to view the attachment.



Jayme Danner

From: Julian Lopez
Sent: Wednesday, November 9, 2016 7:19 AM
To: gemstateroofing@aol.com
Cc: Tracey Felix; David Hurley
Subject: WT roofing

Bob

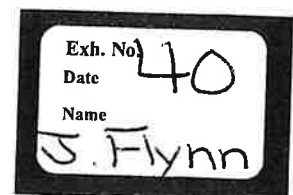
I have reached out to you guys and have had no response. We have had great weather to do some Roofing but you guys have not been around.

Tell me what the plan to get the rest of the metal that needs to be done and of course the Activities roof. Thanks

Julian Lopez
Superintendent
McAlvain Group of Companies
5559 W. Gowen Road
Boise, ID 83709
208.362.2125
208.362.4356 fax



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Jayne Danner

From: Julian Lopez
Sent: Monday, November 28, 2016 4:35 PM
To: gemstateroofing@gmail.com
Cc: Tracey Felix; David Hurley
Subject: WT Snow fence

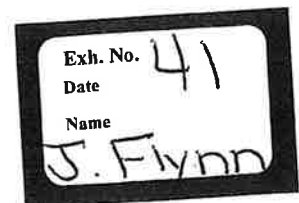
Bob

We need the snow fence installed. What is holding us up? The other thing is I have a leak at the balcony and have some areas of potential leakage. When will you be back?

Julian Lopez
Superintendent
McAlvain Group of Companies
5559 W. Gowen Road
Boise, ID 83709
208.362.2125
208.362.4356 fax



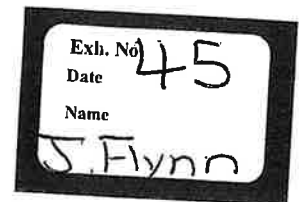
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2:32 PM
02/05/18
Cash Basis

United Components, Incorporated
Profit & Loss
January through December 2017

	Jan - Dec 17
Ordinary Income/Expense	
Income	
Early Payment Discount	-87.50
Job Income	2,062,168.68
Total Income	2,062,081.18
Cost of Goods Sold	
Cost of Goods Sold	
Warranty	5,814.24
Total Cost of Goods Sold	5,814.24
Dump Fees	8,542.28
Equipment Rental for Jobs	22,452.06
Job Damages	945.00
Job Materials Purchased	504,571.55
Permit Fees	4,000.64
Subcontractors Expense	270,396.09
Tools and Small Equipment	625.38
Total COGS	817,347.24
Gross Profit	1,244,733.94
Expense	
Advertising and Promotion	
Referral Fees	600.00
Advertising and Promotion - Ot...	55,317.04
Total Advertising and Promotion	55,917.04
Auto and Truck Expenses	
2017 Denali Duramax Lease	14,381.76
2018 Dodge Mega 3500 - Silver	20,000.00
2018 Dodge Ram 3500 - White	20,000.00
Gas and oil	47,081.06
Towing	337.70
Vehicle Registration	2,305.29
Vehicle Repairs	67,368.84
Total Auto and Truck Expenses	171,474.65
Bank Service Charges	
Credit Card % of Sales	3,418.43
Credit Card Machine Lease	890.28
Maintenace Charges	327.79
Money Order & Cashier Check ...	75.95
Stop Payment	30.00
Total Bank Service Charges	4,742.45
Business Licenses and Permits	428.75
Computer and Internet Expenses	1,900.54
Donation	538.33
Electronic Equipment Rental	1,166.43
Insurance Expense	
Auto Liability Insurance	15,537.00
General Liabilty Insurance	21,671.99
Health Insurance	
Jeff Flynn	4,848.84
Kerrie Kuhn	4,666.04
Total Health Insurance	9,514.88
Life Flight	825.00
Workman's Comp Liability	69,559.00
Total Insurance Expense	117,107.87



2:32 PM
02/05/18
Cash Basis

United Components, Incorporated
Profit & Loss
January through December 2017

	Jan - Dec 17
Interest Expense	
Finance Charges	731.24
Interest	1,260.71
Late Fees	263.06
Total Interest Expense	2,255.01
Janitorial Expense	1,266.85
Lodging	7,400.66
Meals and Entertainment	
Entertainment	3,537.39
Meals	21,223.27
Total Meals and Entertainment	24,760.66
Medical	
Drug Testing	75.00
Medical - Other	6,196.39
Total Medical	6,271.39
Office Supplies	
Arizona	28.45
DOT	1,315.00
Dues	864.00
Licenses	1,855.00
Safety (OSHA)	954.67
Office Supplies - Other	10,109.01
Total Office Supplies	15,126.13
Parking	112.50
Payroll Expenses	
Bonus	610.01
Colonial Life A (Co. Paid)	815.00
Commission - Windows	70.00
Commission	732.50
Commission - Siding	1,560.00
Company SUI ID	12,589.01
Employee Hourly Vacation	3,416.00
Employee Payroll - Doors	1,039.50
Employee Payroll Asphalt	55,267.63
Employee Payroll Estimator	16,721.08
Employee Payroll Office	29,810.42
Employee Payroll Roofing	235,238.92
Employee Payroll Seal Coating	23,787.16
Employee Payroll Shop Clean Up	59,843.67
Employee Payroll Shop Mechan...	525.00
Employee payroll siding work	4,417.85
Employee Payroll Snow Removal	19,358.80
Employee Payroll Window	2,340.00
Employee Seal Coat D/T	1,706.00
FUTA Tax	3,964.79
Holiday Pay	3,872.00
Medicare Company	8,544.89
Officer Payroll	135,121.65
Social Security Company Paid	36,536.71
Workforce Development	421.64
Total Payroll Expenses	658,310.23
Postage and Delivery	2,397.17
Professional Fees	
Accounting Fees	1,400.00
Total Professional Fees	1,400.00
Rent Expense	
Alarm System	300.00

2:32 PM
02/05/18
Cash Basis

United Components, Incorporated
Profit & Loss
January through December 2017

	Jan - Dec 17
Arizona Rental	856.67
Office & Yard	12,329.74
Storage	149.84
Water Machine	151.92
Total Rent Expense	13,788.17
Repairs and Maintenance	
Equipment Repairs	9,047.56
Furance & Cooling	85.00
Office Equipment	466.69
Shop Supplies	2,685.64
Total Repairs and Maintenance	12,284.89
Sales Tax Expense	873.80
Taxes - Arizona TPT	610.30
Taxes - Idaho State Tax Return	20.00
Telephone Expense	
Cell Phone	11,316.55
Internet	691.59
Office Phones	3,512.06
Total Telephone Expense	15,520.20
Tools	
Power Tools	5,875.21
Safety Equipment (OSHA)	5,048.93
Small Hand Tools	3,554.85
Total Tools	14,478.99
Travel Expense	796.98
Utilities	
Arizona - Electric	182.11
Electricity	2,627.93
Gas	368.75
Trash	11.18
Water	615.40
Total Utilities	3,805.37
Total Expense	1,134,755.36
Net Ordinary Income	109,978.58
Other Income/Expense	
Other Income	
Earned Interest	3.19
Finance Charge Income	1,208.40
Total Other Income	1,211.59
Other Expense	
Penalties	1,129.48
Total Other Expense	1,129.48
Net Other Income	82.11
Net Income	110,060.69

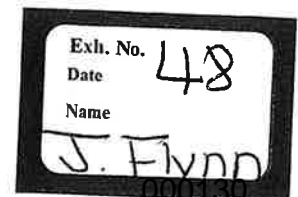
Jayme Danner

From: Tracey Felix
Sent: Wednesday, January 17, 2018 4:55 PM
To: gemstateroofing@gmail.com
Subject: Hailey Idaho Roofing Work?

Hi Kerrie,

I am in need of some help on a project in Hailey. It's too cold to install the roof on our 25,000 square foot building, so I want to do a temporary synthetic underlayment but I can't find anyone to help me out. Are you guys interested?

Tracey



Jayme Danner

From: Tracey Felix
Sent: Friday, January 19, 2018 11:09 AM
To: Kerrie Kuhn
Subject: Animal Shelter
Attachments: Animal Shelter Roof Plan.pdf; Exhibit A_2013 MCI Exhibit A-SubcontractorsInsurance Requirements (8).pdf

Hi Kerrie,

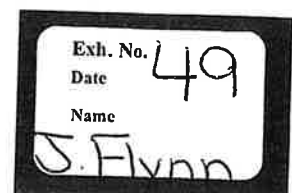
I hope you're well and don't have this horrendous cold that's been going around. I apologize for being non-responsive yesterday. It was all I could do to attend a meeting and leave for the day.

I appreciate you taking a look at this for us. I'm attaching the roof plan for the project. The overall footprint of the building is 27,900 square feet, broken up into four areas.

The framer is installing trusses and sheathing, and then we have Structural Insulated Panels on top of that that installed. We anticipate needing pretty much the whole building to have a temporary roof that can tolerate some wind/snow/traffic for a couple of months and I came up with the synthetic underlayment as a cost-effective option. We're open to other ideas as well. We have half of Area 4 ready, and the trusses are going up now in Area 3. Trusses for Area 1 will follow in two weeks, and then Area 2 will have trusses erected the first week of February.

Realizing it will likely take at least a week to get a Contract to you, we'd like to quickly get a quote from you and hopefully start on this within the next couple of weeks. John Hanson (from our Whitetail project) is the Superintendent and he is thrilled that I'm talking to you guys about this. I think he enjoys working with Bob. Let me know if I can get you any other information in order to provide an estimate.

Thanks!
Tracey







United Components, Incorporated
 DBA: Gem State Roofing
 DBA: Asphalt Maintenance & Paving
 417 Remington Street #2
 Garden City Idaho 83714

Estimate

Date	Estimate #
1/24/2018	3708

Name / Address
Mc Alvain Construction, Inc 5559 W. Gowen Road Boise Idaho 83709

Phone Number

Description	Total						
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of Hailey Animal Shelter, 101 Croy Creek Road, Hailey :</p> <ol style="list-style-type: none"> 1. Install synthetic underlayment 2. Install Ice and Water shield on eaves, rakes 24" past interior wall on steep pitch 3. Install Ice and water shield on entire roof system of 3/12 pitch 4. Install new drip edge and pipe jacks 5. Install Ice and Water shield 36" wide to lap over ridge 6. Install Certaineed Landmark Limited Lifetime Architectural Shingles (Weathered Wood) 7. Install double cap ridge 8. Install associated roof flashings only as per specification 9. Install snow retention as per specs 10. Install 1 layer of 3.0 Poly Iso Insulation Board mechanically fastened (Concrete Decks to be fully adhered) 11. Install taper package according to plans to direct water to drains mechanically fastened (Concrete decks to be fully adhered) 12. Install 1 layer of 3.0 Poly Iso Insulation Board mechanically fastened (Concrete Decks to be fully adhered) 13. Install 1/4" primed dense deck 14. Install 60 mil versigard non reinforced EPDM 15. Set drains 16. Fully adhere walls and terminate under new coping cap 17. Install walkpad as per specifications 18. Install coping cap according to plans on parapet walls on flat decks 19. Terminate EPDM according to manufacture. 20. All debris to be hauled off by Gem State Roofing. 	<div data-bbox="1133 1360 1421 1554" data-label="Text"> <table border="1"> <tr> <td>Exh. No.</td> <td>50</td> </tr> <tr> <td>Date</td> <td></td> </tr> <tr> <td>Name</td> <td>J Flynn</td> </tr> </table> </div> <p>250,684.00</p>	Exh. No.	50	Date		Name	J Flynn
Exh. No.	50						
Date							
Name	J Flynn						

We look forward to doing business with you. Contractor License Number RCE-32821	Total
--	--------------

Signature

Phone #	Fax #	E-mail	Web Site
2083389318	208-388-8461	gemstateroofing@gmail.com	www.gemstateroofing.net



United Components, Incorporated
 DBA: Gem State Roofing
 DBA: Asphalt Maintenance & Paving
 417 Remington Street #2
 Garden City Idaho 83714

Estimate

Date	Estimate #
1/24/2018	3708

Name / Address
Mc Alvain Construction, Inc 5559 W. Gowen Road Boise Idaho 83709

Phone Number

Description	Total
<p>21.20 year manufacture NDL warranty on EPDM</p> <p>Note: EPDM is chemically welded and TPO is heat welded and product is reinforced</p> <p>All material is guaranteed to be as specified and above work to be performed in accordance with the specifications submitted for above work. The work to be completed in a substantial workman like manner.</p> <p>Payment to be made is 1/2 down and the balance upon completion unless otherwise stated by United Components, Inc. DBA: Gem State Roofing. All deposits are non refundable. Once the estimates is signed it becomes a binding contract. Any breach of the contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract. A service charge of 1-1/2 % per month will be charged on all accounts past due. This is expressed as an annual percentage charge of 18%. In the event that any account is placed with a third party collection, customer agrees to pay all cost including reasonable attorney fees, administrative fees, court costs, and finance charges.</p> <p>Any alteration or deviation from above specifications involving unforeseen costs, will be executed only upon written orders, and will become an extra charge over and above the estimate set forth herein. All agreements contingent upon God, accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Our employee's are fully covered by Workmen's Compensation and Public Liability Insurance. Engineer fees and permit fees (if applicable) will be an addendum to contract or billed separately.</p>	

We look forward to doing business with you. Contractor License Number RCE-32821	Total	\$250,684.00
--	--------------	--------------

Signature _____

Phone #	Fax #	E-mail	Web Site
2083389318	208-388-8461	gemstateroofing@gmail.com	www.gemstateroofing.net

Subcontract Letter of Acknowledgement No. S116016-40



Equal Opportunity Employer

February 14, 2018

Gem State Roofing Inc.
2270 S. Longmont
Garden City, ID 83706

Reference: Project: **Animal Shelter of the Wood River Valley**
Project No.: **116016.**

Owner: **Animal Shelter of the Wood River Valley**
Architect:

Congratulations, you have been selected to perform subcontract work on the above project. The project manager and your point of contact with our office is **Tracey Felix**. Please direct all questions and communication to the project manager.

Please sign the Contract and Letter of Acknowledgement. Please initial all pages and all exhibits. The Contract must be signed **by an owner or corporate officer of the company**. If you are not authorized to sign for your company, please decline the contract and notify Paola Eldredge (paolae@mcalvain.com) of the name and email address of the proper signatory. If you have any questions concerning the contract, please call, or e-mail traceyf@mcalvain.com.

- A certificate of insurance for coverage as outlined in Exhibit A is required for you and any lower tier subcontractors you may have on this project. While we should have received your insurance certificates with your Subcontractor Prequalification, we still require insurance certificates for any lower tier subcontractors. You will not be allowed to start any work, nor will you be paid, until all such insurance is on file in our office.
- Please complete the **Lower Tier Subcontractors and Suppliers** attachment, including address and phone number. Your Lower Tier Subcontractors are required to provide insurance as detailed in Exhibit A.
- All submittals are due within 15 days of issuance of your contract. Electronic submittals are preferred; please forward them via e-mail to traceyf@mcalvain.com Please contact Tracey if file sizes are too large for e-mail. If hard copies are submitted, please provide 6 copies.
- Please submit a copy of MSDS sheets (OSHA requirements) for all products you may use at this project. These sheets must be submitted prior to using the product on the project. Also, a copy of your Safety Program and Hazardous Communication Program must be submitted to us.
- Schedule of Values has been provided; please notify your project manager if there is a discrepancy.
- Subcontractor's Application for Payment: Please use the form available at the McAlvain website (www.mcalvain.com); click on the SUBCONTRACTOR link in the upper right hand corner. Applications are due by the 20th of the month or as detailed in Exhibit B. Applications may be emailed to mciAP@mcalvain.com. Late applications will not be paid until the next month.

No change orders or job scheduling will be acknowledged unless approved in writing through our office first. Change orders will not be paid unless approved by owners.

We look forward to working with you on this project.

Sincerely,

Paola Eldredge
Contract Administration

This letter is hereby acknowledged by:

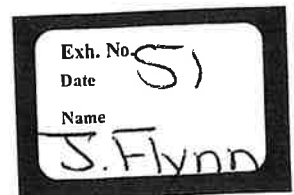
Gem State Roofing Inc.

DocuSigned by:
Kerrie L Kuhn
Signed: _____
CC798DD8127F420...

Printed Name: Kerrie L Kuhn

Title: Corporate Secretary

Date: 2/16/2018



Initial kk



Equal Opportunity Employer

SUBCONTRACT AGREEMENT No. S116016-40 Roofing

SUBCONTRACTOR:

Gem State Roofing Inc.
2270 S. Longmont
Garden City, ID 83706
(208) 338-9318 (208) 388-8461

DATE: February 14, 2018

PROJECT: Animal Shelter of the Wood River Valley

LOCATION: Hailey, ID

OWNER: Animal Shelter of the Wood River Valley

ARCHITECT:

ADDENDA:

The parties agree as follows:

1. Scope of Subcontract Work.

Subcontractor agrees to furnish all necessary labor, materials, supplies, tools, equipment including scaffolding and safety equipment, services, supervision, shop drawings, submittals, samples, and sales taxes unless specifically stated otherwise, necessary or required for the completion of all work described below, reasonably inferable therefrom and incidental thereto (the 'Work'):

Furnish Roofing scope of work per plans, specifications, and the following exhibits to the contract:

- Exhibit A – Insurance Requirements
- Exhibit B – Technical Requirements
- Exhibit C – Project Document List
- Exhibit D – Project Schedule
- Exhibit E – Schedule of Values

The McAlvain Group of Companies, Inc. Safety and Accident Prevention Plan is incorporated into the contract by reference. Copies are available at the jobsite and upon request.

Item	Phase	Description	Quantity	UM	Unit Price	Extended Price
1	07310. .0700	Roofing	0.000	LS	0.00000	\$248,177.16
2	99132. .0110	Synthetic Underlayment (Temp Roofing)	0.000	LS	0.00000	\$6,100.00
3	07310. .0700	Closeout (1% fo O&Ms, Warranty, Redlines)	0.000	LS	0.00000	\$2,506.84
Subtotal:						\$256,784.00

Subcontractor agrees to be bound to Contractor to the same extent as Contractor has assumed to the Owner by Prime Contract. In the event of any conflict between the terms of the Prime Contract and this subcontract, the provisions of this Subcontract shall control. Subcontract shall indemnify and hold Contractor harmless from any and all costs, expenses and liabilities, including attorney fees, incurred by or claimed against Contractor arising out of or relating to Work or any breach of this Subcontract. All subcontractors and suppliers of materials and equipment, including equipment rentals, having agreements with Subcontractor for any part of the Work shall be identified with their current addresses in Lower Tier Subcontractors and Suppliers attachment hereto.

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2. The Subcontract Documents.

The subcontract documents consist of

- (a) this Subcontract;
- (b) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein;
- (c) modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Subcontract; and
- (d) modifications to this Subcontract, all of which are incorporated herein.

This Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

3. Subcontract Price and Payment

In consideration of Subcontractor's complete performance of this Subcontract, Contractor agrees to pay Subcontractor the total sum of **Two Hundred Fifty-Six Thousand Seven Hundred Eighty-Four And 00/100 Dollars (\$ 256,784.00)** (the "Subcontract Price"), subject to adjustments pursuant to paragraph 8. No progress or final payment shall be payable for any payment period unless Subcontractor submits its written application in a form satisfactory to Contractor at least five (5) working days prior to the date required for Contractor's application for payments to the Owner as fixed in the Prime Contract. In the event Subcontractor fails at any time to timely submit its application for payment, Subcontractor will continue with the Work without interruption, without progress payment, until the next payment period for which application is timely submitted.

In the event that unit prices are used for computation of the Subcontract Price or a portion of the Subcontract Price, applicable unit prices shall be identified herein and actual Subcontract Price shall be the total of unit prices multiplied by the actual quantity of Work performed as finally measured and accepted by Owner. Subcontractor acknowledges that unit quantities used for the initial computation of the Subcontract Price are merely estimates of the quantities necessary for completion of the Work and actual quantities necessary for completion of the Work may differ substantially from the estimates set forth herein. For any variation in actual quantities as compared to estimated quantities, Subcontractor shall not be entitled to any adjustment of Subcontractor's unit prices unless and only in the same proportion as Contractor's unit prices therefore, if any, shall be adjusted by the Owner under the Prime Contract.

Subcontractor acknowledges that it relies on credit of Owner, not Contractor, for payment of Work performed. Receipt of payment by Contractor from Owner for Work performed by Subcontractor is an express condition precedent to payment by Contractor to Subcontractor for such Work; however, this condition precedent in no way waives Subcontractor's lien rights for Work performed. In the event Subcontractor makes any claim or asserts any cause of action against Contractor for payments due hereunder: (a) Subcontractor's sole and exclusive remedy shall be against the payments Contractor actually receives from the Owner on account of the Prime Contract ("Prime Contract Payments"); (b) no other real, personal or mixed property of Contractor, wherever located, shall be subject to levy on any judgment obtained against Contractor, (c) if such net income is insufficient to satisfy any judgment, Subcontractor will not institute any further action, suit, claim or demand, in law or in equity, against Contractor for or on the account of such deficiency. Progress payments shall be in the amount representing the value of Work accepted and paid for by the Owner for the Subcontractor's Work, less retainage in the same percentage as fixed by the Prime Contract but in no event less than Five Percent (5%). Progress payments, less retainage, shall become payable to Subcontractor for Work performed to the satisfaction of Owner ten (10) banking days after receipt by Contractor of payment from Owner for such Work. All estimates by Owner of the value of the Work performed for any payment period, or of the amount of any deduction, offset or counterclaim relating to the Work, shall be binding on Subcontractor. Acceptance of any progress payments by Subcontractor shall constitute a release of Contractor from all liability, except retainage and those claims specifically reserved in writing, arising or incurred during the payment period.

Retainage shall be withheld, without interest, by Contractor until final payment. Final payment shall become payable fifteen (15) days after final payment by Owner is received by the Contractor. Prior to and as an additional condition of final payment, Subcontractor shall submit a written release and a waiver of claims and liens against the Project, Owner, and Contractor. Subcontractor must also submit written releases and waivers of claims and liens from all of Subcontractor's suppliers and subcontractors. Acceptance of final payment by Subcontractor constitutes full and final release of Contractor and its surety. Retention as established by the Prime Contract is: 5.00%


No payment including final payment, shall be a waiver of any performance required under this Subcontract, either in whole or in part, and no Payment shall be construed as an acceptance of defective or incomplete work, and Subcontractor shall remain responsible and liable for performance of all Work in strict compliance with this Subcontract and the Prime Contract.

Contractor shall be entitled to withhold, without interest thereon, from progress and/or final payments amounts reasonably necessary to protect from loss or damage caused by or the responsibility of the Subcontractor, including but not limited to:

- (a) repeated or continued failure of performance of this Subcontract.
- (b) loss or damage to Contractor, Owner or others caused by Subcontractor
- (c) alleged failure of Subcontractor to timely pay for labor, materials, equipment or supplies furnished in connection with the Work
- (d) rejected, defective or nonconforming Work
- (e) any delay in performance of the Work; and/or
- (f) evidence of Subcontractor's inability to complete the Work for the unpaid balance of the Subcontract Price

4. Time of Completion.

Time is of the essence. Subcontractor shall begin the Work immediately after notice to proceed by Contractor and shall complete the Work within the time set forth in the Project Schedule, as periodically revised and updated, prepared by Contractor for all work under the Prime Contract. Subcontractor understands and acknowledges that the Project Schedule may change from time to time and Subcontractor shall perform the Work, as changed.

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Should the Subcontractor delay or threaten to delay the progress or performance of this Subcontract or the Project, or cause any delay or actual or damage or liability to Contractor by reason of any delay by Subcontractor, Subcontractor shall be liable for and indemnify and hold Contractor harmless from any penalties, liabilities, liquidated or other damages, costs and/or fees, including but not limited to attorney fees, incurred by Contractor by reason thereof. Subcontractor's liability shall not be deemed waived by any assent or acquiescence by Contractor to Subcontractor's later performance.

In the event Subcontractor's performance of Work is delayed by Owner, the Subcontractor's time for performance shall be extended only to the extent Contractor shall obtain an extension of time for such Work from the Owner under the Prime Contract. Subcontractor agrees to provide notice to Contractor to provide timely notice to Owner under the Prime Contract. Subcontractor's sole remedy for delay caused by Contractor and/or any agent or subcontractor of the Contractor, shall be an extension of the time to complete Subcontractor's Work for a period equal to the actual delay incurred. Subcontractor waives any claim or right to additional compensation or damages relating thereto.

5. Bonds.

PERFORMANCE AND PAYMENT BONDS ARE REQUIRED: (check one) Yes No

If bonds are required, Subcontractor shall furnish to Contractor full and duly executed performance and payment bonds in the amount of the total Subcontract Price issued by a surety company acceptable to Contractor in such form as is required by the Prime Contract or otherwise acceptable to Contractor. Subcontractor's failure to deliver satisfactory bonds within ten (10) days after the effective date of the Subcontract may be deemed a material breach of this Subcontract.

6. Laws, Regulations, Etc.

The Work shall strictly comply with all federal, state, local, municipal and any and all other governing laws, rules, regulations, statutes, ordinances and other directives (hereinafter referred to as "Laws"). All Work specifically required by this Subcontract or necessary to fully comply with such Laws shall be furnished by Subcontractor as part of this Subcontract without any additional compensation. In the event Subcontractor observes any work on the Project, including Work of the Subcontractor, which Subcontractor believes is not in compliance with any Laws, Subcontractor shall immediately notify Contractor in writing of such noncompliance.

Subcontractor warrants and represents that it has obtained and shall maintain all licenses and registrations required to pursue and perform the Work in the applicable jurisdiction and require the same of its representatives, employees, subcontractors, suppliers, design professionals, and any other person participating in the Work. Subcontractor agrees that it shall return any sums paid to it by Contractor to the extent the Owner is not obligated to pay for any of Subcontractor's work due to the failure to maintain all such licenses and registrations. The parties agree the provisions of this sub-section are a separate undertaking from the balance of this Subcontract and shall survive in the event the balance of this Subcontract is deemed unenforceable due to the failure to maintain all such licenses and registrations.

7. Assignment/Delegation of the Work.

Subcontractor shall not assign this Subcontract, delegate or sub-subcontract any of the Work described herein without prior written consent of Contractor.

8. Changes in the Work.

Contractor may add, delete, or otherwise change the Work of the Subcontractor within the general scope of this Subcontract by written directive to the Subcontractor. No extra work, changes or deviations in the Work shall be performed by Subcontractor without the prior written consent of Contractor. Any adjustment in the Subcontract Price or in the time of performance of the Work for additions, deletions or other changes be as agreed in writing and authorized by Subcontract Change Order signed by Contractor, and Contractor shall have no other obligation, express or implied. If no such agreement can be reached, Subcontractor shall perform the Work as directed by the Contractor and the Subcontract Price shall be equitably adjusted as follows:
(a) increased for any additional or different work performed or materials furnished by Subcontractor in an amount equal to the actual cost thereof plus ten percent (10%) of said cost to cover all supervision, general and administrative expenses, jobsite and home office overhead and profit as supported by time records for labor and equipment and material invoices documenting direct out-of-pocket labor, equipment and material costs, plus the agreed percentage mark-up, shall be submitted to and approved by Contractor on a daily basis as such work is performed; and
(b) reduced by the reasonable value of Work deleted or avoided by reason of the change.

If the change, extra work or deviation is the result of an Owner-directed change in the Work, Subcontractor shall be entitled to an adjustment in the Subcontract Price only to the extent that Contractor is entitled to an adjustment under the Prime Contract, minus Contractor's markup.

Ordinary field modifications which do not substantially increase Subcontractor's cost of performing the Work will be performed without any adjustment to the Subcontract Price or time of performance. Contractor agrees to forward to Owner any claims of Subcontractor arising out of changes affecting the Work which are ordered, directly or indirectly, by Owner; provided however, Contractor shall not be liable to Subcontractor for any change to Subcontractor's Work except to the extent approved and paid by Owner.

9. Waiver of Claims.

All claims for adjustment of the Subcontract Price or time of performance arising out of or relating to any addition, deletion or change in the Work are waived by Subcontractor unless the Subcontractor shall provide written notice of such claims within three (3) days after receipt of Contractor's directive therefore or such shorter time required under the Prime Contract for notice of claim to the Owner.

10. Subcontractor Claims.

Unless expressly prohibited by the Prime Contract, if Subcontractor timely submits a claim that is related, in whole or in part, to any decision, directive, act or failure to act by the Owner, Subcontractor agrees, at Contractor's option to prosecute such claim in Contractor's name in accordance with the claims procedure set forth in the Prime Contract. Subcontractor shall be entitled to the amount that is collected from Owner on any such claims, minus Contractor's markup. The claims shall be prosecuted at the sole expense of the Subcontractor and Subcontractor agrees to indemnify Contractor from any

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and all damages, including attorneys' fees and costs, assessed against Contractor as a result of Subcontractor's pursuit of its claims. Subcontractor otherwise shall be bound by the dispute resolution provisions in Paragraphs 19 and 20 and shall be entitled to recover from Contractor only what Contractor receives from Owner for such claims and payment from Owner of such claims is an express condition precedent of Contractor's obligation to pay Subcontractor. Subcontractor shall cooperate with Contractor regarding Contractor's submission of claims to, or prosecution of claims against Owner.

11. Clean-Up.

Subcontractor shall continuously maintain the project free from all dirt, rubbish, debris, and other waste materials. Upon completion of the various portions of the Work, Subcontractor shall remove all rubbish, stains, and blemishes caused by its operations, and it shall perform, at no additional cost, additional clean-up work reasonably directed by Contractor's field superintendent. All costs including supervision incurred by Contractor in the clean-up of Subcontractor's Work will be backcharged to Subcontractor.

12. Material, Tools and Equipment.

Subcontractor shall provide all tools and equipment necessary to perform the Work. Subcontractor agrees to assume sole responsibility for the receipt, delivery, unloading, storage, warehousing, protection, insurance and all other risks of loss relating to any and all materials, tools, and equipment it is to furnish, install, provide or have provided to it under this Subcontract.

13. Indemnity.

To the fullest extent permitted by law, Subcontractor hereby agrees to reimburse, defend, hold harmless and indemnify Contractor, Owner and their respective insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals (collectively, "Indemnitees") from and against any and all claims, liens, causes of action, expenses, penalties, fines, injuries, liabilities, costs, loss, damage of any kind, attorney fees, and expenses arising out of or relating to the Work, Subcontractor's performance, failure to perform or breach of this Subcontract or any warranty hereunder, or the alleged or actual negligence or fault of Subcontractor or any person performing a portion of the Work or otherwise acting at the instance of Subcontractor including, but not limited to Subcontractor's representatives, employees, subcontractors, suppliers, or design professionals. Subcontractor's obligations under this provision shall apply without limitation to death, bodily injury, injury to property, and economic losses and consequential damages. Subcontractor specifically and expressly waives any immunity that may be granted under worker's compensation laws, similar acts and industrial insurance, to the extent necessary, to give effect to its obligations under this provision. Further, Subcontractor's obligations under this provision shall not be limited in any way by any limitation on the amount or type of damages, compensation, benefits payable to or by any third party under Worker's Compensation Acts, Disability Benefit Acts, or other employee benefits acts. Finally, the obligations in this provision are not limited by the amount of any available insurance and are in addition to any express or implied indemnity or contribution rights or remedies available any of the Indemnitees at law or in equity. Subcontractor will defend each Indemnitee through counsel reasonable approved by such Indemnitee.

14. Insurance.

Subcontractor and its subcontractors shall purchase and maintain full and complete insurance on the Work in accordance with this Subcontract. If the Work requires Subcontractor to provide design services, Subcontractor shall require its design professional to purchase and maintain professional liability insurance that will cover any claims arising from design services related to the Work. If the Work or its location constitutes an exposure to employees of Subcontractor under the U.S. Longshoreman and Harbor Workers Act, the Jones Act, or under any other laws, regulation, or statutes applicable to employees, Subcontractor shall procure and maintain applicable coverage. If hauling of hazardous waste is part of the Work, Subcontractor shall procure and maintain applicable automobile liability insurance for hazardous waste hauling vehicles. Subcontractor shall obtain, before commencement of any Work hereunder, and maintain the same insurance coverages with no less than the limits of liability as required of Contractor in the Prime Contract or shown on Exhibit A to this Subcontract, whichever are greater. All insurance shall include Contractor and Owner as additional insureds and any other parties required by the Prime Contract to be additional insureds (collectively, "Additional Insureds"), and shall not permit any change or cancellation without fifteen (15) days prior written notice to Contractor. Subcontractor shall make all deductible payments for claims made against any insurance policy provided by Subcontractor or Additional Insureds relating in any way to any acts or omissions of Subcontractor or its representatives, employees, subcontractors, suppliers, design professionals, or any other person participating in the Work. Subcontractor shall file certificates of insurance containing the limitation on change or cancellation stated above with Contractor at least one (1) day prior to scheduled commencement of the Work. Contractor and Owner have the right to receive copies of all insurance policies upon request. Policies shall not contain any exclusions that are not acceptable to Contractor or Owner. If requested by Contractor or Owner, all policies must be certified by the insurance carrier as being true and complete. Contractor and Owner's right to review and approve all insurance policies shall not constitute a waiver of any rights created by or provision contained in this Subcontract or the Prime Contract should they differ from those contained in such policies.

In no event shall Subcontractor maintain less than the insurance coverages as detailed in: **Exhibit A: Insurance Requirements**

Failure of Subcontractor to obtain and maintain complete insurance as required by this Subcontract, or to require the same of its subcontractors, shall be deemed a material breach of this Subcontract. In such event, in addition to any and all other rights and remedies at law or in equity: (1) Contractor may terminate this Subcontract; (2) Contractor may procure such insurance at Subcontractor's sole expense and withhold such expense from payments hereunder; or (3) Additional Insureds may, at their respective option, require Subcontractor to pay for the attorney's fees, expenses and liability as a result of any claim or lawsuit for which coverage would have been provided to Additional Insureds under this Subcontract if not for Subcontractor's breach.

Subcontractor's insurance policies shall each include a waiver of any right of subrogation and of any right to assert any deduction or offset against Additional Insureds and their insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals. Subcontractor shall require similar waivers from its subcontractors and design professionals. If any of the Additional Insureds are partially or wholly self insured, the waivers of subrogation required by this Subcontract shall apply as if they were in fact covered by their own insurance. All policies required under this Subcontract shall contain a Waiver of Subrogation endorsement.

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Contractor neither represents nor assumes responsibility for the adequacy of any Builders Risk Insurance or any other property insurance to protect the interest of Subcontractors in the Work, its equipment or any other property. It shall be the obligation of Subcontractor to purchase and maintain any property insurance it deems necessary to protect said interests. Subcontractor waives all rights against Indemnitees, Additional Insureds, other contractors, and all of their respective insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals for loss of or damage to the Work, Subcontractor's equipment or other property from whatever cause, or any other losses within the scope of any insurance maintained by Subcontractor or required to be maintained under the Subcontract, and shall require its subcontractors and design professionals to execute waivers of their rights in this regard as well.

15. Liens and Encumbrances.

Subcontractor acknowledges that Contractor may agree to subordinate its lien rights to the interest of Owner, Owner's lender for the Project, title insurer(s) for any loan for the Project, or other third parties. At Contractor's request, Subcontractor agrees to subordinate its lien rights to Owner, Owner's lender for the Project, title insurer(s) for any loan for the Project, or other third parties and further agrees to execute any documents necessary to reflect such subordination. Subcontractor agrees to secure the immediate release and satisfaction of any claims or mechanic's liens resulting from the performance hereof, and bear all expense entailed in the investigation, settling or litigation of any such claims or liens and pay all attorney fees, including paralegal services, expert and consultant fees and any other costs incurred by Contractor in connection with and respecting such claims or liens. The existence of any encumbrance shall preclude Subcontractor's right to receive payment until such encumbrance has been satisfied and removed or Subcontractor provides a bond acceptable to Contractor removing such encumbrance.

16. Default and Failure to Cure.

Subcontractor shall be in default upon the occurrence of any of the following conditions:

- (a) Subcontractor files a petition in bankruptcy, or makes a general assignment for the benefit of creditors, or a receiver is appointed having authority over Subcontractor's business or assets;
- (b) Subcontractor fails to comply with any of the provisions of this Subcontract or any laws applicable to its Work;
- (c) Subcontractor fails to supply sufficient skilled workers, proper materials or equipment or otherwise fails to maintain the progress of Work in accordance with the Project Schedule, as revised and updated by Contractor; or
- (d) Subcontractor fails to pay its obligations for Work to workers, subcontractors or suppliers or others as they become due or fails to remove any liens against the property of the Owner relating to any part of the Work.

In the event Subcontractor fails to cure any such default within forty-eight (48) hours after written notice given by facsimile, certified mail or hand delivery by the Contractor to do so, Contractor may, without prejudice to other rights or remedies and without liability to Subcontractor, take over the Work of the Subcontractor, or any part thereof, and take possession of all materials, appliances, plans, equipment, and other property of the Subcontractor necessary for completion of the Work and withhold the entire unpaid balance of the Subcontract Price. Subcontractor and its surety shall be liable to Contractor for any or all costs and expenses incurred in completion of the Work, including jobsite and home office overhead costs, plus profit thereon of 10% and all fees and costs of consultants and attorneys engaged in connection therewith and all other losses or damages arising out of or relating, directly or indirectly, to Subcontractor's default or threatened default.

17. Warranty.

Subcontractor warrants all Work against all defects or deficiencies of materials, equipment or workmanship for the warranty period required by the Prime Contract but in no event for a period less than one (1) year from the date of completion and final acceptance by Owner of all work under the Prime Contract. Subcontractor shall remove, replace and/or repair, at its own expense, any work, materials, and/or equipment furnished hereunder in which any defect or deficiency (including failure to develop ratings, capacities or characteristics required by any shop drawings or submittals, this Subcontract or the Prime Contract,) shall appear at any time within the applicable warranty period. Subcontractor shall indemnify and hold Contractor harmless from any loss or damages arising from any such defects or deficiencies. The obligations of Subcontractor hereunder are in addition to all other obligations imposed by law or this Subcontract. Contractor may demand assurance, by bond or otherwise, from Subcontractor that it will abide by its guarantee and warrant as specified herein and as might otherwise be specified to a greater extent in the Prime Contract.


18. Termination.

This Subcontract may be terminated, in whole or in part, by Contractor:

- (a) if, for any reason, the Prime Contract is suspended or terminated, in whole or in part, by Owner, Contractor's obligation to Subcontractor shall be limited to the amount actually paid by Owner for any portion of the Work performed and materials delivered by Subcontractor; or
- (b) at any time for Contractor's convenience, with or without cause, and in such event: (1) Subcontractor shall immediately discontinue Work except as may be necessary to preserve and protect the Work, materials or equipment at Contractor's option, place no further orders for materials, equipment, services, facilities and supplies, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Contractor, give Contractor the right to assume Subcontractor's rights and obligations under such order or contracts at Contractor's option; and (2) the Subcontract price shall be equitably adjusted to an amount equal to the value of the Work actually performed and materials delivered; provided, in no event shall Contractor be liable for other costs or damages, including consequential damages or lost profits, relating to such termination. In the event Contractor terminates this Subcontract or Subcontractor's performance for alleged breach or other cause and it is determined such termination for breach or for cause is wrongful, it is agreed that such termination shall be deemed termination for convenience under this provision and Subcontractor's rights shall be determined accordingly.

19. Multiparty Disputes.

Unless expressly prohibited by the Prime Contract, to the extent disputes between Contractor and Subcontractor involve in whole or in part disputes between Contractor and Owner, or any other third party, Contractor shall have the option to: (1) require that such disputes shall be decided by the same tribunal and in the same forum as disputes between Contractor and Owner, or any other third party; (2) stay any action on the dispute between Contractor

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and Subcontractor until the resolution of any such dispute between Contractor and the Owner, or other third party; or (3) proceed with the dispute resolution process set forth in Paragraph 20.

20. Dispute Resolution.

Unless Contractor has exercised its right under Paragraph 19, all disputes arising under or in connection with the Work, this Subcontract, or any matter which is the subject of this Subcontract not resolved by direct discussion shall be submitted to mediation prior to the commencement of any legal action by Subcontractor against Contractor. The mediation shall take place in Boise, Idaho. The parties shall mutually agree upon a mediator and bear the cost of such mediator equally. Unless otherwise agreed in writing, Subcontractor agrees to continue the Work in accordance with this Subcontract until conclusion of the mediation. If mediation does not resolve the dispute, to the fullest extent permitted by law, any such dispute shall be subject to the exclusive jurisdiction of the state and/or federal courts located in Boise, Idaho, and all substantive issues shall be governed by Idaho law to the extent not inconsistent with the Subcontract Documents.

21. Attorney Fees.

In the event of any legal action between Contractor and Subcontractor relating to this Subcontract, the prevailing party shall be entitled to recover from the other party reasonable attorney fees, including paralegal services, expert and consultant fees and any other costs reasonably incurred in any legal proceedings, including mediation, arbitration, trial and appeal. Notwithstanding the foregoing, Subcontractor shall not be entitled to recover any such fees or cost incurred prior to the conclusion of the mediation required in Section 20.

22. Contract Modification.

This Subcontract, together with attachments hereto, constitute agreement and cannot be changed, modified or amended except in writing executed by all parties. This Subcontract supersedes all prior representations, understandings or agreements except as expressly stated herein. This Subcontract shall be binding on the heirs, successors, administrators and assigns of the parties hereto.

23. Counterparts/Signatures.

This Subcontract, and any amendments thereto, may be executed in any number of counterparts, and a facsimile or electronic copy of an executed, or partly executed, counterpart shall be deemed an original for all purposes and shall be binding on the party subscribing the same. Additionally, any electronic signatures to this Subcontract, or any amendments thereto, shall constitute original signatures and are binding on the parties.

24. Severability.

If any term or provision of this Subcontract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties hereto shall be construed and enforced as if this Subcontract did not contain the particular term or provision held invalid.

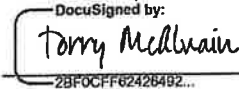
25. Governing Law.

This Subcontract shall be governed by Idaho law to the extent not inconsistent with the Subcontract Documents.

This Subcontract Agreement is effective this date 02/14/2018, between McAlvain Construction, Inc. (referred to as "Contractor") and Gem State Roofing Inc. (referred to as "Subcontractor"), executing this agreement.

Contractor:

McAlvain Construction, Inc.

Signed:  28F0CFF62428492...

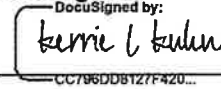
By: Torry McAlvain

Title: CEO

Dated: 2/16/2018

Subcontractor:


Gem State Roofing Inc.

Signed:  CC796DD8127F420...

By: Kerrie L Kuhn

Title: Corporate Secretary

Dated: 2/16/2018

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LOWER TIER SUBCONTRACTOR AND SUPPLIERS, INCLUDING ADDRESS AND PHONE NUMBER

LOWER TIER SUBCONTRACTORS: Please include all lower tier subcontractors having agreements with your company to perform on this project.

None

SUPPLIERS OF MATERIALS AND EQUIPMENT: Please include all suppliers, including equipment rentals, having agreements with your company to be used for any part of the Work on this project.

Roofline Supply 2779 S. Liberty Street Boise Idaho 83709
Woody's Sheetmetal 6583 Supply Way Boise Idaho 83716

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SUBCONTRACT AGREEMENT

No. S116016-40 Roofing

SUBCONTRACTOR:

Gem State Roofing Inc.
2270 S. Longmont
Garden City, ID 83706
(208) 338-9318 (208) 388-8461

DATE: February 14, 2018

PROJECT: Animal Shelter of the Wood River Valley

LOCATION: Hailey, ID

OWNER: Animal Shelter of the Wood River Valley

ARCHITECT:

ADDENDA:

The parties agree as follows:

1. Scope of Subcontract Work.

Subcontractor agrees to furnish all necessary labor, materials, supplies, tools, equipment including scaffolding and safety equipment, services, supervision, shop drawings, submittals, samples, and sales taxes unless specifically stated otherwise, necessary or required for the completion of all work described below, reasonably inferable therefrom and incidental thereto (the 'Work'):

Furnish Roofing scope of work per plans, specifications, and the following exhibits to the contract:

- Exhibit A – Insurance Requirements
- Exhibit B – Technical Requirements
- Exhibit C – Project Document List
- Exhibit D – Project Schedule
- Exhibit E – Schedule of Values

The McAlvain Group of Companies, Inc. Safety and Accident Prevention Plan is incorporated into the contract by reference. Copies are available at the jobsite and upon request.

Item	Phase	Description	Quantity	UM	Unit Price	Extended Price
1	07310 .0700	Roofing	0.000	LS	0.00000	\$248,177.16
2	99132 .0110	Synthetic Underlayment (Temp Roofing)	0.000	LS	0.00000	\$6,100.00
3	07310 .0700	Closeout (1% fo O&Ms, Warranty, Redlines)	0.000	LS	0.00000	\$2,506.84
Subtotal:						\$256,784.00

Subcontractor agrees to be bound to Contractor to the same extent as Contractor has assumed to the Owner by Prime Contract. In the event of any conflict between the terms of the Prime Contract and this subcontract, the provisions of this Subcontract shall control. Subcontract shall indemnify and hold Contractor harmless from any and all costs, expenses and liabilities, including attorney fees, incurred by or claimed against Contractor arising out of or relating to Work or any breach of this Subcontract. All subcontractors and suppliers of materials and equipment, including equipment rentals, having agreements with Subcontractor for any part of the Work shall be identified with their current addresses in Lower Tier Subcontractors and Suppliers attachment hereto.

Exh. No.	52
Date	
Name	J Flynn

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2. The Subcontract Documents.

The subcontract documents consist of

- (a) this Subcontract;
- (b) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein;
- (c) modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Subcontract; and
- (d) modifications to this Subcontract, all of which are incorporated herein.

This Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

3. Subcontract Price and Payment.

In consideration of Subcontractor's complete performance of this Subcontract, Contractor agrees to pay Subcontractor the total sum of **Two Hundred Fifty-Six Thousand Seven Hundred Eighty-Four And 00/100 Dollars (\$ 256,784.00)** (the "Subcontract Price"), subject to adjustments pursuant to paragraph 8. No progress or final payment shall be payable for any payment period unless Subcontractor submits its written application in a form satisfactory to Contractor at least five (5) working days prior to the date required for Contractor's application for payments to the Owner as fixed in the Prime Contract. In the event Subcontractor fails at any time to timely submit its application for payment, Subcontractor will continue with the Work without interruption, without progress payment, until the next payment period for which application is timely submitted.

In the event that unit prices are used for computation of the Subcontract Price or a portion of the Subcontract Price, applicable unit prices shall be identified herein and actual Subcontract Price shall be the total of unit prices multiplied by the actual quantity of Work performed as finally measured and accepted by Owner. Subcontractor acknowledges that unit quantities used for the initial computation of the Subcontract Price are merely estimates of the quantities necessary for completion of the Work and actual quantities necessary for completion of the Work may differ substantially from the estimates set forth herein. For any variation in actual quantities as compared to estimated quantities, Subcontractor shall not be entitled to any adjustment of Subcontractor's unit prices unless and only in the same proportion as Contractor's unit prices therefore, if any, shall be adjusted by the Owner under the Prime Contract.

Subcontractor acknowledges that it relies on credit of Owner, not Contractor, for payment of Work performed. Receipt of payment by Contractor from Owner for Work performed by Subcontractor is an express condition precedent to payment by Contractor to Subcontractor for such Work; however, this condition precedent in no way waives Subcontractor's lien rights for Work performed. In the event Subcontractor makes any claim or asserts any cause of action against Contractor for payments due hereunder: (a) Subcontractor's sole and exclusive remedy shall be against the payments Contractor actually receives from the Owner on account of the Prime Contract ("Prime Contract Payments"); (b) no other real, personal or mixed property of Contractor, wherever located, shall be subject to levy on any judgment obtained against Contractor, (c) if such net income is insufficient to satisfy any judgment, Subcontractor will not institute any further action, suit, claim or demand, in law or in equity, against Contractor for or on the account of such deficiency. Progress payments shall be in the amount representing the value of Work accepted and paid for by the Owner for the Subcontractor's Work, less retainage in the same percentage as fixed by the Prime Contract but in no event less than Five Percent (5%). Progress payments, less retainage, shall become payable to Subcontractor for Work performed to the satisfaction of Owner ten (10) banking days after receipt by Contractor of payment from Owner for such Work. All estimates by Owner of the value of the Work performed for any payment period, or of the amount of any deduction, offset or counterclaim relating to the Work, shall be binding on Subcontractor. Acceptance of any progress payments by Subcontractor shall constitute a release of Contractor from all liability, except retainage and those claims specifically reserved in writing, arising or incurred during the payment period.

Retainage shall be withheld, without interest, by Contractor until final payment. Final payment shall become payable fifteen (15) days after final payment by Owner is received by the Contractor. Prior to and as an additional condition of final payment, Subcontractor shall submit a written release and a waiver of claims and liens against the Project, Owner, and Contractor. Subcontractor must also submit written releases and waivers of claims and liens from all of Subcontractor's suppliers and subcontractors. Acceptance of final payment by Subcontractor constitutes full and final release of Contractor and its surety. Retention as established by the Prime Contract is: 5.00%

No payment including final payment, shall be a waiver of any performance required under this Subcontract, either in whole or in part, and no Payment shall be construed as an acceptance of defective or incomplete work, and Subcontractor shall remain responsible and liable for performance of all Work in strict compliance with this Subcontract and the Prime Contract.

Contractor shall be entitled to withhold, without interest thereon, from progress and/or final payments amounts reasonably necessary to protect from loss or damage caused by or the responsibility of the Subcontractor, including but not limited to:

- (a) repeated or continued failure of performance of this Subcontract.
- (b) loss or damage to Contractor, Owner or others caused by Subcontractor
- (c) alleged failure of Subcontractor to timely pay for labor, materials, equipment or supplies furnished in connection with the Work
- (d) rejected, defective or nonconforming Work
- (e) any delay in performance of the Work; and/or
- (f) evidence of Subcontractor's inability to complete the Work for the unpaid balance of the Subcontract Price

4. Time of Completion.

Time is of the essence. Subcontractor shall begin the Work immediately after notice to proceed by Contractor and shall complete the Work within the time set forth in the Project Schedule, as periodically revised and updated, prepared by Contractor for all work under the Prime Contract. Subcontractor understands and acknowledges that the Project Schedule may change from time to time and Subcontractor shall perform the Work, as changed.

Initial _____

Should the Subcontractor delay or threaten to delay the progress or performance of this Subcontract or the Project, or cause any delay or actual or damage or liability to Contractor by reason of any delay by Subcontractor, Subcontractor shall be liable for and indemnify and hold Contractor harmless from any penalties, liabilities, liquidated or other damages, costs and/or fees, including but not limited to attorney fees, incurred by Contractor by reason thereof. Subcontractor's liability shall not be deemed waived by any assent or acquiescence by Contractor to Subcontractor's later performance.

In the event Subcontractor's performance of Work is delayed by Owner, the Subcontractor's time for performance shall be extended only to the extent Contractor shall obtain an extension of time for such Work from the Owner under the Prime Contract. Subcontractor agrees to provide notice to Contractor to provide timely notice to Owner under the Prime Contract. Subcontractor's sole remedy for delay caused by Contractor and/or any agent or subcontractor of the Contractor, shall be an extension of the time to complete Subcontractor's Work for a period equal to the actual delay incurred. Subcontractor waives any claim or right to additional compensation or damages relating thereto.

5. Bonds.

PERFORMANCE AND PAYMENT BONDS ARE REQUIRED: (check one) Yes No

If bonds are required, Subcontractor shall furnish to Contractor full and duly executed performance and payment bonds in the amount of the total Subcontract Price issued by a surety company acceptable to Contractor in such form as is required by the Prime Contract or otherwise acceptable to Contractor. Subcontractor's failure to deliver satisfactory bonds within ten (10) days after the effective date of the Subcontract may be deemed a material breach of this Subcontract.

6. Laws, Regulations, Etc.

The Work shall strictly comply with all federal, state, local, municipal and any and all other governing laws, rules, regulations, statutes, ordinances and other directives (hereinafter referred to as "Laws"). All Work specifically required by this Subcontract or necessary to fully comply with such Laws shall be furnished by Subcontractor as part of this Subcontract without any additional compensation. In the event Subcontractor observes any work on the Project, including Work of the Subcontractor, which Subcontractor believes is not in compliance with any Laws, Subcontractor shall immediately notify Contractor in writing of such noncompliance.

Subcontractor warrants and represents that it has obtained and shall maintain all licenses and registrations required to pursue and perform the Work in the applicable jurisdiction and require the same of its representatives, employees, subcontractors, suppliers, design professionals, and any other person participating in the Work. Subcontractor agrees that it shall return any sums paid to it by Contractor to the extent the Owner is not obligated to pay for any of Subcontractor's work due to the failure to maintain all such licenses and registrations. The parties agree the provisions of this sub-section are a separate undertaking from the balance of this Subcontract and shall survive in the event the balance of this Subcontract is deemed unenforceable due to the failure to maintain all such licenses and registrations.

7. Assignment/Delegation of the Work.

Subcontractor shall not assign this Subcontract, delegate or sub-subcontract any of the Work described herein without prior written consent of Contractor.

8. Changes in the Work.

Contractor may add, delete, or otherwise change the Work of the Subcontractor within the general scope of this Subcontract by written directive to the Subcontractor. No extra work, changes or deviations in the Work shall be performed by Subcontractor without the prior written consent of Contractor. Any adjustment in the Subcontract Price or in the time of performance of the Work for additions, deletions or other changes be as agreed in writing and authorized by Subcontract Change Order signed by Contractor, and Contractor shall have no other obligation, express or implied. If no such agreement can be reached, Subcontractor shall perform the Work as directed by the Contractor and the Subcontract Price shall be equitably adjusted as follows:

- (a) increased for any additional or different work performed or materials furnished by Subcontractor in an amount equal to the actual cost thereof plus ten percent (10%) of said cost to cover all supervision, general and administrative expenses, jobsite and home office overhead and profit as supported by time records for labor and equipment and material invoices documenting direct out-of-pocket labor, equipment and material costs, plus the agreed percentage mark-up, shall be submitted to and approved by Contractor on a daily basis as such work is performed; and
- (b) reduced by the reasonable value of Work deleted or avoided by reason of the change.

If the change, extra work or deviation is the result of an Owner-directed change in the Work, Subcontractor shall be entitled to an adjustment in the Subcontract Price only to the extent that Contractor is entitled to an adjustment under the Prime Contract, minus Contractor's markup.

Ordinary field modifications which do not substantially increase Subcontractor's cost of performing the Work will be performed without any adjustment to the Subcontract Price or time of performance. Contractor agrees to forward to Owner any claims of Subcontractor arising out of changes affecting the Work which are ordered, directly or indirectly, by Owner; provided however, Contractor shall not be liable to Subcontractor for any change to Subcontractor's Work except to the extent approved and paid by Owner.

9. Waiver of Claims.

All claims for adjustment of the Subcontract Price or time of performance arising out of or relating to any addition, deletion or change in the Work are waived by Subcontractor unless the Subcontractor shall provide written notice of such claims within three (3) days after receipt of Contractor's directive therefore or such shorter time required under the Prime Contract for notice of claim to the Owner.

10. Subcontractor Claims.

Unless expressly prohibited by the Prime Contract, if Subcontractor timely submits a claim that is related, in whole or in part, to any decision, directive, act or failure to act by the Owner, Subcontractor agrees, at Contractor's option to prosecute such claim in Contractor's name in accordance with the claims procedure set forth in the Prime Contract. Subcontractor shall be entitled to the amount that is collected from Owner on any such claims, minus Contractor's markup. The claims shall be prosecuted at the sole expense of the Subcontractor and Subcontractor agrees to indemnify Contractor from any

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and all damages, including attorneys' fees and costs, assessed against Contractor as a result of Subcontractor's pursuit of its claims. Subcontractor otherwise shall be bound by the dispute resolution provisions in Paragraphs 19 and 20 and shall be entitled to recover from Contractor only what Contractor receives from Owner for such claims and payment from Owner of such claims is an express condition precedent of Contractor's obligation to pay Subcontractor. Subcontractor shall cooperate with Contractor regarding Contractor's submission of claims to, or prosecution of claims against Owner.

11. Clean-Up.

Subcontractor shall continuously maintain the project free from all dirt, rubbish, debris, and other waste materials. Upon completion of the various portions of the Work, Subcontractor shall remove all rubbish, stains, and blemishes caused by its operations, and it shall perform, at no additional cost, additional clean-up work reasonably directed by Contractor's field superintendent. All costs including supervision incurred by Contractor in the clean-up of Subcontractor's Work will be backcharged to Subcontractor.

12. Material, Tools and Equipment.

Subcontractor shall provide all tools and equipment necessary to perform the Work. Subcontractor agrees to assume sole responsibility for the receipt, delivery, unloading, storage, warehousing, protection, insurance and all other risks of loss relating to any and all materials, tools, and equipment it is to furnish, install, provide or have provided to it under this Subcontract.

13. Indemnity.

To the fullest extent permitted by law, Subcontractor hereby agrees to reimburse, defend, hold harmless and indemnify Contractor, Owner and their respective insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals (collectively, "Indemnitees") from and against any and all claims, liens, causes of action, expenses, penalties, fines, injuries, liabilities, costs, loss, damage of any kind, attorney fees, and expenses arising out of or relating to the Work, Subcontractor's performance, failure to perform or breach of this Subcontract or any warranty hereunder, or the alleged or actual negligence or fault of Subcontractor or any person performing a portion of the Work or otherwise acting at the instance of Subcontractor including, but not limited to Subcontractor's representatives, employees, subcontractors, suppliers, or design professionals. Subcontractor's obligations under this provision shall apply without limitation to death, bodily injury, injury to property, and economic losses and consequential damages. Subcontractor specifically and expressly waives any immunity that may be granted under worker's compensation laws, similar acts and industrial insurance, to the extent necessary, to give effect to its obligations under this provision. Further, Subcontractor's obligations under this provision shall not be limited in any way by any limitation on the amount or type of damages, compensation, benefits payable to or by any third party under Worker's Compensation Acts, Disability Benefit Acts, or other employee benefits acts. Finally, the obligations in this provision are not limited by the amount of any available insurance and are in addition to any express or implied indemnity or contribution rights or remedies available any of the Indemnitees at law or in equity. Subcontractor will defend each Indemnitee through counsel reasonable approved by such Indemnitee.

14. Insurance.

Subcontractor and its subcontractors shall purchase and maintain full and complete insurance on the Work in accordance with this Subcontract. If the Work requires Subcontractor to provide design services, Subcontractor shall require its design professional to purchase and maintain professional liability insurance that will cover any claims arising from design services related to the Work. If the Work or its location constitutes an exposure to employees of Subcontractor under the U.S. Longshoreman and Harbor Workers Act, the Jones Act, or under any other laws, regulation, or statutes applicable to employees, Subcontractor shall procure and maintain applicable coverage. If hauling of hazardous waste is part of the Work, Subcontractor shall procure and maintain applicable automobile liability insurance for hazardous waste hauling vehicles. Subcontractor shall obtain, before commencement of any Work hereunder, and maintain the same insurance coverages with no less than the limits of liability as required of Contractor in the Prime Contract or shown on Exhibit A to this Subcontract, whichever are greater. All insurance shall include Contractor and Owner as additional insureds and any other parties required by the Prime Contract to be additional insureds (collectively, "Additional Insureds"), and shall not permit any change or cancellation without fifteen (15) days prior written notice to Contractor. Subcontractor shall make all deductible payments for claims made against any insurance policy provided by Subcontractor or Additional Insureds relating in any way to any acts or omissions of Subcontractor or its representatives, employees, subcontractors, suppliers, design professionals, or any other person participating in the Work. Subcontractor shall file certificates of insurance containing the limitation on change or cancellation stated above with Contractor at least one (1) day prior to scheduled commencement of the Work. Contractor and Owner have the right to receive copies of all insurance policies upon request. Policies shall not contain any exclusions that are not acceptable to Contractor or Owner. If requested by Contractor or Owner, all policies must be certified by the insurance carrier as being true and complete. Contractor and Owner's right to review and approve all insurance policies shall not constitute a waiver of any rights created by or provision contained in this Subcontract or the Prime Contract should they differ from those contained in such policies.

In no event shall Subcontractor maintain less than the insurance coverages as detailed in: **Exhibit A: Insurance Requirements**

Failure of Subcontractor to obtain and maintain complete insurance as required by this Subcontract, or to require the same of its subcontractors, shall be deemed a material breach of this Subcontract. In such event, in addition to any and all other rights and remedies at law or in equity: (1) Contractor may terminate this Subcontract; (2) Contractor may procure such insurance at Subcontractor's sole expense and withhold such expense from payments hereunder; or (3) Additional Insureds may, at their respective option, require Subcontractor to pay for the attorney's fees, expenses and liability as a result of any claim or lawsuit for which coverage would have been provided to Additional Insureds under this Subcontract if not for Subcontractor's breach.

Subcontractor's insurance policies shall each include a waiver of any right of subrogation and of any right to assert any deduction or offset against Additional Insureds and their insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals. Subcontractor shall require similar waivers from its subcontractors and design professionals. If any of the Additional Insureds are partially or wholly self insured, the waivers of subrogation required by this Subcontract shall apply as if they were in fact covered by their own insurance. All policies required under this Subcontract shall contain a Waiver of Subrogation endorsement.

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Contractor neither represents nor assumes responsibility for the adequacy of any Builders Risk Insurance or any other property insurance to protect the interest of Subcontractors in the Work, its equipment or any other property. It shall be the obligation of Subcontractor to purchase and maintain any property insurance it deems necessary to protect said interests. Subcontractor waives all rights against Indemnitees, Additional Insureds, other contractors, and all of their respective insurers, underwriters, sureties, assigns, subsidiaries, affiliates, officers, directors employees, agents, and principals for loss of or damage to the Work, Subcontractor's equipment or other property from whatever cause, or any other losses within the scope of any insurance maintained by Subcontractor or required to be maintained under the Subcontract, and shall require its subcontractors and design professionals to execute waivers of their rights in this regard as well.

15. Liens and Encumbrances.

Subcontractor acknowledges that Contractor may agree to subordinate its lien rights to the interest of Owner, Owner's lender for the Project, title insurer(s) for any loan for the Project, or other third parties. At Contractor's request, Subcontractor agrees to subordinate its lien rights to Owner, Owner's lender for the Project, title insurer(s) for any loan for the Project, or other third parties and further agrees to execute any documents necessary to reflect such subordination. Subcontractor agrees to secure the immediate release and satisfaction of any claims or mechanic's liens resulting from the performance hereof, and bear all expense entailed in the investigation, settling or litigation of any such claims or liens and pay all attorney fees, including paralegal services, expert and consultant fees and any other costs incurred by Contractor in connection with and respecting such claims or liens. The existence of any encumbrance shall preclude Subcontractor's right to receive payment until such encumbrance has been satisfied and removed or Subcontractor provides a bond acceptable to Contractor removing such encumbrance.

16. Default and Failure to Cure.

Subcontractor shall be in default upon the occurrence of any of the following conditions:

- (a) Subcontractor files a petition in bankruptcy, or makes a general assignment for the benefit of creditors, or a receiver is appointed having authority over Subcontractor's business or assets;
- (b) Subcontractor fails to comply with any of the provisions of this Subcontract or any laws applicable to its Work;
- (c) Subcontractor fails to supply sufficient skilled workers, proper materials or equipment or otherwise fails to maintain the progress of Work in accordance with the Project Schedule, as revised and updated by Contractor; or
- (d) Subcontractor fails to pay its obligations for Work to workers, subcontractors or suppliers or others as they become due or fails to remove any liens against the property of the Owner relating to any part of the Work.

In the event Subcontractor fails to cure any such default within forty-eight (48) hours after written notice given by facsimile, certified mail or hand delivery by the Contractor to do so, Contractor may, without prejudice to other rights or remedies and without liability to Subcontractor, take over the Work of the Subcontractor, or any part thereof, and take possession of all materials, appliances, plans, equipment, and other property of the Subcontractor necessary for completion of the Work and withhold the entire unpaid balance of the Subcontract Price. Subcontractor and its surety shall be liable to Contractor for any or all costs and expenses incurred in completion of the Work, including jobsite and home office overhead costs, plus profit thereon of 10% and all fees and costs of consultants and attorneys engaged in connection therewith and all other losses or damages arising out of or relating, directly or indirectly, to Subcontractor's default or threatened default.

17. Warranty.

Subcontractor warrants all Work against all defects or deficiencies of materials, equipment or workmanship for the warranty period required by the Prime Contract but in no event for a period less than one (1) year from the date of completion and final acceptance by Owner of all work under the Prime Contract. Subcontractor shall remove, replace and/or repair, at its own expense, any work, materials, and/or equipment furnished hereunder in which any defect or deficiency (including failure to develop ratings, capacities or characteristics required by any shop drawings or submittals, this Subcontract or the Prime Contract,) shall appear at any time within the applicable warranty period. Subcontractor shall indemnify and hold Contractor harmless from any loss or damages arising from any such defects or deficiencies. The obligations of Subcontractor hereunder are in addition to all other obligations imposed by law or this Subcontract. Contractor may demand assurance, by bond or otherwise, from Subcontractor that it will abide by its guarantee and warrant as specified herein and as might otherwise be specified to a greater extent in the Prime Contract.

18. Termination.

This Subcontract may be terminated, in whole or in part, by Contractor:

- (a) if, for any reason, the Prime Contract is suspended or terminated, in whole or in part, by Owner, Contractor's obligation to Subcontractor shall be limited to the amount actually paid by Owner for any portion of the Work performed and materials delivered by Subcontractor; or
- (b) at any time for Contractor's convenience, with or without cause, and in such event: (1) Subcontractor shall immediately discontinue Work except as may be necessary to preserve and protect the Work, materials or equipment at Contractor's option, place no further orders for materials, equipment, services, facilities and supplies, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Contractor, give Contractor the right to assume Subcontractor's rights and obligations under such order or contracts at Contractor's option; and (2) the Subcontract price shall be equitably adjusted to an amount equal to the value of the Work actually performed and materials delivered; provided, in no event shall Contractor be liable for other costs or damages, including consequential damages or lost profits, relating to such termination. In the event Contractor terminates this Subcontract or Subcontractor's performance for alleged breach or other cause and it is determined such termination for breach or for cause is wrongful, it is agreed that such termination shall be deemed termination for convenience under this provision and Subcontractor's rights shall be determined accordingly.

19. Multiparty Disputes.

Unless expressly prohibited by the Prime Contract, to the extent disputes between Contractor and Subcontractor involve in whole or in part disputes between Contractor and Owner, or any other third party, Contractor shall have the option to: (1) require that such disputes shall be decided by the same tribunal and in the same forum as disputes between Contractor and Owner, or any other third party; (2) stay any action on the dispute between Contractor

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and Subcontractor until the resolution of any such dispute between Contractor and the Owner, or other third party; or (3) proceed with the dispute resolution process set forth in Paragraph 20.

20. Dispute Resolution.

Unless Contractor has exercised its right under Paragraph 19, all disputes arising under or in connection with the Work, this Subcontract, or any matter which is the subject of this Subcontract not resolved by direct discussion shall be submitted to mediation prior to the commencement of any legal action by Subcontractor against Contractor. The mediation shall take place in Boise, Idaho. The parties shall mutually agree upon a mediator and bear the cost of such mediator equally. Unless otherwise agreed in writing, Subcontractor agrees to continue the Work in accordance with this Subcontract until conclusion of the mediation. If mediation does not resolve the dispute, to the fullest extent permitted by law, any such dispute shall be subject to the exclusive jurisdiction of the state and/or federal courts located in Boise, Idaho, and all substantive issues shall be governed by Idaho law to the extent not inconsistent with the Subcontract Documents.

21. Attorney Fees.

In the event of any legal action between Contractor and Subcontractor relating to this Subcontract, the prevailing party shall be entitled to recover from the other party reasonable attorney fees, including paralegal services, expert and consultant fees and any other costs reasonably incurred in any legal proceedings, including mediation, arbitration, trial and appeal. Notwithstanding the foregoing, Subcontractor shall not be entitled to recover any such fees or cost incurred prior to the conclusion of the mediation required in Section 20.

22. Contract Modification.

This Subcontract, together with attachments hereto, constitute agreement and cannot be changed, modified or amended except in writing executed by all parties. This Subcontract supersedes all prior representations, understandings or agreements except as expressly stated herein. This Subcontract shall be binding on the heirs, successors, administrators and assigns of the parties hereto.

23. Counterparts/Signatures.

This Subcontract, and any amendments thereto, may be executed in any number of counterparts, and a facsimile or electronic copy of an executed, or partly executed, counterpart shall be deemed an original for all purposes and shall be binding on the party subscribing the same. Additionally, any electronic signatures to this Subcontract, or any amendments thereto, shall constitute original signatures and are binding on the parties.

24. Severability.

If any term or provision of this Subcontract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties hereto shall be construed and enforced as if this Subcontract did not contain the particular term or provision held invalid.

25. Governing Law.

This Subcontract shall be governed by Idaho law to the extent not inconsistent with the Subcontract Documents.

This Subcontract Agreement is effective this date 02/14/2018, between McAlvain Construction, Inc. (referred to as "Contractor") and Gem State Roofing Inc. (referred to as "Subcontractor"), executing this agreement.

Contractor:
McAlvain Construction, Inc.

Subcontractor:
Gem State Roofing Inc.

Signed: _____

Signed: _____

By: Torry McAlvain

By: _____

Title: CEO

Title: _____

Dated: _____

Dated: _____

LOWER TIER SUBCONTRACTOR AND SUPPLIERS, INCLUDING ADDRESS AND PHONE NUMBER

LOWER TIER SUBCONTRACTORS: Please include all lower tier subcontractors having agreements with your company to perform on this project.

SUPPLIERS OF MATERIALS AND EQUIPMENT: Please include all suppliers, including equipment rentals, having agreements with your company to be used for any part of the Work on this project.

Jayne Danner

From: Gem State Roofing <gemstateroofing@gmail.com>
Sent: Monday, March 19, 2018 2:55 PM
To: Tracey Felix
Subject: Re: Animal Shelter Subs - Blaine County Economy: ACTION REQUIRED
Attachments: Copy of Blaine County.xlsx

Thank you,

Kerrie

On Fri, Mar 16, 2018 at 11:05 AM, <traceyf@mc Alvain.com> wrote:

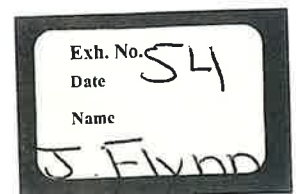
Hi All,

The Animal Shelter has requested that we provide as much data as possible to the Sun Valley Economic Development for them to develop a report of our construction project's impact to the local economy. Realizing that this is short-notice, I don't expect 100% accuracy, but please provide your best guess input to the best of your ability. I need this by the end of the day Monday. Thank you!!

Blaine County Economy Development

1	Company Name
2	\$ in Labor Spent in Blaine County
3	\$ in Labor Spent Elsewhere
4	\$ Materials Purchased in Blaine County
5	\$ Materials Purchased Elsewhere
6	\$ Equipment Rented in Blaine County
7	\$ Equipment Rented or Brought In From Elsewhere
8	Average No. of On Site Workers
9	Average No. of Local Workers
10	Average No. of Travellers
11	Comments?
12	Contract Value: \$

Tracey Felix
Sr. Project Manager
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709



Blaine County Economy Development

1	Company Name	United Components Inc DBA: Gem State Roofing
2	\$ in Labor Spent in Blaine County	0
3	\$ in Labor Spent Elsewhere \$	51,356.80
4	\$ Materials Purchased in Blaine County \$	5,000.00
5	\$ Materials Purchased Elsewhere \$	120,000.00
6	\$ Equipment Rented in Blaine County \$	4,000.00
7	\$ Equipment Rented or Brought In From Elsewhere \$	-
8	Average No. of On Site Workers	8.00
9	Average No. of Local Workers	-
10	Average No. of Travellers	8.00
11	Comments?	
12	Contract Value: \$	256,784.00

Jayne Danner

From: Gem State Roofing <gemstateroofing@gmail.com>
Sent: Tuesday, April 3, 2018 2:19 PM
To: Tracey Felix
Subject: Re: S116016-40 Change Order 01.pdf
Attachments: Signed Change Order #1.pdf

Thank you,

Kerrie

On Mon, Apr 2, 2018 at 3:05 PM, Gem State <gemstateroofing@gmail.com> wrote:
Ok will do
Thanks

Kerrie Kuhn

On Apr 2, 2018, at 2:13 PM, Tracey Felix <traceyf@mcavain.com> wrote:

Kerrie,

Please sign and return the attached C.O. for the snow removal. I know John spoke with Bob about this, but no additional work is to be performed without written approval. We don't have labor rates for you and our budget for weather protection is gone. Thanks so much!

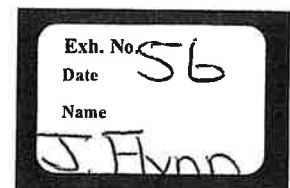
Tracey

Tracey Felix
Sr. Project Manager
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709
208.908.5990 office
208.871.1569 mobile
208.362.4356 fax



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<S116016-40 Change Order 01.pdf>





Equal Opportunity Employer

Change Order

Project: 116016. Animal Shelter of the Wood River Valley
 100 Croy Creek Road
 Hailey, ID 83333

Subcontract #: S116016-40

Subcontract Change Order #: 1

Description: Snow Removal from Roof

To (Subcontractor): Gem State Roofing Inc.
 417 Remington St Suite #02
 Garden City, ID 83714

Change Order Date: 4/2/18

You are directed to make the following changes in this SubContract:

Subct Item	C. O. Item	Contract Item	Phase	Description	Units	U/M	Unit Price	Amount
4		0110	99132. 0110	Snow Removal from Roof	0.000	LS	0.00000	2,275.00

Total 2,275.00

Not valid until signed by both the Subcontractor and Contractor. Signature of the Subcontractor indicates the Subcontractor's agreement herewith, including any adjustment in the Subcontract Sum or Time.

The original Subcontract Sum was	256,784.00
The net change by previously authorized Change Orders was	0.00
The Subcontract Sum prior to this Change Order was	256,784.00
The Subcontract Sum will be increased by this Change Order	2,275.00
The new Subcontract Sum will be	259,059.00

Authorized By Contractor:
 McAlvain Construction, Inc.
 5559 W. Gowen Road
 Boise ID 83709

Accepted By Subcontractor:
 Gem State Roofing Inc.
 417 Remington St Suite #02
 Garden City, ID 83714

By: _____
 Date: _____

By:
 Date: 4/3/2018

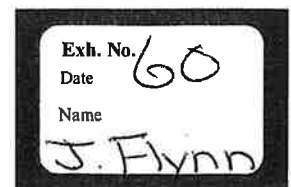
Jayne Danner

From: Gem State Roofing <gemstateroofing@gmail.com>
Sent: Tuesday, June 5, 2018 12:30 PM
To: Tracey Felix
Subject: pump house

Bob was wondering if we had approval on roof system for pump house?

Thank you,

Kerrie





Equal Opportunity Employer

Change Order

Project: 116016. Animal Shelter of the Wood River Valley
100 Croy Creek Road
Hailey, ID 83333

Subcontract #: S116016-40

Subcontract Change Order #: 4

Description: Temp Roof Area 3 Flat Roof

To (Subcontractor): Gem State Roofing Inc.
417 Remington St Suite #02
Garden City, ID 83714

Change Order Date: 6/25/18

You are directed to make the following changes in this SubContract:

Subct Item	C. O. Item	Contract Item	Phase	Description	Units	U/M	Unit Price	Amount
8		0110	99132. .0110	Temp Roof Area 3 Flat Roof	0.000	LS	0.00000	250.00

Total 250.00

Not valid until signed by both the Subcontractor and Contractor. Signature of the Subcontractor indicates the Subcontractor's agreement herewith, including any adjustment in the Subcontract Sum or Time.

The original Subcontract Sum was	256,784.00
The net change by previously authorized Change Orders was	5,206.00
The Subcontract Sum prior to this Change Order was	261,990.00
The Subcontract Sum will be increased by this Change Order	250.00
The new Subcontract Sum will be	262,240.00

Authorized By Contractor:

McAlvain Construction, Inc.
5559 W. Gowen Road
Boise ID 83709

By: _____
Date: _____

Accepted By Subcontractor:

Gem State Roofing Inc.
417 Remington St Suite #02
Garden City, ID 83714

By: _____
Date: _____

Exh. No.	61
Date	
Name	J. Flynn

Jayme Danner

From: Tracey Felix
Sent: Monday, September 10, 2018 2:18 PM
To: Kerrie Kuhn
Subject: Roofing at Animal Shelter

Kerrie/Bob,
Where are your roofers?

Exh. No.	62
Date	
Name	J. Flynn

Jayme Danner

From: Tracey Felix
Sent: Monday, September 10, 2018 2:35 PM
To: Kerrie Kuhn
Subject: FW: Roof
Attachments: IMG_5967.JPG; IMG_5968.JPG

Kerrie,
See attached photos. Our Owner is coming back from vacation tomorrow and they haven't seen progress on this sloped roof for a long time. It has been scheduled for two months. Please confirm you'll have this addressed ASAP.
Thanks,

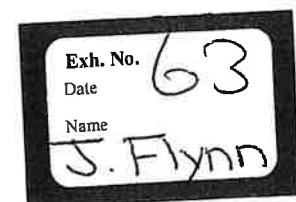
-----Original Message-----

From: John Hanson
Sent: Monday, September 10, 2018 2:30 PM
To: Tracey Felix <traceyf@mcavain.com>
Cc: John Hanson <johnh@mcavain.com>
Subject: Roof

John Hanson
Sr. Superintendent
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709
208.871.1179 office
208.871.1179 mobile
208.362.4356 fax

[McAlvain Group of Companies] <<http://www.mcalvain.com/wp-content/uploads/2015/02/Group.jpg>>

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Jayme Danner

From: Gem State Roofing <gemstateroofing@gmail.com>
Sent: Monday, September 17, 2018 1:31 PM
To: Tracey Felix
Subject: Re: Snow Clips

Tracy,

Thought this was already done. I will have this to you tomorrow.

Than you,

Kerrie

On Mon, Sep 17, 2018 at 10:59 AM Tracey Felix <traceyf@mcavain.com> wrote:

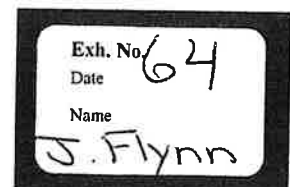
Kerrie,

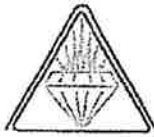
What is the status of the submittals for the snow clips? This is an important item that the Owner is anxious about. He's afraid of lawsuits and would like us to have this installed ASAP. I need to get these approved by the architect though. Can you please send me product data on the snow clips?

Tracey Felix
Sr. Project Manager
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709
208.908.5990 office
208.871.1569 mobile
208.362.4356 fax



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United Components, Incorporated
 DBA: Gem State Roofing
 DBA: Asphalt Maintenance & Paving
 417 Remington Street #2
 Garden City Idaho 83714

Invoice

Date	Invoice #
9/27/2018	2278

Bill To
Mc Alvain Construction, Inc 5559 W. Gowen Road Boise Idaho 83709

P.O. Number	Terms
	Due on receipt

Description	Amount						
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of Hailey Animal Shelter. 101 Croy Creek Road, Hailey:</p> <p>Pump House</p> <ol style="list-style-type: none"> 1. Install Grace Ultra Ice and Water shield over entire roof system 2. Install Drip edge 3. Install Timberline Natural Shadow Limited Lifetime Architectural Shingles (Weathered Wood) 4. All debris to be hauled away by Gem State Roofing 	7,150.00						
<p>We look forward to doing business with you. Contractor License Number RCE-32821</p>	<table border="1"> <tr> <td>Exh. No</td> <td>65</td> </tr> <tr> <td>Date</td> <td></td> </tr> <tr> <td>Name</td> <td>J. Flynn</td> </tr> </table>	Exh. No	65	Date		Name	J. Flynn
Exh. No	65						
Date							
Name	J. Flynn						
Total	\$7,150.00						

Jayme Danner

From: Tracey Felix
Sent: Friday, October 19, 2018 9:59 AM
To: Kerrie Kuhn
Subject: RE: 116016 Payables

Kerrie – never mind the Deuter Construction lien waiver Aja requested. Deuter thought we were using Gem State Roofing of Hailey so he bought some flashing from them. It wasn't you guys 😊

Exh. No.	66
Date	
Name	J. Flynn

Jayme Danner

From: Tracey Felix
Sent: Monday, November 12, 2018 12:39 PM
To: 'Gem State Roofing'; 'Kerrie Kuhn'
Subject: FW: QC after roofers
Attachments: IMG_7464.mov

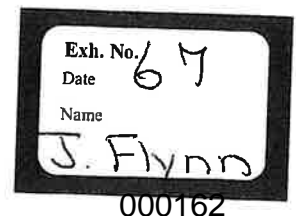
From: Mike Walchli <mike@deuterconstruction.com>
Sent: Friday, November 9, 2018 2:14 PM
To: Tracey Felix <traceyf@mcavain.com>
Cc: John Hanson <johnh@mcavain.com>; Brett Deuter <brett@deuterconstruction.com>
Subject: QC after roofers

Tracey/John

Pls see attached video -> after the 3rd-one that Justin touched today (and all where loose like in the video) he sent me this. Idk where the roofer is, we haven't seen him. But also told him probably 4-5times now that he has to change some and fix others.. looking for some help to get the roofers on the same page - it's been hard with them all along, but now we're moving into these areas where I just can't tell the guys to go to another location and keep working and finish later.

Thank you

Deuter Construction llc
Mike Walchli
Design&Estimation
(208) 309-3822
mike@deuterconstruction.com



Jayne Danner

From: Tracey Felix
Sent: Monday, November 12, 2018 3:33 PM
To: Gem State Roofing
Subject: RE: Letter to Gem State Roofing
Attachments: ASWRV- Letter to Gem State Roofing 2018-11-12.pdf

Here you go.

From: Gem State Roofing <gemstateroofing@gmail.com>
Sent: Monday, November 12, 2018 3:29 PM
To: Tracey Felix <traceyf@mcavain.com>
Subject: Re: Letter to Gem State Roofing

Can you please change to United Components, Inc DBA: Gem State Roofing, 417 Remington Street #2, Garden City Idaho 83714.

Thank you,

Kerrie

On Mon, Nov 12, 2018 at 2:47 PM Tracey Felix <traceyf@mcavain.com> wrote:

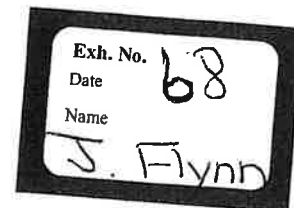
Kerrie,

Please review the attachment and let me know if this addresses the situation we discussed via phone.

Thanks!

Tracey

Tracey Felix
Sr. Project Manager
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709
208.908.5990 office
208.871.1569 mobile
208.362.4356 fax



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Equal Opportunity Employer

November 12, 2018

Kerrie Kuhn
United Components, Inc DBA: Gem State Roofing
417 Remington Street #2
Garden City, ID 83714

Re: Animal Shelter of the Wood River Valley

Dear Kerrie,

This letter is being provided to explain to those whom it may concern of our relationship with Gem State Roofing and our position with their work in the Wood River Valley.

McAlvain Construction, Inc. is working with the Animal Shelter of the Wood River Valley to build a 29,000 square foot new construction project in Hailey, Idaho. In May of 2017, McAlvain went out to bid and received bids from three bidders: 1) Dricon Roofing; 2) Signature Roofing; and 3) Professional Roofing. Our project budget was based on the low bid from Dricon Roofing in the amount of \$247,000. We entered into contract with Dricon Roofing on November 7, 2017.

On January 11, 2018, McAlvain held a preconstruction meeting at 8:30 AM with the envelope consultant for the project, PIE Consulting, as well as applicable subcontractors including Dricon Roofing. The envelope consultant that was hired by the Owner reviewed the project expectations and reiterated the design specifications that require installation per all manufacturer written instructions. On January 11, 2018 at 12:44 PM, McAlvain received an email from the estimator at Dricon Roofing expressing concerns with the requirements of the project with regards to the means and methods for installing Ice and Water shield (they wanted to use nails to install Ice and Water Shield which is against the manufacturer's instructions) as well as their concern with the schedule through the winter. In this email dated January 11, Dricon suggested that McAlvain contract with a different Contractor for this project. After attempting to have temporary protection only installed, it was apparent the best option was to cancel the Subcontract with Dricon and enter into Contract with another roofing company. The other two bids that we received were not within our budget.

A handwritten signature in black ink, appearing to be 'JK' or similar initials.

As our Construction Schedule states, the project was ready for temporary roofing/plastic as early as January 4, 2018. Gem State Roofing of Boise, Idaho is a Contractor that had recently completed a successful project for our Whitetail Clubhouse project in McCall, Idaho. This Clubhouse project was managed by the same Superintendent (John Hanson) and Project Manager (myself) as the team for the Animal Shelter of the Wood River Valley. On January 18, 2018, Gem State Roofing was contacted by McAlvain in the hopes of receiving a bid that would work within our budget. The Contract with Dricon was canceled on February 5, 2018 and McAlvain entered into Contract with Gem State Roofing for the full scope of roofing work on February 16, 2018.

Should you have any questions, please feel free to contact me at (208) 908-5990.

Sincerely,



Tracey Felix
Project Manager



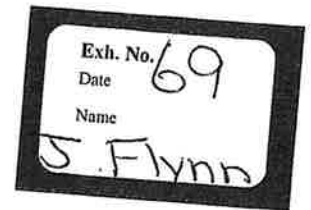
Equal Opportunity Employer

November 12, 2018

Kerrie Kuhn
United Components, Inc DBA: Gem State Roofing
417 Remington Street #2
Garden City, ID 83714

Re: Animal Shelter of the Wood River Valley

Dear Kerrie,



This letter is being provided to explain to those whom it may concern of our relationship with Gem State Roofing and our position with their work in the Wood River Valley.

McAlvain Construction, Inc. is working with the Animal Shelter of the Wood River Valley to build a 29,000 square foot new construction project in Hailey, Idaho. In May of 2017, McAlvain went out to bid and received bids from three bidders: 1) Dricon Roofing; 2) Signature Roofing; and 3) Professional Roofing. Our project budget was based on the low bid from Dricon Roofing in the amount of \$247,000. We entered into contract with Dricon Roofing on November 7, 2017.


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DEFENDANT000116

As our Construction Schedule states, the project was ready for temporary roofing/plastic as early as January 4, 2018. Gem State Roofing of Boise, Idaho is a Contractor that had recently completed a successful project for our Whitetail Clubhouse project in McCall, Idaho. This Clubhouse project was managed by the same Superintendent (John Hanson) and Project Manager (myself) as the team for the Animal Shelter of the Wood River Valley. On January 18, 2018, Gem State Roofing was contacted by McAlvain in the hopes of receiving a bid that would work within our budget. The Contract with Dricon was canceled on February 5, 2018 and McAlvain entered into Contract with Gem State Roofing for the full scope of roofing work on February 16, 2018.

Should you have any questions, please feel free to contact me at (208) 908-5990.

Sincerely,



Tracey Felix
Project Manager

Jayne Danner

From: Tracey Felix
Sent: Wednesday, November 21, 2018 10:33 AM
To: 'Kerrie Kuhn'
Subject: RE: "Leak"

Thanks Kerrie. Have a great weekend! I'll be at the site – trying to confirm quantities of the snow splitters. I might need Bob's help Monday. I did get this message from the architect so I'm going to finalize the decision.

Personally, I think we're fine to omit the large exhaust fans with square curbs from this including EF 16, EF 5, EF7. We should include all the smaller penetrations and the balance of the smaller exhaust fan outlets..

Please make that adjustment and provide to owner.

From: Kerrie Kuhn <gemstateroofing@aol.com>
Sent: Wednesday, November 21, 2018 10:24 AM
To: Tracey Felix <traceyf@mcavain.com>
Subject: Re: "Leak"

They will be there monday to fix this and work on other stuff.

Thank you,

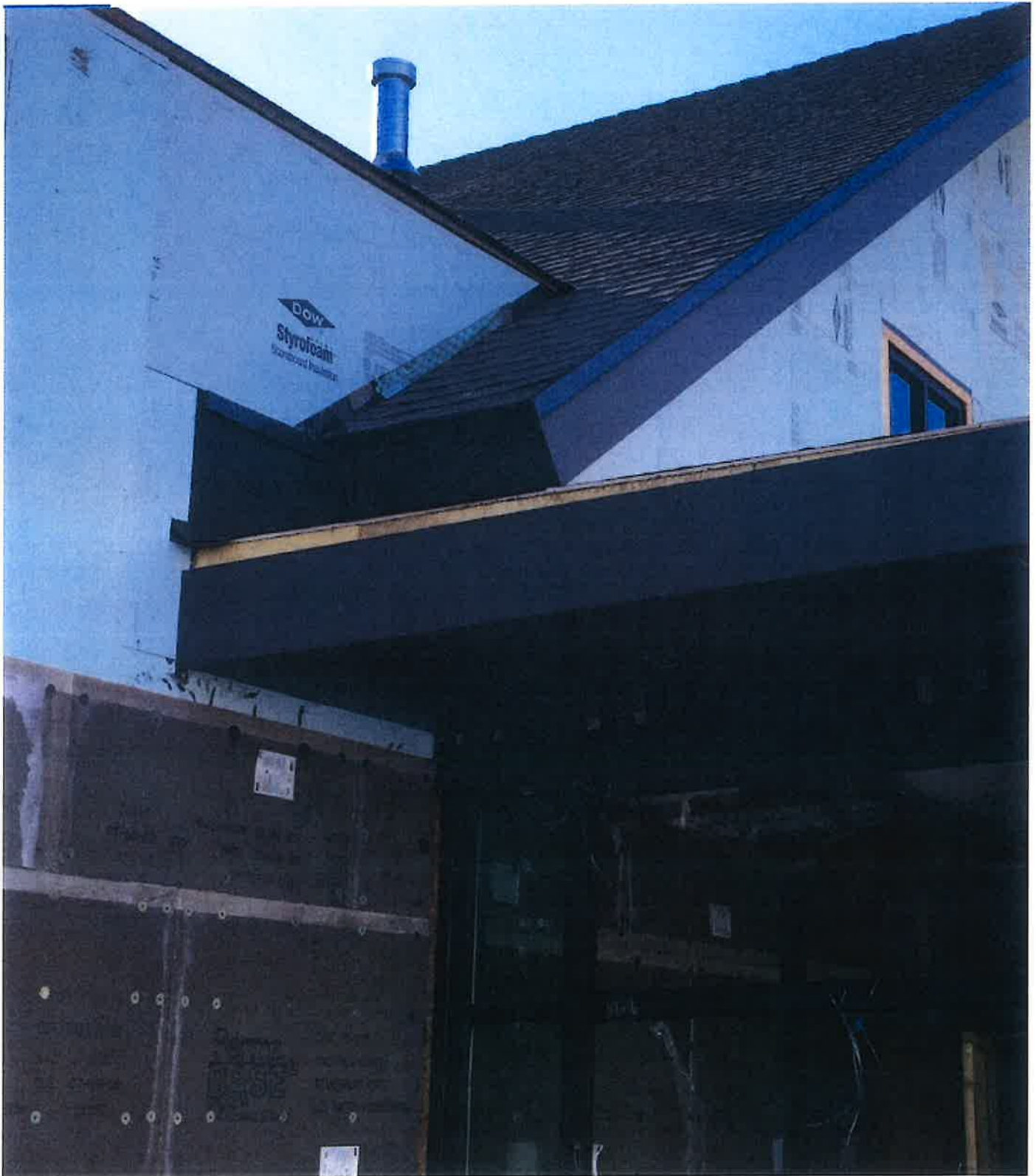
Kerrie

-----Original Message-----

From: Tracey Felix <traceyf@mcavain.com>
To: John Hanson <johnh@mcavain.com>
Cc: Kerrie Kuhn <gemstateroofing@aol.com>
Sent: Mon, Nov 19, 2018 4:08 pm
Subject: "Leak"

Kyle pointed out to me that on this far northeast corner, there was water coming out between the fascia and the soffit. When I climbed onto the curb, I saw that this isn't fully roofed.





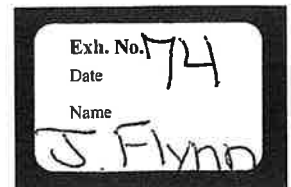
Tracey Felix
Sr. Project Manager
McAlvain Companies, Inc.
5559 W. Gowen Road
Boise, ID 83709
208.908.5990 office

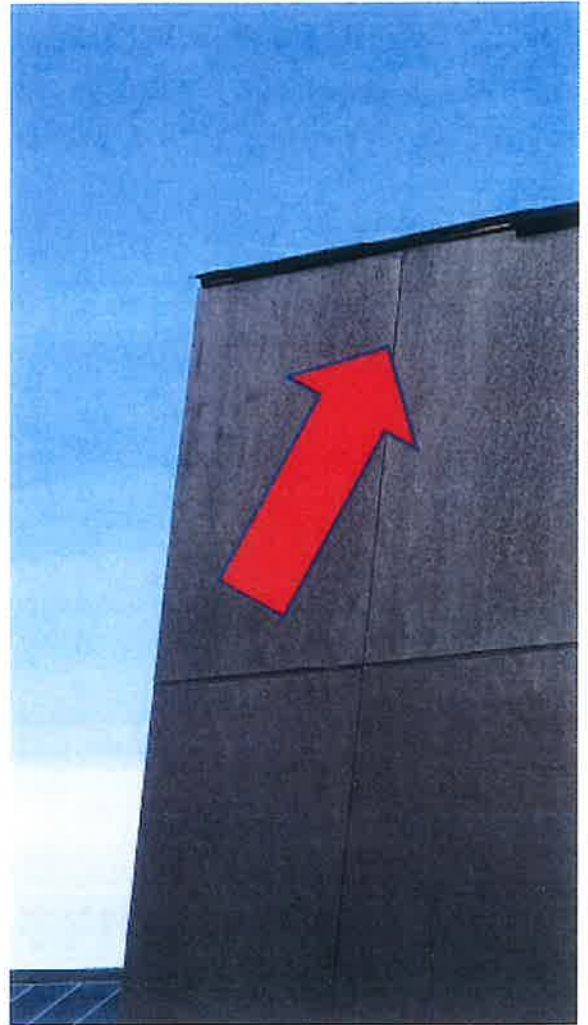
Jayne Danner

From: Tracey Felix
Sent: Tuesday, November 27, 2018 8:48 AM
To: 'Kerrie Kuhn'
Cc: John Hanson
Subject: Roofing

Kerrie,
I apologize if either I already sent this or if John did.

We're updating our site observation log from the Architect's visit on 11/16.
Roof membrane at coping: Two areas were noted where roofing membrane did not adequately lap over coping. One is in area A at mechanical roof. The other is near maintenance yard. Both are noted in photos.





One other:



Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., hereby moves the Court, pursuant to rule 56 of the Idaho Rules of Civil Procedure, for entry of summary judgment in its favor with prejudice.

This Motion is based upon the records and files herein, the Memorandum in Support of Defendant's Cross Motion for Summary Judgment, Declaration of Terri Pickens Manweiler, and Declaration of Jeffrey Flynn, each filed concurrently herewith.

Oral argument is requested.

DATED: February 13, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., submits this Memorandum in Support of its Cross Motion for Summary Judgment. This Memorandum is supported by the *Declaration of Terri Pickens Manweiler in Support of Defendant's Cross Motion for Summary Judgment ("Manweiler Dec.")*, and the *Declaration of Jeffery Flynn in Support of Defendant's Cross Motion for Summary Judgment ("Flynn Dec.")*, each filed concurrently herewith.

I. INTRODUCTION

Plaintiff Gem State Roofing Incorporated ("Plaintiff") commenced this litigation against Defendant United Components Incorporated, dba, Gem State Roofing ("UCI") on July 20, 2018

alleging the following causes of action against UCI: Count I: Breach of Contract, Count II: Breach of Covenant of Good Faith and Fair Dealing, Count III: Trademark Infringement, Count IV: Unjust Enrichment, Count V: Preliminary Injunction, and Count VI: Permanent Injunction. UCI seeks an entry of judgment dismissing each of these counts since no genuine issues of material fact exist.

II. STATEMENT OF UNDISPUTED FACTS

A. Plaintiff's Formation.

Richard Silvia filed a Certificate of Assumed Business Name with the Idaho Secretary of State on August 12, 1997 which provided that he would be doing business as Gem State Roofing. *Manweiler Dec.*, ¶ 4, Exhibit A. On December 19, 2000, Mr. Silvia filed the Articles of Incorporation for Gem State Roofing Incorporated with the Idaho Secretary of State. *Manweiler Dec.*, ¶ 5, Exhibit B.

B. Defendant's Formation.

Jeff Flynn started a roofing company in 1985 called Gem State Roofing in Nampa Idaho. *Flynn Dec.*, ¶ 2. Mr. Flynn began putting the name Gem State Roofing on business cards, invoices, estimates, flyers, company vehicles, and phone book advertising. *Flynn Dec.*, ¶ 3. Mr. Flynn began to expand his business by adding asphalt maintenance to his roofing business when he moved to Boise in 1987. *Flynn Dec.*, ¶ 4. Mr. Flynn's business was called Gem State Roofing and Asphalt Maintenance ("GSRAM"). *Flynn Dec.*, ¶ 5.

On May 30, 1995, Mr. Flynn filed with the Idaho Secretary of State the Certificate of Incorporation of Flynn, Inc. *Flynn Dec.*, ¶ 6, Exhibit A. On December 28, 1998, Mr. Flynn filed the Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance. *Flynn Dec.*, ¶ 7, Exhibit B. On July 19, 1999, Michelle Flynn filed a Certificate of Assumed

Business Name with the Idaho Secretary of State which provided that Gem State Roofing & Asphalt Maintenance would be doing business as Gem State Roofing. *Flynn Dec.*, ¶ 8, Exhibit C.

GSRAM had two officers initially, Mr. Flynn, and his wife Michelle Flynn. *Flynn Dec.*, ¶ 9. Michelle Flynn owned 51% of GSRAM and Mr. Flynn owned 49%. *Flynn Dec.*, ¶ 10. GSRAM was initially operated out of the Flynn's home located at 2204 South Philippi, Boise Idaho and then operated out of the Flynn's home located at 2270 Longmont, Boise Idaho and was operated from this location for ten years. *Flynn Dec.*, ¶ 11. GSRAM then moved to an office space on Chinden Boulevard where it was operated for eight years. *Flynn Dec.*, ¶ 12.

GSRAM, throughout its pendency, accrued significant tax liability and in 2010 the IRS lienied all of GSRAM's equipment, causing GSRAM to dissolve. *Flynn Dec.*, ¶ 13. At this same time, Michelle Flynn and Jeff Flynn filed for divorce. *Flynn Dec.*, ¶ 14. Michelle Flynn left GSRAM in 2010 and her stock dissolved along with Jeff's stock because of GSRAM's dissolution. *Flynn Dec.*, ¶ 15. The IRS and Michelle Flynn entered into an offer in compromise to settle her portion of the liability, Mr. Flynn is still negotiating with the IRS regarding his portion of liability. *Flynn Dec.*, ¶¶ 16, 17. The IRS informed Mr. Flynn that he could start up a new company with a different name, and so on October 25, 2011, Mr. Flynn filed with the Idaho Secretary of State the Articles of Incorporation for United Components Inc. *Flynn Dec.*, ¶ 18, Exhibit D. Mr. Flynn also filed a Cancellation or Amendment of Certificate of Assumed Business Name deleting Gem State Roofing & Asphalt Maintenance and amending it to United Components Inc. *Flynn Dec.*, ¶ 19, Exhibit E. On October 26, 2011, Mr. Flynn filed a Certificate of Assumed Business Name identifying that Asphalt Maintenance and Paving would operate under United Components Incorporated. *Flynn Dec.*, ¶ 20, Exhibit F. The IRS allowed Mr. Flynn to keep the Gem State brand and the Asphalt Maintenance brand, but he had to change the corporate veil to keep those

two companies. *Flynn Dec.*, ¶ 21. Once UCI was formed, the IRS made UCI buy back the equipment they had liened in 2010, and so UCI paid the IRS around \$40,000 for the equipment to remove the lien. *Flynn Dec.*, ¶ 22.

C. Trademark Dispute.

i. Plaintiff's Trademark

On April 8, 2002, Richard Silvia filed an Application for Registration of Trademark Service Mark with the Idaho Secretary of State. *Manweiler Dec.*, ¶ 8, Exhibit C. On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark-Service Mark to Gem State Roofing, Inc. stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. *Manweiler Dec.* ¶ 9, Exhibit D. The Certificate of Registration showed that the trademark assigned to Plaintiff was the following:



Manweiler Dec., ¶ 10, Exhibit D.

No filings or renewal registrations have been filed by Plaintiff, and the trademark expired on May 2, 2012. *Manweiler Dec.*, ¶ 11.

ii. GSRAM's Trademark.

On December 29, 2004, Michelle Flynn filed with the Idaho Secretary of State an Application for Registration of Trademark Service Mark for GSRAM. *Manweiler Dec.* ¶ 12, Exhibit E. A Certificate of Registration of Trademark Service Mark was issued that same day by the State of Idaho and provides that the first use of the trademark was in 1985 and that such trademark would expire on December 29, 2014. *Manweiler Dec.* ¶ 13, Exhibit F. The Certificate of Registration showed that the Trademark assigned to GSRAM was the following:



Manweiler Dec., ¶ 14 Exhibit F.

After GSRAM dissolved, Jeff Flynn filed an Application for Registration for Assignment of Trademark and an Application for Renewal Registration of Trademark on December 1, 2014. *Manweiler Dec.*, ¶ 15, Exhibit G. On that same date, a Certificate of Assignment Registration of Trademark was issued by the State of Idaho, assigning the GSRAM trademark to UCI, again noting that the first use was in 1985. *Manweiler Dec.*, ¶ 16 Exhibit H. On December 1, 2014 the state of Idaho also issued a Certificate Renewal Registration of Trademark noting that UCI had renewed the GSRAM trademark, that its first use was in 1985 and that it would expire on December 29, 2024. *Manweiler Dec.*, ¶¶ 17, 18, Exhibit I. The Trademark is still currently in place. *Manweiler Dec.*, ¶ 19.

In October 2005, Plaintiff and GSRAM entered into a Trademark Settlement Agreement to determine which areas of Idaho each company could advertise and solicit in. *Manweiler Dec.* ¶ 20, Exhibit J. Michelle Flynn signed the Settlement Agreement on behalf of GSRAM. *Manweiler Dec.* ¶ 21. Mr. Flynn did not review the settlement agreement and does not recall ever reading through it. *Flynn Dec.*, ¶ 23. United Components, Inc. is not a party to the Settlement Agreement nor referenced anywhere in the Settlement Agreement. *Manweiler Dec.*, ¶ 22. Michelle Flynn has no interest in United Components Inc. as she has never been a shareholder, stakeholder, or interest holder in United Components Inc. *Manweiler Dec.*, ¶ 23, *Flynn Dec.*, ¶ 24.

III. STANDARD FOR CROSS SUMMARY JUDGMENT

Summary judgment is proper “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 a judgment as a matter of law.” I.R.C.P. 56(c). Accordingly, the movant must prove the absence of a genuine issue of material fact. *E.G. Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 103-104, 294 P.3d 1111, 1115-16 (2013). If the movant so proves, the burden shifts to the nonmovant to prove the opposite: the existence of a genuine issue of material fact. *Id.* at 104, 294 P.3d at 1116.

To meet that ultimate burden, the nonmovant “may not rest upon mere allegations in the pleadings but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Id.* The record must be construed in the light most favorable to the nonmovant, with all reasonable inferences drawn in the nonmovant’s favor. *Id.* A “material fact” for summary judgment purposes is one upon which the outcome of the case may be different. *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

In determining whether or not to grant summary judgment, the court is to liberally construe the facts and draw all reasonable inferences in favor of the nonmoving party. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992). Nevertheless, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159 163, 307 P.3d 176, 180 (2013). The nonmovant’s failure to prove the existence of a genuine issue of material fact “will result in an order granting summary judgment.” *Sprinkler Irrigation Co., v. John Deere Ins. Co.*, 139 Idaho 691, 698, 85 P.3d 667, 675 (2004).

As a general rule, the court must liberally construe the facts and inferences contained in the existing record in favor of the nonmoving party. There is, however, a limited exception to the application of this rule in cases, such as this one, where the matter is to be tried before the court without a jury. In such cases, the judge is not constrained to draw inferences in favor of the party

opposing a motion for summary judgment. Rather the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Development Co. v. Richie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

Further, the legal standard by which this Court considers cross-motions for summary judgment allows the Court to draw reasonable inferences from the record before it because the parties have essentially agreed no factual issues exist. Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Davis v. Peacock*, 133 Idaho 637, 640, 991 P.2d 362, 365 (1999) (citing *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996); *Morrissey v. Haley*, 124 Idaho 870, 872, 865 P.2d 961, 963 (1993)). Additionally, because both parties are moving the court for an order on the same issue, this Court is free to draw all reasonable inferences from the record in favor of either party. See, e.g., *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

However, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321 (1986) (citing *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 507, 600 P.2d 1387, 1389 (1979)). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000); *Bear Island Water Ass'n, Inc., v. Brown*, 125 Idaho 717, 721, 874 P.2d 528, 532 (1994); *Intermountain Forest Mgmt. v. Louisiana-Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

IV. LEGAL ARGUMENT

Plaintiff's Complaint alleges five causes of action against UCI and there are no genuine issues of material fact that would preclude this Court from entering judgment dismissing each cause of action in favor of UCI. Each cause of action is addressed, in order as plead, as follows:

A. UCI DID NOT BREACH THE CONTRACT

In order to prevail on a breach of contract cause of action, the following elements must be proven:

1. A Contract existed between the parties
2. Defendant breached the contract
3. Plaintiff has been damaged because of the breach
4. Amount of damages

IDJI 6.10.1

1. A Contract Did Not Exist Between the Parties.

Plaintiff's cause of action for Breach of Contract fails based upon this first element – there is no contract that exists between the parties. The parties to the Trademark Settlement Agreement are Gem State Roofing & Asphalt Maintenance Inc. and Gem State Roofing, Inc. UCI is not a named party anywhere within the Trademark Settlement Agreement.

Plaintiff has no standing to sue UCI as it cannot demonstrate the requisite privity of contract therewith. Under general contract law, it is axiomatic that a party must show privity to have standing to sue for breach of contract. *Campbell v. Parkway Surgery Center, LLC*, 158 Idaho 957, 963, 354 P.3d 1171, 1178 (2015). Privity “refers to those who exchange the [contractual] promissory words or those to whom the promissory words are directed.” *DAFCO LLC v. Stewart Title Guaranty Company*, 156 Idaho 749, 754, 331 P.3d 491, 496 (2014) (quoting *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1171, 1177 (1984)). Accordingly, “[a] party must look to that person with whom he is in a direct contractual relationship for relief, in the event that his expectations under the contract were not met.” *Wing v. Martin* at 272, 688 P.2d 1171, 1177 (1984) (citing

Pierson v. Sewell, 97 Idaho 38, 45, 539 P.2d 590, 597 (1975); *Minidoka County v. Krieger*, 88 Idaho 395, 399 P.2d 962 (1965)).

UCI was not even in existence when the Settlement Agreement was entered into in 2005, UCI did not come into existence until October 2011, thus, there is no contractual obligation owed to Plaintiff by UCI.

2. Remaining Breach of Contract Elements.

The three remaining elements required to prove a breach of contract has occurred cannot be satisfied by Plaintiff because there is no contract in existence between UCI and Plaintiff. Thus, Plaintiff's cause of action for breach of contract should be dismissed.

B. UCI HAS NOT BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING

An implied covenant of good faith and fair dealing is a covenant implied by law in every contract that "requires 'that the parties perform in good faith the obligations imposed in their agreement.'" *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991). "A violation of the covenant occurs only when 'either party ... violates, nullifies or significantly impairs any benefit of the ... contract....'" *Id.* (quoting *Sorenson v. Comm Tek, Inc.*, 118 Idaho 664, 669, 799 P.2d 70, 75 (1990); *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989)).

As stated in Section A above, UCI was not a party to the Settlement Agreement, thus the covenant of good faith and fair dealing is not applicable to UCI. Because the covenant of good faith and fair dealing is not applicable to UCI, there can be no breach of the covenant. Thus, Plaintiff's cause of action for breach of covenant of good faith and fair dealing should be dismissed.

C. UCI HAS NOT INFRINGED ON PLAINTIFF'S TRADEMARK

Plaintiff alleges it has a common law trademark in the mark Gem State Roofing in Blaine County Idaho (Complaint, ¶ 36) and that UCI has conducted business in Blaine County as “Gem State Roofing” which constitutes a violation of 15 U.S.C. § 1125.

In order to prevail on a claim for trademark infringement under 15 U.S.C. § 1125, Plaintiff must establish that: (1) it is the owner of a valid and protectable trademark; (2) the UCI used the mark in commerce; (3) UCI's use of the mark is likely to cause confusion; and (4) Plaintiff has suffered damages. 15 U.S.C. § 1125(a); *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015) (citing *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010)).

Plaintiff cannot prevail under 15 U.S.C. § 1125 because it cannot meet the first element, it is not the owner of a valid and protectable trademark. 15 U.S.C. § 1125 defines ‘trademark as’

The term “trademark” includes any word, name, symbol, or device, or any combination thereof—

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and **applies to register on the principal register** established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

(Emphasis added). Plaintiff has not registered its trademark with the principal register, instead Plaintiff only registered it with the Idaho Secretary of State and such registration has since expired. Idaho Code § 48-512 governs trademark infringement at the state level and provides that common law trademarks are analyzed under the federal system of trademark registration and protection under the Trademark Act of 1946. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 841 (9th Cir. 2002). Thus, when analyzing Plaintiff's claim under Idaho Law, it still fails because Plaintiff cannot meet

the requirement that it has a valid and protectable trademark.

The Idaho Secretary of State shows that Mr. Silvia applied for a registration of trademark on April 8, 2002 (*Manweiler Dec.* ¶ 8, Exhibit C) and a Certificate of Trademark was entered on May 2, 2002 (*Manweiler Dec.*, ¶ 9, Exhibit D). Per the Certificate, the trademark was first used in November 1997 and expired May 2, 2012. There have been no renewal or application to reinstate the trademark used by Plaintiff.

UCI first applied to register its Trademark on December 29, 2004, and on the same day, a Certificate Registration of Trademark Service Mark was issued by the State of Idaho stating the first use of the trademark was in 1985 and that such trademark expired on December 29, 2014. UCI filed an Application for Renewal of Trademark on December 1, 2014 as well as an Application for Registration of Assignment of Trademark on the same date. The State of Idaho issued Certificates accepting the assignment and renewal and provided the new expiration date to be December 29, 2024. Thus, any use of the trademark and trademark name Gem State Roofing by Plaintiff expired on May 2, 2012. Plaintiff does not have a trademark that could have been infringed upon by UCI, thus its claim for trademark infringement should be dismissed.

D. UCI HAS NOT BEEN UNJUSTLY ENRICHED

Plaintiff has alleged that UCI has been unjustly enriched because Plaintiff built a reputation for quality roofing services in Blaine County under the name “Gem State Roofing” and such reputation constitutes a benefit to UCI to which UCI has not paid for. To prevail on its claim for unjust enrichment, Plaintiff must show (1) a benefit was conferred upon UCI by Plaintiff, (2) appreciation by UCI of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for UCI to retain the benefit without payment to Plaintiff for the value thereof. *Med. Recovery Servs., LLC v. Bonneville Billing and Collections, Inc.*, 157 Idaho 395,

398, 336 P.3d 802, 805 (2014). “The substance of an action for unjust enrichment lies in a promise, implied by law, that a party will render to the person entitled thereto that which in equity and good conscience belongs to the latter.” *Smith v. Smith*, 95 Idaho 477, 484, 511 P.2d 294,301 (1973).

1. A Benefit was Not Conferred Upon UCI.

“To confer a benefit in the context of unjust enrichment, the plaintiff must give the defendant an interest in money, land, or possessions, or perform services beneficial to, or at the request of, the other.” *Medical Recovery Services, LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 336 P.3d 802, (2014). Here, no benefit was conferred upon UCI because Plaintiff did not give UCI an interest in money, land, possessions, or perform services beneficial to or at the request of UCI. The first element cannot be met by Plaintiff.

2. There is No Appreciation nor Acceptance of a Benefit by UCI.

As with the first element, the second and third elements cannot be met by Plaintiff because there was no benefit conferred to UCI by Plaintiff. Without a benefit conferred by Plaintiff to UCI, UCI cannot appreciate such benefit nor accept such benefit. thus, UCI no appreciation can occur. Thus, Plaintiff’s claim for Unjust Enrichment should be dismissed.

E. PRELIMINARY AND PERMANENT INJUNCTIONS ARE NOT APPROPRIATE

Plaintiff seeks preliminary and permanent injunctions prohibiting UCI from conducting business in Blaine County, which as alleged by Plaintiff constitutes a violation of the Settlement Agreement.

This Court has the authority to issue a preliminary injunction during the pendency of the litigation as set out in Idaho Rule of Civil Procedure 65(e) which provides in pertinent part as follows:

- (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the

commission or continuance of the acts complained of, either for a limited period or perpetually;

- (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;
- (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;
- (4) when it appears, by affidavit, that the defendant is about to remove or to dispose of the defendant's property with intent to defraud the plaintiff;
- (5) for the defendant upon filing of a counterclaim praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

The purpose of a preliminary injunction is to preserve the status quo between the parties pending the resolution of a case on the merits. *Wolford v. Montee*, 161 Idaho 432, 442, 387 P.3d 100, 110 (2016). Additionally, preliminary injunctions may be granted to prevent defendants from engaging in activities that would render the judgment ineffectual. *Id.* (citing I.R.C.P. 65(e)(3)). The decision to grant injunctive relief rests with the sound discretion of the trial court. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993) (citing *O'Boskey v. First Fed. Savs. & Loan Ass'n*, 112 Idaho 1002, 1007, 739 P.2d 301, 305 (1987)).

In this case, Plaintiff does not meet any of the five requirements under IRCP 65(e) for the issuance of a preliminary injunction. There is no status quo of the parties that needs to be preserved. As already briefed, UCI is not a party to the Settlement Agreement and UCI has not committed trademark infringement, thus there is no status quo between the parties that this Court should attempt to preserve until this litigation is complete.

As to a permanent injunction, such cause of action by Plaintiff should be dismissed because there is no basis for the issuance of a permanent injunction. UCI is not a party to the Settlement Agreement; thus, any alleged breach of the Settlement Agreement is inapplicable to UCI, therefore it is inappropriate for this Court to enter a permanent injunction against UCI.

V. CONCLUSION

Based on the forgoing, because no genuine issues of material fact exist, Defendant respectfully requests this Court enter judgment dismissing each of Plaintiff's causes of action.

DATED: February 13, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DECLARATION OF JEFFREY
FLYNN IN SUPPORT OF
DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

I, JEFFREY FLYNN make the following declaration pursuant to Idaho Code § 9-1406:

1. I am the President of Defendant United Components Incorporated and have personal knowledge to the matters herein.
2. I started a roofing company in 1985 called Gem State Roofing in Nampa Idaho.
3. I began putting the name Gem State Roofing on business cards, invoices, estimates, flyers, company vehicles, and phone book advertising.
4. I began to expand my business by adding asphalt maintenance to the roofing business when I moved to Boise in 1987.

5. The business was called Gem State Roofing and Asphalt Maintenance (“GSRAM”).

6. On May 30, 1995, I filed with the Idaho Secretary of State the Certificate of Incorporation of Flynn, Inc. A true and accurate copy of the Certificate of Incorporation is attached hereto as **Exhibit A**.

7. On December 28, 1998, I filed the Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance. A true and accurate copy of the Articles of Amendment is attached hereto as **Exhibit B**.

8. On July 19, 1999, Michelle Flynn, my wife, filed a Certificate of Assumed Business Name with the Idaho Secretary of State which provided that Gem State Roofing & Asphalt Maintenance would be doing business as Gem State Roofing. A true and accurate copy of the Certificate of Assumed Business Name is attached hereto as **Exhibit C**.

9. GSRAM had two officers initially, my wife Michelle Flynn and myself.

10. Michelle Flynn owned 51% of GSRAM and I owned 49%.

11. GSRAM was initially operated out of our home located at 2204 South Philippi, Boise Idaho and then operated out of our next home located at 2270 Longmont, Boise Idaho and was operated from this location for ten years.

12. GSRAM then moved to an office space on Chinden Boulevard where it was operated for eight years.

13. GSRAM, throughout its pendency, accrued significant tax liability and in 2010 the IRS liened all of GSRAM’s equipment, causing GSRAM to dissolve.

14. At this same time, Michelle Flynn and I had separated and filed for divorce.

15. Michelle Flynn left GSRAM in 2010 and her stock dissolved along with my stock because of GSRAM's dissolution.

16. The IRS and Michelle Flynn entered into an offer in compromise to settle her portion of the liability.

17. I am still negotiating with the IRS regarding my portion of liability.

18. The IRS informed me that I could start up a new company with a different name, and so on October 25, 2011, I filed with the Idaho Secretary of State the Articles of Incorporation for United Components Inc. A true and accurate copy of the Articles of Incorporation is attached hereto as **Exhibit D**.

19. I also filed a Cancellation or Amendment of Certificate of Assumed Business Name deleting Gem State Roofing & Asphalt Maintenance and amending it to United Components Inc. A true and accurate copy of the Cancellation is attached hereto as **Exhibit E**.

20. On October 26, 2011, I filed a Certificate of Assumed Business Name identifying that Asphalt Maintenance and Paving would operate under United Components Incorporated. A true and accurate copy of the Certificate of Assumed Business Name is attached hereto as **Exhibit F**.

21. The IRS allowed me to keep the Gem State brand and the Asphalt Maintenance brand, but I had to change the corporate veil to keep those two companies.

22. Once UCI was formed, the IRS made UCI buy back the equipment they had liened in 2010, and so UCI paid the IRS around \$40,000 for the equipment to remove the lien.

23. I did not review the Trademark Settlement Agreement and do not recall ever reading through it.

24. Michelle Flynn was never a shareholder, stakeholder or interest holder in UCI.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: February 13, 2019.

/s/ Jeffery Flynn
JEFFERY FLYNN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT A

000193

State of Idaho

Department of State

CERTIFICATE OF INCORPORATION OF

FLYNN, INC.

File number C 110802

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of Articles of Incorporation for the incorporation of the above named corporation, duly signed pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Certificate of Incorporation and attach hereto a duplicate original of the Articles of Incorporation.

Dated: May 30, 1995



Pete T. Cenarrusa
SECRETARY OF STATE

By _____

L. D. [Signature]

EXHIBIT B

000195

ARTICLES OF AMENDMENT

OF

FLYNN, INC.

DEC 29 3 07 PM '98

SEC. 1 1 18

Jeff Flynn and Michelle Flynn, certify that:

1. They are the President and Secretary, respectively of Flynn, Inc., an Idaho corporation.

2. The articles of incorporation of said corporation are amended to read as follows:

FIRST

The name of the corporation is Gem State Roofing & Asphalt Maintenance, Inc.

3. The foregoing amendment of the articles of incorporation has been duly approved by the board of directors of the Corporation on December 28, 1998.

4. The Corporation has 15,000 shares of stock issued and outstanding as of December 28, 1998.

5. The foregoing amendment of the articles of incorporation has been duly approved by the required vote of all of the issued and outstanding shares of the Corporation on December 28, 1998.

Dated: December 28, 1998.

By Jeff Flynn
Jeff Flynn, President

By Michelle Flynn
Michelle Flynn, Secretary

12/29/1998 09:00
CK: 3633 CT: 85549 BH: 173975

1 0 38.00 = 38.00 AMEND PROF # 2

C 110802

ARTICLES OF AMENDMENT

EXHIBIT C
000197

CERTIFICATE OF ASSUMED BUSINESS NAME

(Please type or print legibly. See instructions on reverse)

ORIGINAL

FILED



To the SECRETARY OF STATE, STATE OF IDAHO

Pursuant to Section 53-504, Idaho Code, the undersigned gives notice of adoption of an Assumed Business Name.

APR 19 9 02 PM '99

1. The assumed business name which the undersigned uses in the transaction of business is:

Gem State Roofing

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name is/are:

Name	Complete Address
Gem State Roofing & Asphalt	2270 S. Lonamont
Maintenance, Inc. C110802	Boise, ID 83706

3. The general type of business transacted under the assumed business name is: (mark only those that apply)

- Retail Trade
- Wholesale Trade
- Services
- Manufacturing
- Agriculture
- Construction
- Transportation and Public Utilities
- Finance, Insurance, and Real Estate
- Mining

4. The name and address to which future correspondence should be addressed: Phone number (optional): _____

Gem State Roofing & Asphalt
Maintenance, Inc.
2270 S. Lonamont
Boise, ID 83706

Submit Certificate of Assumed Business Name and \$20.00 fee to:

Secretary of State
700 West Jefferson
Basement West
PO Box 83720
Boise ID 83720-0080
208 334-2301

5. Name and address for this acknowledgment copy is (if other than # 4 above):

Janice E. Lawson
McAnaney & Associates
1087 W. River Street, Suite 100
Boise, ID 83702

Signature: Michelle Flynn

Printed Name: Michelle Flynn

Capacity: Secretary

(see instruction # 8 on back of form)

Revision 2/97 g:\cop\forms\abn.p85

Secretary of State use only

IDAHO SECRETARY OF STATE

07/19/1999 09:00
CK: 4869 CT: 85549 BH: 234683

1 @ 20.00 = 20.00 ASSUM NAME # 3

027679

EXHIBIT D

000199

FILED EFFECTIVE

ARTICLES OF INCORPORATION
OF
UNITED COMPONENTS, INCORPORATED

11 OCT 25 PM 12:41
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 I

The name of the Corporation is United Components, Incorporated

ARTICLE II

The Corporation shall have the authority to issue 1,000 shares of one class of common stock. Each share shall have no par value.

ARTICLE III

The street address of the registered office of the Corporation is, and the name of the registered agent at that address is:

Jeff Flynn
417 Remington Suite #2
Garden City, ID 83714

ARTICLE IV

The name and post office address of the incorporator is as follows:

Jeff Flynn
1502 Colorado Ave
Boise, ID 83706

ARTICLE V

The mailing address of the Corporation shall be: 417 Remington Suite #2 Garden City, Id 83714

ARTICLE VI

The Corporation is to have perpetual existence.

IDAHO SECRETARY OF STATE
10/25/2011 05:00
CK: 816275 CT: 172899 BH: 1295552
1 @ 100.00 = 100.00 CORP # 2
1 @ 20.00 = 20.00 EXPEDITE C # 3

0192636

ARTICLE VII

The Corporation is organized for the purpose of engaging in the business of roofing, paving, asphalt maintenance and all other lawful business for which corporations may be incorporated under Idaho Law.

ARTICLE VIII

The one class of common stock authorized by these Articles are intended to be Section 1244 stock and to qualify as such and comply with Section 1244 of the Internal Revenue Code of the United States.

ARTICLE IX

The transferability of the shares of stock of this Corporation may be restricted as set out in the Bylaws of this Corporation regarding the sale of stock and the death of a Stockholder. Said Bylaws will be kept at the registered office of the Corporation or at the offices of MARTELLE BRATTON & ASSOCIATES, P.A.

ARTICLE X

The number of Directors of the Corporation shall be as specified in the Bylaws, and such number may from time to time be increased or decreased in such manner as may be prescribed in the Bylaws, provided that the number of Directors of the Corporation shall not be fewer than the number required by law. In case of any increase in the number of Directors, the additional Directors may be elected by the Directors then in office, and the Directors so elected shall hold office until the next annual meeting of the shareholders and until their successors are elected and qualified.

ARTICLE XI

The Stockholders of the Corporation shall have pre-emptive and preferential rights of subscription to any shares of stock with the Corporation whether now or hereafter authorized, or to any obligations of the Corporation convertible into stock.

ARTICLE XII

No contract or other transaction between the Corporation and any other corporation and no act of the Corporation shall in any way be affected or invalidated by the fact that any of the Directors of the Corporation are pecuniarily or otherwise interested in, or are Directors or officers of, such other corporation; any Director, individually, or any firm of which any Director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the Corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors or a majority thereof, and any Director of the Corporation who is also a Director or officer of such other corporation, or who is to be interested may be counted in determining the existence of a quorum

at any meeting of the Board of Directors of the Corporation which shall authorize any such contract or transaction with like force and effect as if he were not such Director or officer of such other corporation or not so interested.

ARTICLE XIII

The Corporation shall be governed as to its internal affairs by the Bylaws of the Corporation kept at the registered office of the Corporation or the offices of its Attorney.

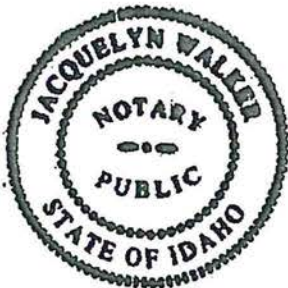
IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of October, 2011.

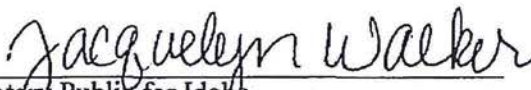

Jeff Flynn

STATE OF IDAHO)
 : ss.
COUNTY OF ADA)

On this 25th day of October, 2011, before me, the undersigned Notary Public for said State, personally appeared Jeff Flynn, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 9/18/12

FILED EFFECTIVE

**ARTICLES OF INCORPORATION
OF
UNITED COMPONENTS, INCORPORATED**

11 OCT 25 PM 12:41
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 I

The name of the Corporation is United Components, Incorporated

ARTICLE II

The Corporation shall have the authority to issue 1,000 shares of one class of common stock. Each share shall have no par value.

ARTICLE III

The street address of the registered office of the Corporation is, and the name of the registered agent at that address is:

Jeff Flynn
417 Remington Suite #2
Garden City, ID 83714

ARTICLE IV

The name and post office address of the incorporator is as follows:

Jeff Flynn
1502 Colorado Ave
Boise, ID 83706

ARTICLE V

The mailing address of the Corporation shall be: 417 Remington Suite #2 Garden City, Id 83714

ARTICLE VI

The Corporation is to have perpetual existence.

IDAHO SECRETARY OF STATE
10/25/2011 05:00
CK: 816275 CT: 172899 BH: 1295552
1 @ 100.00 = 100.00 CORP # 2
1 @ 20.00 = 20.00 EXPEDITE C # 3

0192636

ARTICLE VII

The Corporation is organized for the purpose of engaging in the business of roofing, paving, asphalt maintenance and all other lawful business for which corporations may be incorporated under Idaho Law.

ARTICLE VIII

The one class of common stock authorized by these Articles are intended to be Section 1244 stock and to qualify as such and comply with Section 1244 of the Internal Revenue Code of the United States.

ARTICLE IX

The transferability of the shares of stock of this Corporation may be restricted as set out in the Bylaws of this Corporation regarding the sale of stock and the death of a Stockholder. Said Bylaws will be kept at the registered office of the Corporation or at the offices of MARTELLE BRATTON & ASSOCIATES, P.A.

ARTICLE X

The number of Directors of the Corporation shall be as specified in the Bylaws, and such number may from time to time be increased or decreased in such manner as may be prescribed in the Bylaws, provided that the number of Directors of the Corporation shall not be fewer than the number required by law. In case of any increase in the number of Directors, the additional Directors may be elected by the Directors then in office, and the Directors so elected shall hold office until the next annual meeting of the shareholders and until their successors are elected and qualified.

ARTICLE XI

The Stockholders of the Corporation shall have pre-emptive and preferential rights of subscription to any shares of stock with the Corporation whether now or hereafter authorized, or to any obligations of the Corporation convertible into stock.

ARTICLE XII

No contract or other transaction between the Corporation and any other corporation and no act of the Corporation shall in any way be affected or invalidated by the fact that any of the Directors of the Corporation are pecuniarily or otherwise interested in, or are Directors or officers of, such other corporation; any Director, individually, or any firm of which any Director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the Corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors or a majority thereof, and any Director of the Corporation who is also a Director or officer of such other corporation, or who is to be interested may be counted in determining the existence of a quorum

at any meeting of the Board of Directors of the Corporation which shall authorize any such contract or transaction with like force and effect as if he were not such Director or officer of such other corporation or not so interested.

ARTICLE XIII

The Corporation shall be governed as to its internal affairs by the Bylaws of the Corporation kept at the registered office of the Corporation or the offices of its Attorney.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of October, 2011.

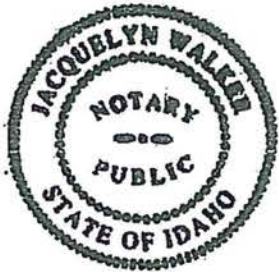
Jeff Flynn

Jeff Flynn

STATE OF IDAHO)
 : ss.
COUNTY OF ADA)

On this 25th day of October, 2011, before me, the undersigned Notary Public for said State, personally appeared Jeff Flynn, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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



Jacquelyn Walker

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 9/18/12

EXHIBIT E

000206

CANCELLATION OR AMENDMENT OF CERTIFICATE OF ASSUMED BUSINESS NAME

(Please type or print legibly. Instructions are included on the back of the application.)

NOT EFFECTIVE
OCT 25 11 00 AM
AM10:03
SECRETARY OF STATE
STATE OF IDAHO

To the SECRETARY OF STATE, STATE OF IDAHO
Pursuant to Section 53-507 and 53-508, Idaho Code, the undersigned gives notice of the action(s) indicated below:

1. The assumed business name is: GEM STATE ROOFING
2. The assumed business name was filed with the Secretary of State's Office on 16 JUL 1999 as file number D27679.
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:

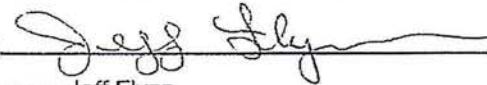
Add:	Delete:	Name:	Address:
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>(C192636) United Components, Incorporated</u>	<u>417 Remington #2, Garden City, ID 83714</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<u>(C110802) Gem State Roofing &</u>	<u>2270 S. Longmont, Boise, ID 83706</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<u>Asphalt Maintenance Inc.</u>	_____

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"/> Finance, Insurance, and Real Estate
<input checked="" type="checkbox"/> Services	<input type="checkbox"/> Construction	<input type="checkbox"/> Mining

7. The name and address to which future correspondence should be addressed is changed to read:
United Components, Incorporated, 417 Remington Suite #2, Garden City, ID 83714

8. Name and address for this acknowledgment copy is:
United Components, Incorporated
417 Remington Suite #2
Garden City, ID 83714

Signature: 
 Printed Name: Jeff Flynn
 Capacity: President
 Signature: _____
 Printed Name: _____
 Capacity: _____

Secretary of State use only

IDAHO SECRETARY OF STATE
 10/26/2011 05:00
 CK: 14096 CT: 225015 BH: 1295725
 I @ 10.00 = 10.00 ASSUM AMEN # 3

D 27679

DEFENDANT000084
000207

EXHIBIT F
000208

FILED ELECTRONIC



CERTIFICATE OF ASSUMED BUSINESS NAME

Pursuant to Section 53-504, Idaho Code, the undersigned submits for filing a certificate of Assumed Business Name.

11 OCT 26 AM 10:03

SECRETARY OF STATE
STATE OF IDAHO

Please type or print legibly.

Instructions are included on back of application.

- The assumed business name which the undersigned use(s) in the transaction of business is:

ASPHALT MAINTENANCE & PAVING

- The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name:

<u>Name</u>	<u>Complete Address</u>
UNITED COMPONENTS, INCORPORATED	417 REMINGTON SUITE #2
(C192636)	GARDEN CITY, ID 83714

- The general type of business transacted under the assumed business name is:

- | | |
|--|--|
| <input type="checkbox"/> Retail Trade | <input type="checkbox"/> Transportation and Public Utilities |
| <input type="checkbox"/> Wholesale Trade | <input type="checkbox"/> Construction |
| <input checked="" type="checkbox"/> Services | <input type="checkbox"/> Agriculture |
| <input type="checkbox"/> Manufacturing | <input type="checkbox"/> Mining |
| <input type="checkbox"/> Finance, Insurance, and Real Estate | |

Submit Certificate of Assumed Business Name and \$25.00 fee to:

Secretary of State
450 North 4th Street
PO Box 83720
Boise ID 83720-0080
208 334-2301

- The name and address to which future correspondence should be addressed:

UNITED COMPONENTS, INC.
417 REMINGTON SUITE #2
GARDEN CITY, ID 83714

- Name and address for this acknowledgment copy is (if other than # 4 above):
- _____

Signature: Jeff Flynn
 Printed Name: JEFF FLYNN
 Capacity/Title: PRESIDENT
 Signature: _____
 Printed Name: _____
 Capacity/Title: _____

Secretary of State use only

IDAHO SECRETARY OF STATE
 10/26/2011 05:00
 CK: 14096 CT: 225015 BH: 1295725
 1 @ 25.00 = 25.00 ASSUM NAME # 2

D151002

DEFENDANT000083
000209

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DECLARATION OF TERRI PICKENS
MANWEILER IN SUPPORT OF
DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

I, TERRI PICKENS MANWEILER make the following declaration pursuant to Idaho
Code § 9-1406:

1. I am the attorney of record for Defendant, and as such, I have personal knowledge of the facts herein.
2. The Idaho Secretary of State website contains a record of all business filings.
3. I accessed the Idaho Secretary of State website during the pendency of the litigation and found the following items and records.
4. Richard Silvia filed a Certificate of Assumed Business Name with the Idaho Secretary of State on August 12, 1997 which provided that he would be doing business as Gem

State Roofing. A true and accurate copy of the Certificate of Assumed Business Name is attached hereto as **Exhibit A**.

5. On December 19, 2000, Mr. Silvia filed the Articles of Incorporation for Gem State Roofing Incorporated with the Idaho Secretary of State. A true and accurate copy of the Articles of Incorporation are attached hereto as **Exhibit B**.

6. The Idaho Secretary of State website also contains a record of all trademark registrations and renewals.

7. I accessed the Idaho Secretary of State website during the pendency of this litigation and found the following items and records.

8. On April 8, 2002, Richard Silvia filed an Application for Registration of Trademark Service Mark with the Idaho Secretary of State. A true and accurate copy of the Application is attached hereto as **Exhibit C**.

9. On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark-Service Mark to Gem State Roofing, Inc. stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. A true and accurate copy of the Certificate is attached hereto as **Exhibit D**.

10. As shown in Exhibit D attached hereto, the Certificate of Registration shows the trademark assigned to Plaintiff is as follows:



11. Per my search on the Idaho Secretary of State website, no renewals or applications have been filed by Plaintiff and the trademark expired on May 2, 2012.

12. On December 29, 2004, Michelle Flynn filed with the Idaho Secretary of State an Application for Registration of Trademark Service Mark for Gem State Roofing and Asphalt Maintenance. A true and accurate copy of the Application is attached hereto as **Exhibit E**.

13. A Certificate of Registration of Trademark Service Mark was issued that same day by the State of Idaho and provides that the first use of the trademark was in 1985 and that such trademark would expire on December 29, 2014. A true and accurate copy of the Certificate is attached hereto as **Exhibit F**.

14. As shown in Exhibit F attached hereto, the trademark assigned to Gem State Roofing and Asphalt Maintenance is the following:



15. On December 1, 2014, an Application for Registration for Assignment of Trademark and an Application for Renewal Registration of Trademark was filed by Jeff Flynn. True and accurate copies of these Applications are attached hereto as **Exhibit G**.

16. On December 1, 2014, the State of Idaho issued a Certificate of Assignment of Registration of Trademark assigning the trademark to United Components Inc. A true and accurate copy of this Certificate is attached hereto as **Exhibit H**.

17. On December 1, 2014, the State of Idaho also issued a Certificate Renewal Registration of Trademark noting that United Components Inc. had renewed the Gem State Roofing and Asphalt Maintenance Trademark. A true and accurate copy of the Certificate is attached hereto as **Exhibit I**.

18. Per the Certificate attached as Exhibit I, the first use of the trademark was in 1985 and it did not expire until December 29, 2024.

19. The trademark for United Components Inc. is still in place.

20. In October 2005, Plaintiff and Gem State Roofing and Asphalt Maintenance entered into a Trademark Settlement Agreement. A true and accurate copy was attached to the Complaint filed on June 20, 2018 and is also attached hereto as **Exhibit J**.

21. Michelle Flynn signed the Settlement Agreement on behalf of Gem State Roofing and Asphalt Maintenance. *See* Exhibit I.

22. United Components was not a party to the Settlement Agreement nor referenced anywhere in the Settlement Agreement.

23. Michelle Flynn has no interest in United Components.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: February 13, 2019.

/s/ Terri Pickens Manweiler
TERRI PICKENS MANWEILER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

First Class Mail
 Facsimile – 208.895.1270
 Hand Delivery
 iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT A
000214

CERTIFICATE OF ASSUMED BUSINESS NAME

To the SECRETARY OF STATE, STATE OF IDAHO

Pursuant to Section 53-504, Idaho Code, the undersigned gives notice of adoption of an Assumed Business Name.

ST AUG 12 AM 11:03:58
STATE OF IDAHO

1. The assumed business name which the undersigned use(s) in the transaction of business is:

Gen State Roofing

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name is/are:

Richard & Silvia ^{Name} PO Box 748 Sun Valley, Id. ^{Address}
83353

3. The general type of business transacted under the assumed business name is:

Roofing CONSTRUCTION
See categories on the reverse

4. The name and address to which correspondence should be addressed:

Rick Silvia PO Box 748 Sun Valley, Id. 83353

Signed



By

Richard Silvia

Capacity

Owner

Submit Certificate of Assumed Business Name and \$20.00 fee to:

Secretary of State
700 West Jefferson
PO Box 83720
Boise ID 83720-0080

334-2300

Customer #

IDAHO SECRETARY OF STATE
Secretary of State use only
06/12/1997 09:00
CX: 568 CT: 85699 BH: 29165
1 @ 20.00 = 20.00 ASSUM NAME

D 7183

DEFENDANT000029

000215

FILED VER CTIVE

00 DEC 18 PM 2:14

STATE OF IDAHO

ORIGINAL IN RED

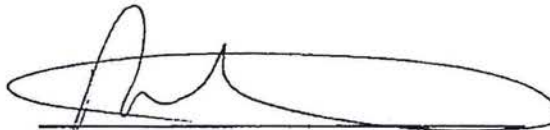
ARTICLES OF INCORPORATION

OF

GEM STATE ROOFING, INCORPORATED

1. Name. The name of the corporation is Gem State Roofing, Incorporated.
2. Authorized shares. The aggregate number of shares the corporation is authorized to issue shall be One Thousand (1000) shares, all of which shall be common voting stock with a par value of Five Dollars (\$5.00) per share.
3. Registered office and agent. The registered office of the corporation is located at 3171 Glenbrook Drive, Hailey, Idaho, and its registered agent at that address is Richard G. Silvia.
4. Incorporator. The name of the incorporator is Richard G. Silvia, and the incorporator's address is Post Office Box 3171, Hailey, Idaho (83333).
5. Initial director. The name and address of the initial director is: Richard G. Silvia, Post Office Box 3171, Hailey, Idaho (83333).
6. Corporate purpose. The purpose for which this corporation is organized is the transaction of any and all lawful business for which corporations may be incorporated under the Idaho Business Corporation Act.

In witness whereof, I have subscribed these Articles of Incorporation this 15th day of December, 2000.



Richard G. Silvia, Incorporator

G:\WPDATA\CORP\Gem State Roofing\articles.inc
November 28, 2000

IDAHO SECRETARY OF STATE

12/19/2000 09:00

CK: 4358 CT: 91048 BH: 367573

1 @ 100.00 = 100.00 CORP # 2

C136788

DEFENDANT000040
000217

Single Ply
Metal Roofs
Composition
Shakes
Snow Removal



New Roofs
Re-Roofs
Repairs
Residential
Commercial

RICK SILVIA 208.578.0212
President Cell: 720.4317
Licensed & Insured PO Box 3916, Hailey, ID 83433

APPLICATION FOR TRADEMARK-SERVICE MARK STATE OF IDAHO

Corrected application

APR 8 PM 2:32
SECRETARY OF STATE
STATE OF IDAHO

and is now using in the State of Idaho the trademark-service mark identified below, and believes that no other individual, firm, partnership, corporation, association, union, or other organization has the right to use such trademark-service mark in connection with the same or similar goods or services identified below in this State, either in the identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor.

Complete all items on the application. The application must be signed by an individual, general partner or officer of a corporation. Enclose one specimen of the mark and a \$30. filing fee.

Check box if this is a Union Label.

- Name of applicant: Gem State Roofing, Inc.
- Business address: PO Box 3916 Hailey, ID 83333
- If applicant is a partnership, name the general partners: N/A
- If applicant is a corporation, limited liability company or partnership, give state of domestication: Idaho
- Describe in detail the exact mark to be registered: The name: Gem State Roofing, Inc. and logo enclosed. SEE WRITTEN DESCRIPTION ATTACHED HERETO.
- Number of class in which above particular goods or services fall: 37
(\$30.00 filing fee per class code) Classes listed on backside
- Describe the kind(s) of goods or services in the above class which the trademark-service mark is used to identify: Roofing materials & Services
- Date of first use of trademark-service mark anywhere: November of 97
MUST BE IN USE PRIOR TO REGISTRATION
- Date of first use of trademark-service mark in Idaho: November of 97
MUST BE IN USE PRIOR TO REGISTRATION
- State the manner in which the mark will be used (i.e. on the foods, on labels or tags, on displays, on signs, on letter-heads, in advertising materials, on business cards, etc.): All Business Transactions
- Person and mailing address if different from above: Richard G Silvia (President)
PO Box 3916 Hailey, ID 83333 Phone (208) 578-0212

[Signature]
Applicant

Submit Application, Specimen and \$30.00 filing fee to:

SECRETARY OF STATE
Trademark Division
700 West Jefferson, Room 203
P.O. Box 83720
Boise ID 83720-0080

Jennifer
578-0520

Filing Office Use Only

IDAHO SECRETARY OF STATE
04/08/2002 05:00
CK: 1595 CT: 159330 BH: 457666
LE 30.00 = 30.00 TRADE MARK # 2

ORIGINAL###

DEFENDANT0022
000219

ADDENDUM TO QUESTION LINE 5
APPLICATION FOR REGISTRATION OF
TRADEMARK-SERVICE MARK
STATE OF IDAHO

FOR: GEM STATE ROOFING, CT: 159330, BH:457666

"DESCRIBE IN DETAIL THE EXACT MARK TO BE REGISTERED"

~~Profile of the State of Idaho with a diamond overlayed over the south central portion of the state, with rays emanating from the diamond. A line behind the profile of the State of Idaho interests the state profile, and pitches up in the middle like a roof-line. Arching over the state profile and the roof line pitch are the words "Gem State" Curving under the state profile are the words "Roofing, Inc." The arching and curving words meet at a center line (where the roof line starts) to form a circle of words around the roof line and the state of Idaho profile. An example of the mark is attached on a business card submitted with the application.~~

*per attorney for
Ruth Silvia*

2. The mark: Profile of the State of Idaho with a diamond overlayed over the south central portion of the state, with rays emanating from the diamond. A line behind the profile of the State of Idaho interests the state profile, and pitches up in the middle like a roof-line. Arching over the state profile and the roof line pitch are the words "Gem State" Curving under the state profile are the words "Roofing, Inc." The arching and curving words meet at a center line (where the roof line starts) to form a circle of words around the roof line and the state of Idaho profile. An example of the mark is attached on a business card submitted with the application.

EXHIBIT D

000221

State of Idaho

Office of the Secretary of State

CERTIFICATE REGISTRATION OF TRADEMARK-SERVICE MARK STATE OF IDAHO

I, *Pete T. Cenarrusa*, Secretary of State of Idaho and custodian of the records of Trademarks and Service Marks, do hereby certify to the following Trademark/Service Mark Registration filed on 05/02/2002.

Name of Registrant: GEM STATE ROOFING, INC.
Business Address: PO Box 3916
Hailey ID 83333

File No: 17232 Class: 37 State of Incorporation: Idaho

First Use in Idaho: 11/1997 First Use Anywhere: 11/1997 Expiration Date: 5/2/2012

Goods or Services with which mark is used: ROOFING MATERIALS AND SERVICES

Registered Trademark-Service Mark: TMPROFILE OF THE STATE OF IDAHO WITH A DIAMOND OVERLAYED OVER THE SOUTH CENTRAL PORTION OF THE STATE, WITH RAYS EMANATING FROM THE DIAMOND. A LINE BEHIND THE PROFILE OF THE STATE OF IDAHO INTERESTS THE STATE PROFILE, AND PITCHES UP IN THE MIDDLE LIKE A ROOF-LINE. ARCHING OVER THE STATE PROFILE AND THE ROOF LINE PITCH ARE THE WORDS "GEM STATE". CURVING UNDER THE STATE PROFILE ARE THE WORDS "ROOFING, INC." THE ARCHING AND CURVING WORDS MEET AT A CENTER LINE (WHERE THE ROOF LINE STARTS) TO FORM A CIRCLE OF WORDS AROUND THE ROOF LINE AND THE STATE OF IDAHO PROFILE.



Pete T. Cenarrusa
SECRETARY OF STATE

By *Lillian [Signature]*

EXHIBIT E

000223

APPLICATION FOR REGISTRATION OF TRADEMARK-SERVICE MARK COLLECTIVE OR CERTIFICATION MARK STATE OF IDAHO

The applicant swears that he has adopted and is now using in the State of Idaho the trademark-service mark identified below, and believes that no other individual, firm, partnership, corporation, association, union, or other organization has the right to use such trademark-service mark in connection with the same or similar goods or services identified below in this State, either in the identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor.

Complete all items on the application. The application must be signed by an individual, general partner or officer of a corporation. Enclose one specimen of the mark as actually used in commerce and a \$30. filing fee.

Check box if this is a Certification Mark or Collective Mark.

- Name of registrant: Gem State Roofing Asphalt-Maintenance, Inc.
- Business address: 2210 S. Longmont Boise ID 83706
- If applicant is a partnership, name the general partners: Jeffery Flynn, Vice President
Michelle Flynn, President
- If applicant is a corporation, limited liability company or partnership, give state of domestication: ID
- Describe in detail the exact mark to be registered: diamond shape with rays of light coming off the diamond with an upside down V with the words "Gem State Roofing" to the side *per michelle*
- Number of class in which above particular goods or services fall: 27
(\$30.00 filing fee per class code) Classes listed on backside
- Describe the kind(s) of goods or services in the above class which the trademark-service mark is used to identify: Roofing materials + Installation
- Date of first use of trademark-service mark in Idaho: 1985
MUST BE IN USE PRIOR TO REGISTRATION
- Date of first use of trademark-service mark anywhere: ~~2008~~ 1985
MUST BE IN USE PRIOR TO REGISTRATION
- State the manner in which the mark will be used (i.e. on the foods, on labels or tags, on displays, on signs, on letter-heads, in advertising materials, on business cards, etc.): on signs, Business Card, advertising, letter heads, + Stationery
- Person and mailing address if different from above: _____

Phone (208) 338-9318

Michelle Flynn, President
Applicant

Submit Application, Specimen and \$30.00 filing fee to:
SECRETARY OF STATE
Trademark Division
700 West Jefferson, Room 203
P.O. Box 83720
Boise ID 83720-0080
Make Checks payable to: Secretary of State

Filing Office Use Only

18267

IDAHO SECRETARY OF STATE
12/29/2004 05:00
CK: 2275 CT: 132338 BH: 783969
1 @ 30.00 = 30.00 TRADE MARK # 3

ORIGINAL### 64364514
DEFENDANT0019
000224

**WE STOP
LEAKS!**



**FREE
ESTIMATES!**

All Types of Roofing

MOBILE HOMES • RESIDENTIAL • COMMERCIAL

Built-up • Composition & Shakes

Specializing in Linseed Oiling • Modified Coatings

JEFF FLYNN

**2270 S. Longmont
Boise, ID 83706**

**Boise (208) 338-9318
Twin Falls (208) 736-9437
Fax (208) 388-8461**

EXHIBIT F

000226

State of Idaho

Office of the Secretary of State

CERTIFICATE REGISTRATION OF TRADEMARK-SERVICE MARK STATE OF IDAHO

I, LAWRENCE DENNEY, Secretary of State of Idaho and custodian of the records of Trademarks and Service Marks, do hereby certify to the following Trademark/Service Mark Registration filed on December 29, 2004.

Name of Registrant: **UNITED COMPONENTS INCORPORATED**
Business Address: **417 REMINGTON ST #2
BOISE, ID 83714**

File Number: **018267**

State of Domestication: **IDAHO**

Class: International **37**

First Use in Idaho: **01/01/1985**

First Use Anywhere: **01/01/1985**

Expiration: **12/29/2024**

Goods or Services with which mark is used:
ROOFING MATERIALS AND INSTALLATION

Registered Trademark-Service Mark:

DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "GEM STATE ROOFING" TO THE SIDE

Reproduction of the mark:




Lawrence Denney
Secretary of State

Processed by: Business Division

APPLICATION FOR REGISTRATION
OF ASSIGNMENT OF TRADEMARK-SERVICE MARK
STATE OF IDAHO



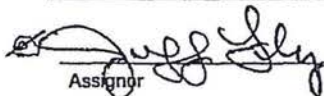
2014 PM-1 APR 15
SECRETARY OF STATE

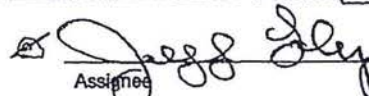
The assignor named herein states that he has heretofore registered in the State of Idaho the trademark-service mark identified below. The assignor further states that he has transferred all right and interest in the trademark-service mark to the assignee. The assignee states that he has adopted and is now using in the State of Idaho the trademark-service mark identified below.

Pursuant to Section 48-507, Idaho Code, the undersigned hereby applies for the assignment registration of its trademark/service mark.

1. Name of assignor: Gem State Roofing & Asphalt Maintenance, INC.
2. Name of assignee: United Components Incorporated
3. Business address of assignee: 417 Remington Street #1 Boise ID 83714
4. If assignee is a partnership, name the general partners: N/A
5. If assignee is a corporation, give state of incorporation: Idaho
6. The exact registered trademark-service mark assigned is described in detail as follows: Diamond shape with rays of light coming off inside triangle diamond with an upside down V with words "Gem State Roofing " to the side
7. The registration number and date of the registered trademark-service mark assigned are:
No. 18267 Date 12/29/2004
8. Number of class in which above particular goods or services fall: 37
9. Date of assignment: 1/1/2012
10. Person and mailing address if different from above: _____

Phone(208) 338-9318


Assignor


Assignee

Submit Application and \$30.00 filing fee to:

SECRETARY OF STATE
Trademark Division
450 N 4th Street
PO Box 83720
Boise ID 83720-0080

k:\TMARKS\ASSIGNMT.PM6

Filing Office Use Only

IDAHO SECRETARY OF STATE
12/01/2014 05:00
CK:3999 CT:303663 BH:1451137
1@ 30.00 = 30.00 TM ASSIGN #3

Web Form
TM#OTHER####

DEFENDANT000075
000229

APPLICATION FOR RENEWAL
REGISTRATION OF TRADEMARK-SERVICE MARK
COLLECTIVE OR CERTIFICATION MARK
STATE OF IDAHO

2014 DEC -1 AM 9:15
SECRETARY OF STATE
STATE OF IDAHO

A new registration is required if the mark is changed or if the kind of goods is expanded from that set forth in the registration being renewed.

If everything is correct sign the application and return it with the filing fee. If you need to make changes to the address or if you have not already made the change from the US Class Codes to the International Class Codes indicate the necessary changes in the appropriate box.

Name and Business Address of registrant:
GEM STATE ROOFING ASPHALT MAINTENANCE, INC.
2270 S LONGMONT
BOISE, ID 83706 -

USE ONLY IF ADDRESS HAS CHANGED:
417 Remington St #2
Garden City ID 83714

Description of Trademark-Service Mark being renewed:
DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE
DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "GEM
STATE ROOFING" TO THE SIDE

If the registrant is a partnership, name the general partners:

INTERNATIONAL CLASS CODE: 37

Person and mailing address if different from above:

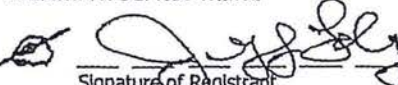
Renewal Date: 12/29/2014

File Number: 18267

Check box if this is a Certification Mark or Collective Mark.

The application must be signed by an individual applicant, by a general partner of a partnership applicant, or by an office of a corporate applicant. The registrant named herein swears that he is now using in the State of Idaho and has heretofore registered the trademark-service mark identified below.

Pursuant to Section 48-506, Idaho Code, the undersigned hereby applies for the renewal registration of its trademark-service mark.


Signature of Registrant
Phone: 208 338-9318

FILING OFFICE SECRETARY OF STATE
12/01/2014 05:00
CK:3999 CT:303663 BH:1451137
I@ 30.00 = 30.00 TM RENEWAL #6

Submit Application and \$30.00 filing fee per class code to:
SECRETARY OF STATE
Trademark Division
700 West Jefferson, Room 203
P.O. Box 83720
Boise, ID 83720-0080
Make checks payable to: Secretary of State

State of Idaho

Office of the Secretary of State

CERTIFICATE ASSIGNMENT REGISTRATION OF TRADEMARK-SERVICE MARK STATE OF IDAHO

I, *BEN YSURSA*, Secretary of State of Idaho and custodian of the records of Trademarks and Service Marks, do hereby certify to the Assignment of the following Trademark/Service Mark Registration filed on 12/01/2014.

Name of Assignor: GEM STATE ROOFING ASPHALT MAINTENANCE, INC.

Name of Assignee: UNITED COMPONENTS INCORPORATED

Business Address: 417 REMINGTON ST #1
BOISE, ID 83714

File No: 18267

State of Domestication: ID

Class: International 37

First Use in Idaho: 1985

First Use Anywhere: 1985

Expiration: 12/29/2014

Goods or Services with which mark is used:

ROOFING MATERIALS AND INSTALLATION

Registered Trademark-Service Mark:

DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "GEM STATE ROOFING" TO THE SIDE



Ben Yursa
SECRETARY OF STATE

By *[Signature]*

EXHIBIT I

000233

State of Idaho

Office of the Secretary of State

**CERTIFICATE
RENEWAL REGISTRATION OF TRADEMARK-SERVICE MARK
STATE OF IDAHO**

I, *BEN YSURSA*, Secretary of State of Idaho and custodian of the records of Trademarks and Service Marks, do hereby certify to the renewal of the following Trademark/Service Mark Registration filed on 12/01/2014.

Name of Registrant: UNITED COMPONENTS INCORPORATED

Business Address: 417 REMINGTON ST #2
BOISE, ID 83714

18267

State of Domestication: ID

File No:

Class: International 37

First Use in Idaho: 1985

First Use Anywhere: 1985

Expiration: 12/29/2024

Goods or Services with which mark is used:

ROOFING MATERIALS AND INSTALLATION

Registered Trademark-Service Mark:

DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "GEM STATE ROOFING" TO THE SIDE



Ben Yursa

SECRETARY OF STATE

By *[Signature]*

EXHIBIT J

000235

TRADEMARK SETTLEMENT AGREEMENT

THIS AGREEMENT, effective as of the date the last of the parties hereto executes this Agreement below, is entered into by and between Gem State Roofing & Asphalt Maintenance, Inc., and Gem State Roofing, Inc.

RECITALS

- A. Gem State Roofing & Asphalt Maintenance, Inc. is an Idaho Corporation in good standing duly organized on May 30, 1995 as Flynn, Inc., having amended its name to Gem State Roofing and Asphalt Maintenance, Inc., on December 28, 1998, and having filed a Certificate of Assumed Business Name as "Gem State Roofing" on July 19, 1999, and which provides roofing and asphalt services primarily in the Boise and Twin Falls areas.
- B. Gem State Roofing, Inc. is an Idaho Corporation in good standing duly organized on December 18, 2000, which is the successor in interest of Richard Silvia, who filed a Certificate of Assumed Business Name as "Gem State Roofing" on August 12, 1997, and which provides roofing services primarily in the Blaine County area.
- C. The parties' names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services.
- D. Gem State Roofing & Asphalt Maintenance, Inc., represents that it has not performed any work in Blaine County during the time period of May 26, 2002, to May 26, 2005, other than the jobs disclosed in the Affidavit of Michelle Flynn dated May 27, 2005, a true and correct copy of which and accompanying exhibits is attached hereto as Exhibit A and incorporated herein by this reference. Gem State Roofing & Asphalt Maintenance, Inc., further represents that from June 1, 2005, until the date of execution of this Agreement, it has not performed any work in Blaine County other than that which was disclosed in said Affidavit, and that it has not undertaken any efforts to solicit advertising directed toward the Blaine County market, including but not limited to soliciting advertising in the *Names and Numbers* and *Sun Valley Directory* telephone directories.
- E. Gem State Roofing & Asphalt Maintenance, Inc. represents that it has provided roofing and asphalt services in Valley County, Idaho for the customers identified on Exhibit B attached hereto and incorporated herein by this reference.
- F. Gem State Roofing, Inc., represents that it has not performed any work in any of those counties identified in subparagraph 2(a) below within the last three (3) years other than for those customers identified in subparagraph 4(a) below. Gem State Roofing, Inc.,

COPY

further represents that from June 1, 2005 until the date of execution of this Agreement, it has not undertaken any efforts to solicit advertising directed toward any of the counties listed in subparagraph 2(a).

- G. The parties wish to resolve this matter without litigation by agreeing not to do business or advertise in the other's primary market.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN, THE PARTIES AGREE AS FOLLOWS:

1. Commencing immediately upon execution of this Agreement, Gem State Roofing & Asphalt Maintenance, Inc., agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County. Radio or television advertising on a Boise or Twin Falls station that happens to reach Blaine County is permissible so long as it does not state or imply that Gem State Roofing & Asphalt Maintenance, Inc., performs services in Blaine County. Gem State Roofing & Asphalt Maintenance, Inc., may advertise in Twin Falls telephone directories which may be distributed in Blaine County so long as it is not listed under any cities in Blaine County, and does not state or imply that it performs services in Blaine County.
2. Commencing immediately upon execution of this Agreement, Gem State Roofing, Inc., agrees that it will not advertise or solicit business in the counties listed in subparagraph 2(a), including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in said counties. Radio or television advertising on a Blaine County station that happens to reach said counties set forth in subparagraph 2(a) is permissible so long as it does not state or imply that Gem State Roofing, Inc., performs services in said counties. Gem State Roofing, Inc., may advertise in the Twin Falls Yellow Book and the Qwest Dex Twin Falls directories so long as it is listed only under cities in Blaine County and does not state or imply that it performs services in the counties set forth in subparagraph 2(a).
 - a. Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.
3. Gem State Roofing & Asphalt Maintenance, Inc., shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is

put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing & Asphalt Maintenance, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the photographs of the service vehicles attached hereto as Exhibit C and incorporated herein by this reference.

- a. Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.
4. Gem State Roofing, Inc., shall not perform any services in the counties listed in paragraph 2(a) except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 4(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the attached Exhibit D.
 - a. Wells Fargo Bank (in Shoshone, Idaho only), Tonya White (Twin Falls County), Mike Blank (Twin Falls County), Mitch Matteson (Twin Falls County), and John Ward (Valley County).
 5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.
 6. It is understood and agreed that this Agreement affects the parties' respective rights only in Blaine County and the counties listed in subparagraph 2(a). No agreement is reached regarding the parties' respective rights outside these counties.
 7. Neither party shall oppose the other party's state of Idaho trademark registrations dated May 2, 2002 in the case of Gem State Roofing, Inc., and dated December 29, 2004 in the case of Gem State Roofing & Asphalt Maintenance, Inc. Gem State Roofing & Asphalt Maintenance, Inc., agrees and consents to Gem State Roofing, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in Blaine County; Gem State Roofing, Inc., agrees and consents to Gem State Roofing & Asphalt Maintenance, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in the counties listed in subparagraph 2(a).
 8. Except as otherwise provided in this Agreement, this Agreement is solely for the benefit of the parties hereto and no other person or entity is entitled to rely upon or benefit from this Agreement or any term herein, except by a writing signed by all of the parties hereto, or as stated in paragraph 13.

9. The waiver or failure to enforce any provision of this Agreement shall not operate as a waiver of any further breach of any such provision or any other provision herein.
10. This Agreement (including the Recitals, all Exhibits attached hereto, all of which are hereby expressly incorporated herein by this reference) constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all prior understandings, if any, with respect hereto.
11. If any litigation or proceeding is commenced between or among the parties or their representatives arising out of, or relating to, this Agreement, including, without limitation, a breach of any covenant, condition, representation, warranty, agreement, or provision of this Agreement, the prevailing party shall be entitled, in addition to such other relief as may be granted, to have and recover from the other party reasonable attorneys' fees and all costs of such action.
12. The terms of this Agreement may not be modified, amended, or otherwise changed in any manner, except by an instrument in writing executed by each of the parties.
13. This Agreement shall be binding upon and shall inure to the benefit of the successors, assigns, personal representatives, heirs, and legatees of the respective parties.
14. The provisions of this Agreement shall be construed and enforced in accordance with the laws of the State of Idaho. Any action for breach of this agreement shall be brought and litigated in the district court of the state of Idaho, in the county in which the alleged breach occurred. Time is of the essence. Each party hereby acknowledges, represents, and warrants that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the drafting, preparation, and negotiation of this Agreement; (iii) each party has been represented by its own legal counsel; and (iv) any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement, or any portion herein.
15. Each party to this Agreement warrants that it had independent counsel review the terms and conditions of this Agreement, and enters into this Agreement knowingly based on the advice of independent counsel. Each party further acknowledges and represents that it fully understands the meaning and ramifications of this Agreement, and no implication shall be drawn against any party by virtue of the drafting of this Agreement, since this Agreement was drafted by both parties. With regard to the drafting of this Agreement, each party shall bear its own attorney fees and costs.
16. Each party has the requisite power and authority to enter into this Agreement, to perform

its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any and all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this 20 day of October, 2005.


Michelle Flynn
President of Gem State Roofing &
Asphalt Maintenance, Inc.

DATED this _____ day of _____, 2005.

Rick Silvia
President of Gem State Roofing, Inc.

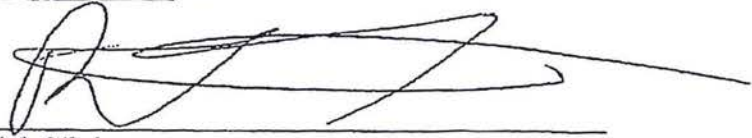
its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

- 17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any and all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
- 18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this _____ day of _____, 2005.

 Michelle Flynn
 President of Gem State Roofing &
 Asphalt Maintenance, Inc.

DATED this 19th day of October, 2005.



 Rick Silvia
 President of Gem State Roofing, Inc.

EXHIBIT A – AFFIDAVIT OF MICHELLE FLYNN

TRADEMARK SETTLEMENT AGREEMENT - 6

M:\Clients\Gem State Roofing & Asphalt Maintenance - 36211\36211.0003 - Trademark Infringement\Agreement Final 101705.doc

STATE OF IDAHO)
COUNTY OF ADA)

Michelle Flynn having been first duly sworn deposes and says:

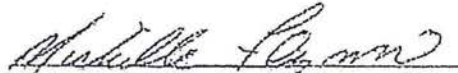
1. I am over the age of 18 and competent to testify and make the following statements based on my own personal knowledge.
2. I am the President of Gem State Roofing and Asphalt Maintenance, Inc., a duly incorporated Idaho Corporation.
3. I am the custodian of the business records for Gem State Roofing and Asphalt Maintenance, Inc.
4. I have conducted a review of the business records for Gem State Roofing and Asphalt Maintenance, Inc. for the purpose of ascertaining the extent of the work undertaken by Gem State Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho during the three (3) year period from May 26, 2002 through May 26, 2005.
5. I found the following documents that are attached hereto which reflect the jobs that Gem State Roofing and Asphalt Maintenance in fact performed during the aforesaid period. Said attached records reflect the profits that were made from said jobs.
6. After a search of my business records during this three year period, I am confident that there were no other jobs performed by Gem State

Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho.

- 7. At present I have one pending job in the Wood River Valley that has been estimated but no work has commenced. The anticipated profits from our \$ 13, 220 estimate is approximately \$ 3,000.


FURTHER YOUR AFFIANT SAITH NOT.

DATED this 27 day of May, 2005.


 Michelle Flynn, Affiant

Sworn to and subscribed before me this 27th day of May, 2005.




 Notary Public
 Residing At: Boise
 My Commission Expires: 9-18-09

DATED this 27th day of May, 2005.


 JOHN SULLIVAN

Kelly Herrera, Called office I always answer the phone" Gem State Roofing and Asphalt Maintenance this is Michelle." Know mention of Rick was ever made and she now we were coming from Boise.

Material: \$220.00

Vehicle and Gas: \$100,00

Employee's: \$200,00 with taxes and insurance

Profit: \$120,00

Estimate

DATE	ESTIMATE #
8/2/2004	5844

NAME / ADDRESS
Kelly Herrera P.O. Box 6435 Ketchum Id 83340 720-4479 788-1392 Fax

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of 163 Spur Lane, Ketchum Id:</p> <ol style="list-style-type: none"> 1. Drill pilot holes for installation of snow clips on front entry. 2. Install approximately ten snow clips to shake roof system. 3. Fasten with sinker screws set in cork seal at pilot holes. 4. Any other roof repairs at time and materials over snow clip price. <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gem State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written order, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	\$40.00

We look forward to doing business with you.	TOTAL \$40.00
---	----------------------

SIGNATURE _____

Spring Condo's

Material: 39,221.98
Ply wood and other: 312,853.07
Subcontractors: 59,550.00
Payroll: 11,451.12
Taxes: 4936.34
Perdium: 2,520.00
Hotel: 1,440.00
Other fee's dump: 1098.20
Vehicles: 2,500.00
Insurances: 2,817.75
Vehicle Insurance: 498.00
Liability: 700.00

Other business expenses: 3,000.00

Profit: 11,550.54 which pay other expense occurred over time.

ELLE

FEDERSEN AND LIMP
27 38 1461

PAGE 07/09
P.6

Mrs. Lipton, The same as Kelly Heran called office worked with her for a month to get scheduled so that her husband could be there.

Material: \$ 1,258.74

Payroll: \$2039.83

Taxes: \$699.04

Insurance: \$562.58

Vehicles: \$210.00

Subcontractor Foremen: \$875.00

Profit: \$743.81

Estimate

DATE	ESTIMATE #
5/14/2004	3822

NAME / ADDRESS
Mrs. Lipton 3950 Mistle Valley Dr. Bloom Field Hills, MI 48302 248-642-6529 Fax 248-514-5294 cell 208-720-2601 Ketchum

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of the roof system at 460 N. Washington, Ketchum Id Chester and Lakes</p> <ol style="list-style-type: none"> 1. Tear off existing roof system to ply wood decking. 2. Install 1/2 inch recovery board 3. Install single ply mechanically fastened roof system. Use existing coping cap. 4. Lower deck on back. Install single ply with custom metal around perimeter. 5. Exclusion: Ply wood decking that may need to be replaced. This will not be known until old roof is removed. Ply wood cost is \$55.00 per sheet over cost of estimate you will be notified first. <p>Ten year manufacturer warranty. On single ply this is membrane roof system not for tar.</p> <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gen State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gen State Roofing.</p>	6,260.00

We look forward to doing business with you.	TOTAL	\$6,260.00
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SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchikan Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
We hereby propose to furnish all the materials and perform all the labor necessary for the completion of roof system at Springs Condo's located at 125 Howard Ketchikan, Id 83340:	
1. Tear off tile roof to existing deck.	
2. Remove all existing tile roof pailer and curbs.	
3. Install ice and water shield to entire sub straight or ply wood deck.	
4. Rebuild cricket at chimney chase on large building where six pipes existing for fireplace area.	525.00
5. Remove and rebuild Boston to code all new product. Boston is roof ventilation system.	4,200.00
6. Install all new pipe flashings with caps. Plumbing pipes to be addressed by plumber.	
7. Envelope all counter flashings at skylights and eve areas with ice and water shield.	
8. Install drip edge around entire perimeter and at terminations.	
9. Apply fifty year architectural shingle either Elk or Certintwood to entire sub straight surface and Boston areas top and bottom.	64,975.00
10. Extra cost for upgrade to Presidential Shake TL Charcoal Black.	4,700.00
11. Roof system to be high wind nailed or six nailed.	
12. Job site safety high profile.	
13. Install five hundred snow clips to roof system. Five hundred should be sufficient. If 1,000 are installed price is \$6,000.00. For fifteen hundred \$9,000.00.	3,000.00
14. Roofing permit through city of Ketchikan. Project to last approximately 1-31 days weather permitting.	1,062.00
Alternate to upgrade SBS High Profile Ridge to hips ridge and rakes verses metal drip edge. Deduct if not accepted on rake \$3,450.	1,725.00
Alternate on roof siding and corner trim. Remove and replace for proper installation of counter flashing and ice and water shield not to exceed.	10,275.00
Plumbing pipes, heating pipes, and exhaust pipe penetrating roof to be secured and rebuilt by heating and plumbing company. Gem State Roofing is not responsible for this phase of work.	
Any unforeseen circumstances under roof deck or metal will become an extra cost over contract.	

We look forward to doing business with you.	TOTAL
---	--------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchikan Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
Gem State Roofing to be in full contact with gutter contractor, electrical contract, or any subs as per heating and plumbing on roof system.	
Gem State Roofing scope of roof construction.	
All demo to roof system metal, existing saww bracing, tile roof, and siding for proper installation.	
All siding, trim, and Boston rebuild by Gem State Roofing. Any decking or structure damage unforeseen will also be executed by Gem State Roofing in writing of change order.	
Insulation of ice and water shield, counter flashing, drip edge, skylight flashings, wall flashings, valley metal, roofing product, Presidential TL Lifetime shingles, elevation ridge SBS modified high profile hip and ridge color Charcoal Black roof and ridge.	
Demco cricket behind large fireplace flue area. Rebuild cricket for proper drainage.	
Over build frame work above skylight on east building. West side of roof for proper construction of new roof system.	
Elevation ridge- on life time warranty life of warranty of roof system field.	
Any deck damage ply wood remove and replace \$50.00 per sheet 318 sheets worst case scenario, all new decking \$15,900.00.	12,600.00
Prep aluminum metal on parapet walls. Pressure wash metal, primer seal acrylic stucco, and paint elastomeric paint. Twelve hours labor.	900.00
Plus paint. Not to exceed.	175.00

We look forward to doing business with you.	TOTAL
---	--------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchikan Id 99901 907-225-1773 788-2242 Fax

DESCRIPTION	TOTAL
<p>Please keep in mind that this project is a complete roof rebuild any unforeseen damage to beams and trusses decking to be extra cost over contract.</p> <p>Exclusions: Deck damage, fascia damage, structure damage, siding, and parapets.</p> <p>Barriacades: Ground monitor safety man at all time of work. Shovel for debris removal supplied by Gem State Roofing. Job site to be kept clean and organized at all times. All change orders in writing by Gem State Roofing and Representative for the Springs Condos should be readily available. All manufactures warranty information supplied by Gem State Roofing.</p> <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made 1/2 upon acceptance of contract due to special order of materials. Check to be written to supplier and Gem State Roofing. Lien release to be provided for materials at that time. Balance due upon completion of project. Lien release for full project to be signed at that time. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	

We look forward to doing business with you.	TOTAL	\$104,137.00
---	--------------	--------------

SIGNATURE

EXHIBIT B – GEM STATE ROOFING & ASPHALT MAINTENANCE, INC. VALLEY
COUNTY JOBS

Brundage Realty, 118 N. Main, Donnelly, Idaho 83638 09/28/04 Invoice #1738

Norm & Robert Haliday, 180 Shadow Tailor, Between Cascade and Donnelly, Id 09/10/04 and 10/27/03 Invoice #3956 & 1606

Carl Thompson 365 Knights Rd., McCall, Id 09/30/02 Estimate #3558

Craig Mozkis 14135 Jefferson Rd. McCall Id 83638 06/29/04 Estimate #3874

Dick Darmody, Forest Hayes McCall, 09/28/04 Invoice #1774

Ellsworth Construction 254 McCall Id 10/19/03 Invoice # 1122

Dale Bergeson 1211 Boro's New Meadows, Id 05/17/04 Invoice #1693

Mike Churchill 300 Mission St. McCall Id 09/30/02 Estimate #3557

Richard Harvey 255 Brook Dr. McCall Id 10/15/03 Estimate #3712

Perception Construction, Rick Winkeller, 02/11/05 Off plans Estimate #4050

State Wide Construction, Brian Warner, 7/28/04 Invoice # 1740

Scott McDaniels, LarMac, McCall Id 07/01/04 Repeat Customer, Invoice #3885

Scott Jones, 4902 Blue Grass 04/30/05 Estimate # 4130

Rocky Mountain CTR, 3580 Warren Wagon Rd. 10/21/02 Invoice 3562

World Marc out of Washington Bid work in McCall 05/01/02 Estimate # 3477

John Dahl 2450 Sheri Lane McCall, Long time friend we have worked for in 03 and 04.

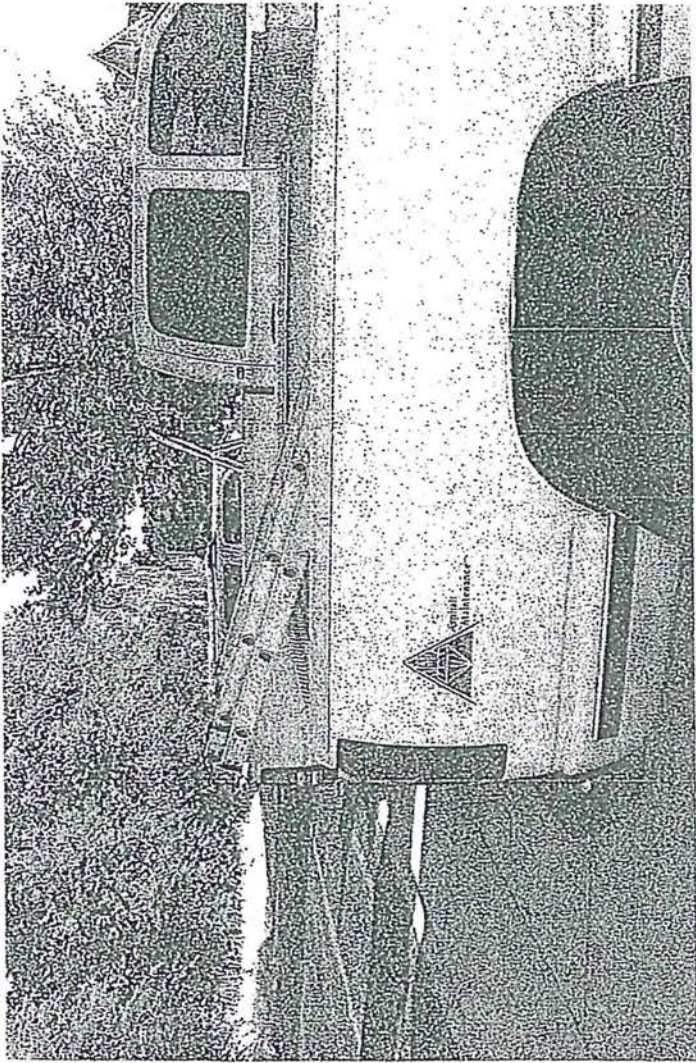
Berry Bloom Meadow Creed in 1998 under Ellsworth Construction different invoice than above.

Forrester's, Lynn Mitchell, long time friend off and on in 03 and 04

EXHIBIT C – PHOTOGRAPH OF GEM STATE ROOFING & ASPHALT LOGO ON
SERVICE VEHICLES

TRADEMARK SETTLEMENT AGREEMENT - 8

M:\Clients\Gem State Roofing & Asphalt Maintenance - 36211\36211.0003 - Trademark Infringement\Agreement Final 101705.doc



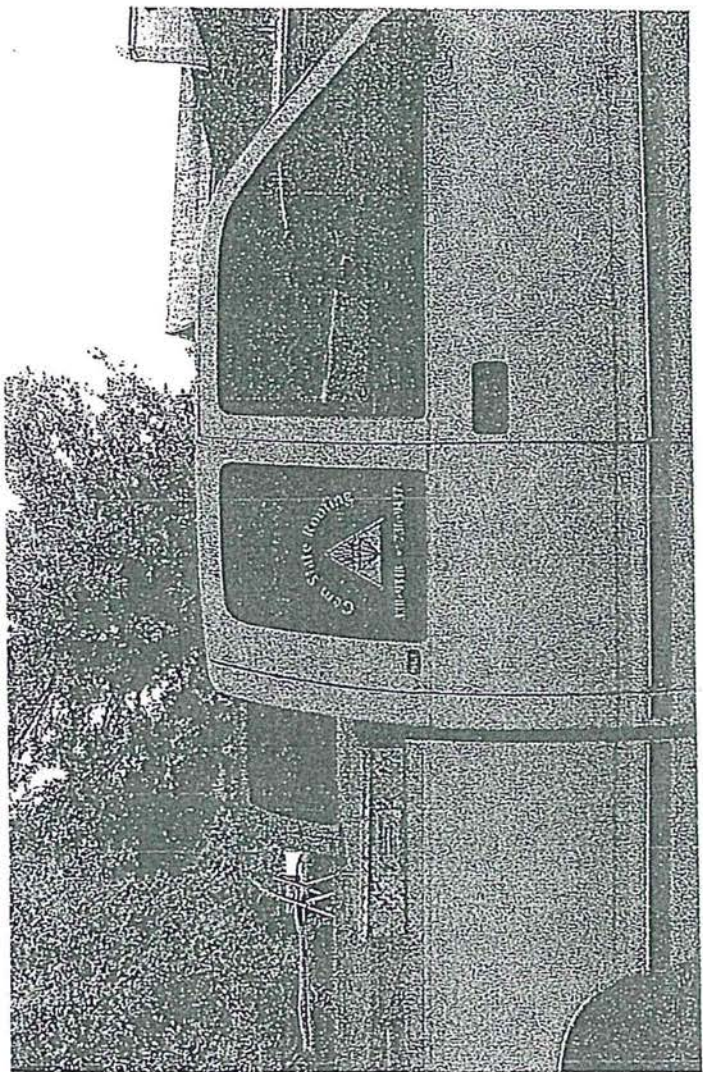
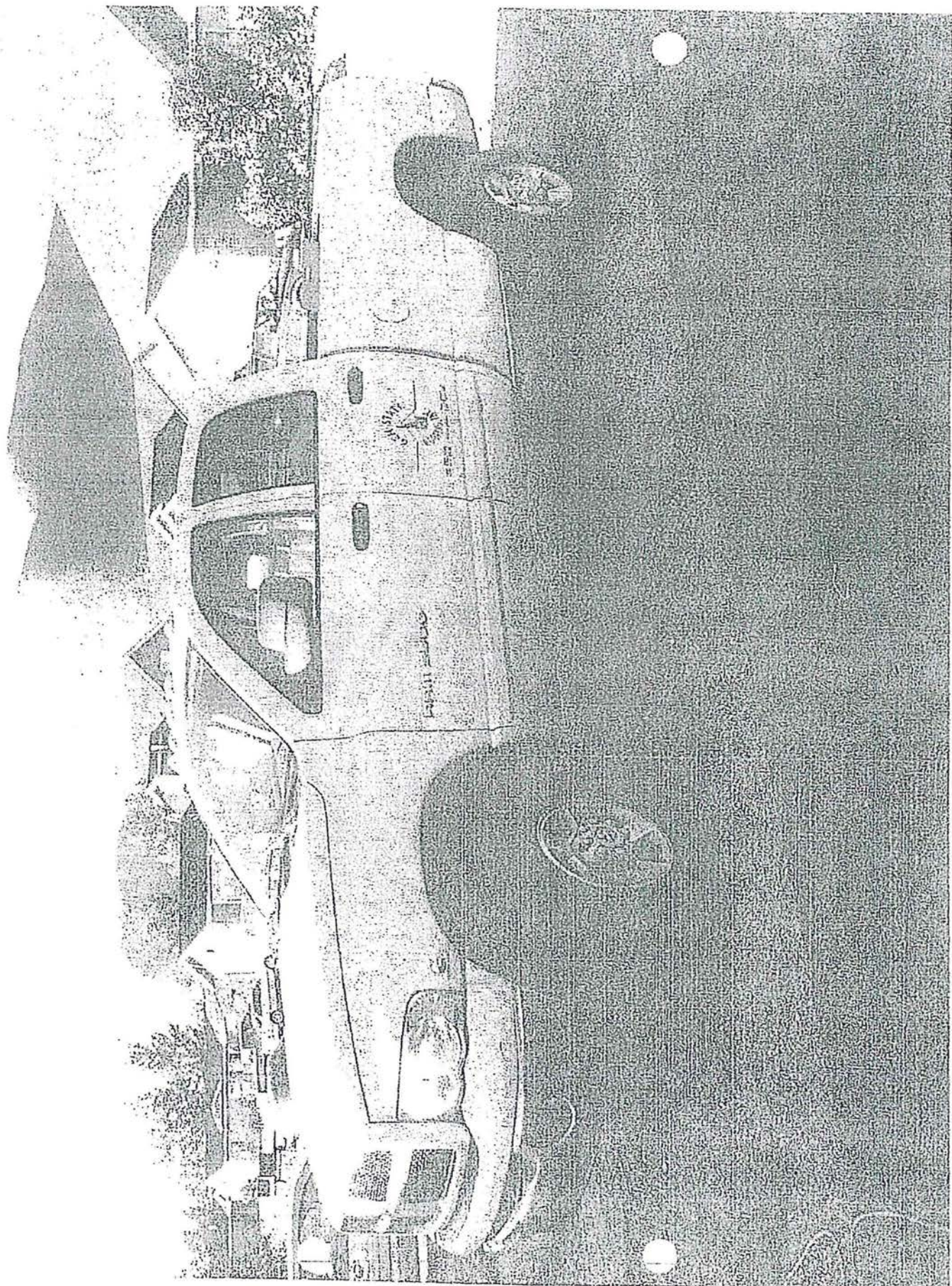


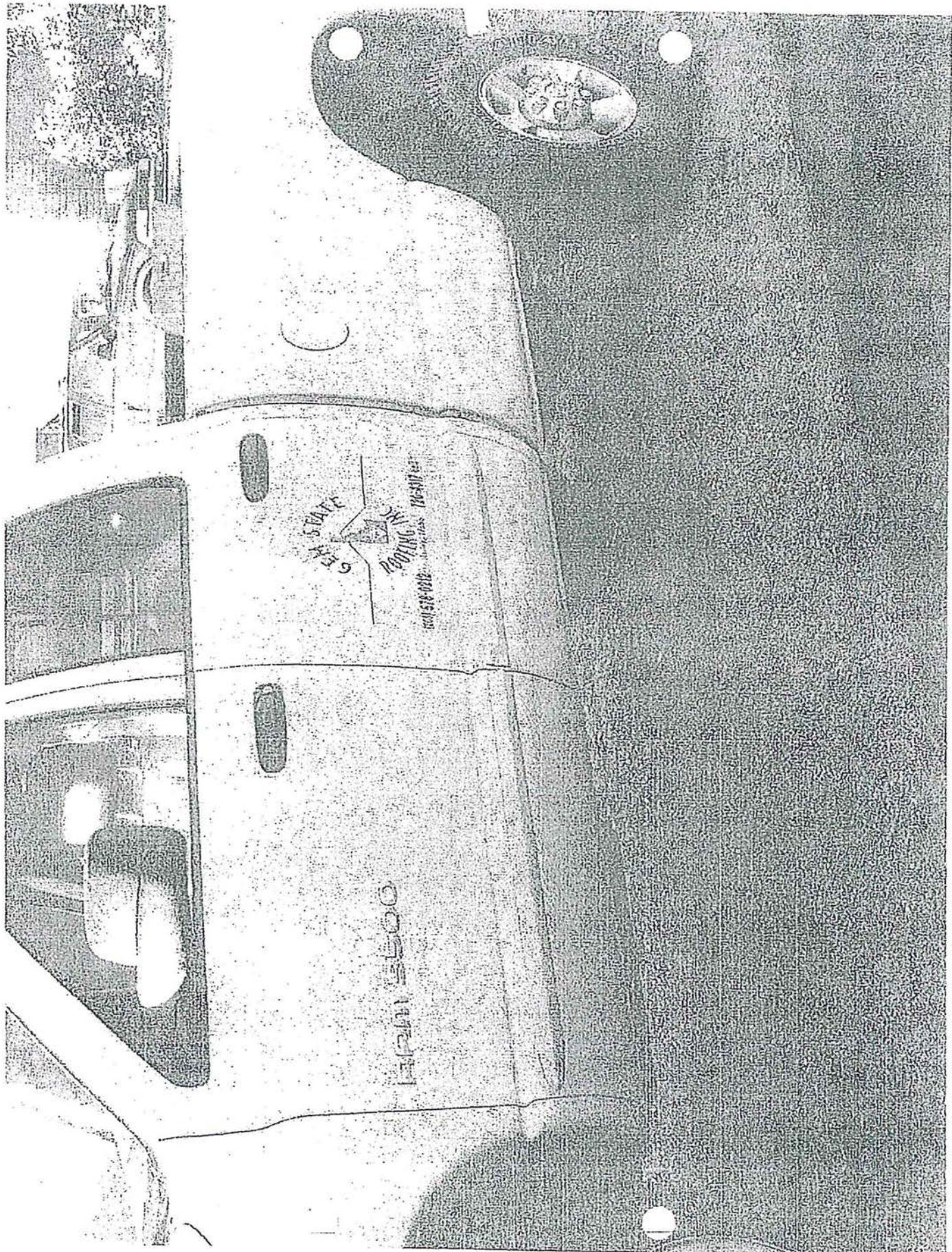
EXHIBIT D – PHOTOGRAPH OF GEM STATE ROOFING, INC. LOGO ON SERVICE
VEHICLE

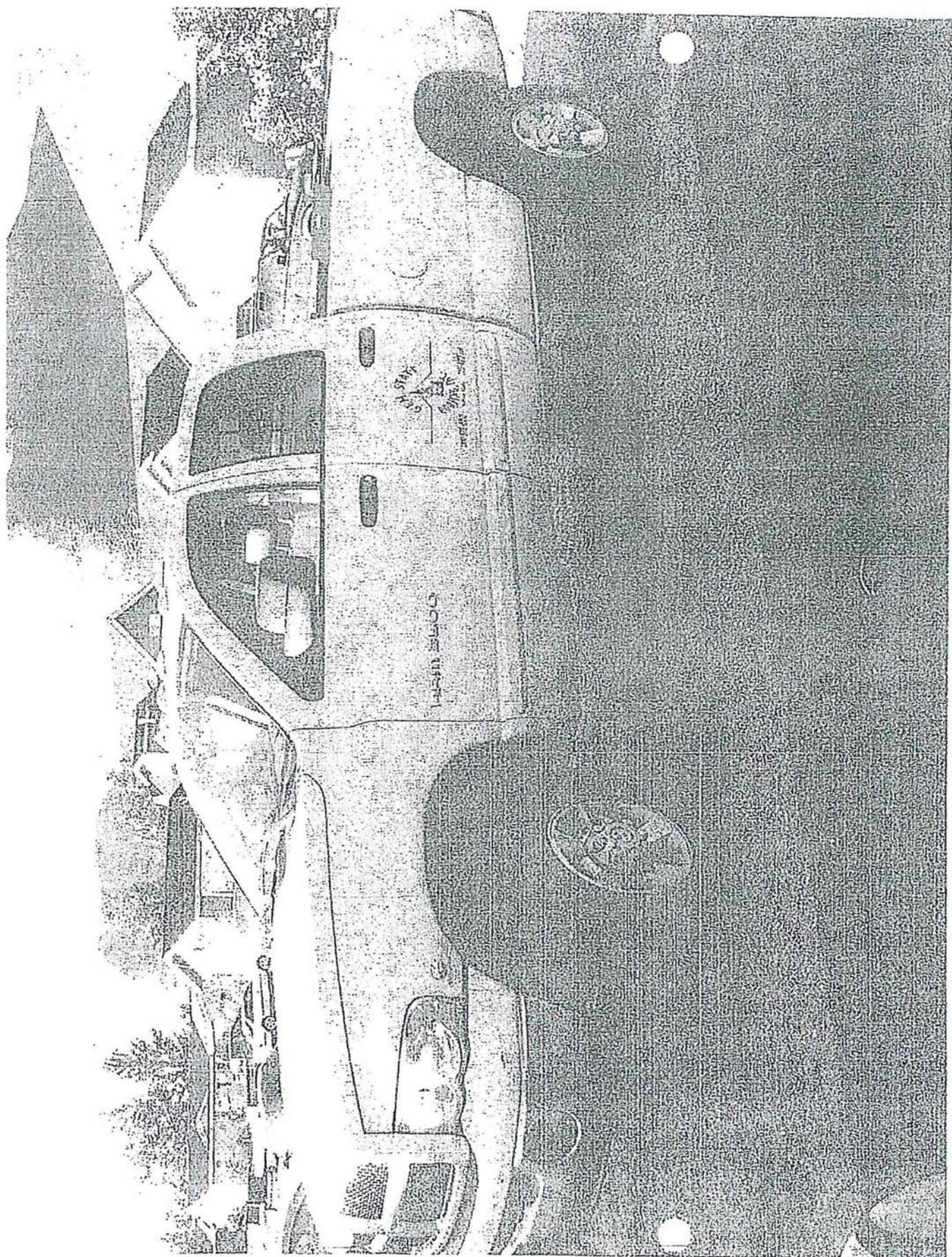
TRADEMARK SETTLEMENT AGREEMENT - 9

M:\Clients\Gem State Roofing & Asphalt Maintenance - 36211\36211.0003 - Trademark Infringement\Agreement Final 101705.doc



000259





McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)	
	)	Case No. <u>CV01-18-13437</u>
Plaintiff,)	
	)	AFFIDAVIT OF RICK SILVIA IN SUPPORT
vs.	)	OF PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT'S CROSS
UNITED COMPONENTS, INC. dba GEM	)	MOTION FOR SUMMARY JUDGMENT
STATE ROOFING,)	
)	
Defendant.)	

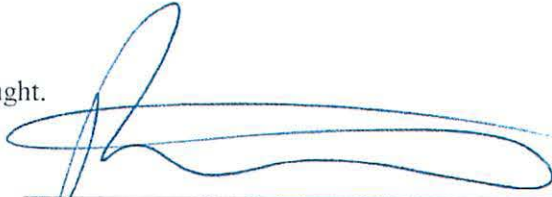
Rick Silvia, being first duly sworn upon oath, deposes and says:

1. Your affiant is the President and owner of the Plaintiff corporation Gem State Roofing, Incorporated ("Gem State") in the above-captioned action. I make this Affidavit based upon my own personal knowledge and can testify as to the truth of the matters contained herein if called upon as a witness at trial.

2. In or about August 1997, I filed a Certificate of Assumed Business Name with the Idaho Secretary of State declaring that Gem State was operating under the business name "Gem State Roofing." A true and correct copy of the Certificate of Assumed Business Name is attached hereto as Exhibit A.

3. Gem State has operated its business in Blaine County under the "Gem State Roofing" trademark continuously, without interruption, since 1997.

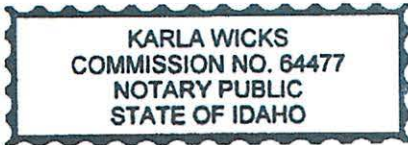
Further your affiant sayeth naught.


Rick Silvia

STATE OF IDAHO)
) ss
County of Blaine)

I, Karla Wicks, a Notary Public, do hereby certify that on this 28th day of February 2019, personally appeared before me Rick Silvia, who, being by me first duly sworn, declared that he is the President and owner of Plaintiff corporation in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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



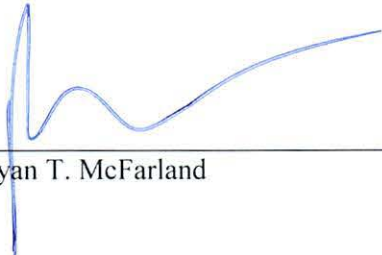
Notary Public for Idaho Karla Wicks
Residing at: Blaine County
My commission expires: 10-27-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RICK SILVIA IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
Terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing



Ryan T. McFarland

EXHIBIT A

CERTIFICATE OF ASSUMED BUSINESS NAME

To the SECRETARY OF STATE, STATE OF IDAHO

Pursuant to Section 53-504, Idaho Code, the undersigned gives notice of adoption of an Assumed Business Name.

97 AUG 12 AM 10:58
STATE OF IDAHO

1. The assumed business name which the undersigned use(s) in the transaction of business is:

Gen State Roofing

2. The true name(s) and business address(es) of the entity or individual(s) doing business under the assumed business name is/are:

Richard L Silvia ^{Name} PO Box 748 Sun Valley, Id. ^{Address}
83353

3. The general type of business transacted under the assumed business name is:

Roofing CONSTRUCTION
See categories on the reverse

4. The name and address to which correspondence should be addressed:

Rick Silvia PO Box 748 Sun Valley, Id. 83353

Signed



By

Richard L Silvia

Capacity

OWNER

Submit Certificate of Assumed Business Name and \$20.00 fee to:

Secretary of State
700 West Jefferson
PO Box 83720
Boise ID 83720-0080
334-2300

Customer #

2000 SECRETARY OF STATE
Secretary of State use only
08/12/1997 09:00
CR: 568 CT: 85699 DR: 29165
1 @ 20.00 = 20.00 ASSUM NAME

D 7183

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION TO COMPEL**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., submits this Objection to Plaintiff's Motion to Compel dated January 28, 2019. This Objection is supported by the Declaration of Terri Pickens Manweiler, filed concurrently herewith.

I. INTRODUCTION

Plaintiffs are seeking to compel responses for Interrogatory No. 3 and 20, Requests for Production No. 6, 7, and 24, and Requests for Admission No. 10, 12, and 17. Plaintiff's Motion to Compel should be denied because it has failed to adequately meet and confer with Defendant and some of the information or documentation requested simply does not exist.

II. STATEMENT OF FACTS

The following chart provides a timeline of the discovery requests and responses served in this case along with all meet and confer attempts by Plaintiff.

DATE	ITEM	CITATION
09/4/18	Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission <i>(Interrogatories 1 – 19, Requests for Production 1 - 23, Requests for Admission 1 – 28)</i>	<i>Manweiler Dec.</i> , ¶ 2
10/4/18	Defendant's Answers to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission. <i>(Produced bates stamped documents DEFENDANT0001-27)</i>	<i>Manweiler Dec.</i> , ¶ 3
10/17/18	Plaintiff's Second Set of Interrogatories and Requests for Production of Documents. <i>(Interrogatories 20, 21, Requests for Production 24, 25)</i>	<i>Manweiler Dec.</i> , ¶ 4,
10/17/18	Meet and Confer Letter from Lori Hickman as to Interrogatories 3, 4, 6, 10, 11, Requests for Production 4, 6, 7, 9, and Requests for Admission 11, 22, 24.	<i>Manweiler Dec.</i> , ¶¶ 5,6 Exhibit A
10/24/18	Phone conversation between Lori Hickman and Terri Pickens Manweiler	<i>Manweiler Dec.</i> , ¶ 7
11/6/18	Defendant's First Supplemental Answers to Plaintiff's First Interrogatories, Requests for Production, and Requests for Admission. <i>(Supplemented Interrogatories 3, 4, 6, 10, 11, Request for Production 4, Requests for Admission 11, 22, 24 and bates stamped documents DEFENDANT00028-85)</i>	<i>Manweiler Dec.</i> , ¶ 10
11/19/18	Defendant's Answers to Plaintiff's Second Set of Interrogatories and Requests for Production <i>(Produced bates stamped documents DEFENDANT00086-113).</i>	<i>Manweiler Dec.</i> , ¶ 13
11/19/18	Meet and Confer Letter as to Interrogatory No. 2.	<i>Manweiler Dec.</i> , ¶ 14, Exhibit B
11/21/18	Defendant's Second Supplemental Answers to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission. <i>(Supplemented Interrogatories 2, 11, and 12, Requests for Production No. 's 16 and 23, and bates stamped documents DEFENDANT000114-117).</i>	<i>Manweiler Dec.</i> , ¶¶ 15, 16
03/04/19	Defendant's Third Supplemental Answers to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission. <i>(Supplemented Requests for Production No. 6 & 7 with bates stamped documents DEFENDANT000118-1148.)</i>	<i>Manweiler Dec.</i> , ¶¶ 17, 18

As identified above, Plaintiff sent two meet and confer letters, both of which were complied with in a timely manner. After the first meet and confer letter dated October 17, 2018, counsel for Defendant set up a conference call which took place on October 24, 2018. *Manweiler Dec.*, ¶ 7. During this telephone conference, Ms. Hickman and the undersigned discussed the discovery deficiencies and agreed that Defendant would provide supplemental responses by November 6, 2018. *Manweiler Dec.*, ¶ 8. As to Interrogatory No. 3, Ms. Hickman was informed that Defendant did not keep any diaries, calendars, notes, or journals. *Manweiler Dec.*, ¶ 9. Defendant supplemented its responses on November 6, 2018 and produced DEFENDANT00028-85 pursuant to the conversation between counsel. *Manweiler Dec.*, ¶ 10, 11. Plaintiff did not inform Defendant that the First Supplemental Responses dated November 6, 2018 were still insufficient or deficient in any way before filing its Motion to Compel. *Manweiler Dec.*, ¶ 12. As such, Defendant assumed the supplemental responses were sufficient, especially in light of the fact that Plaintiff submitted a second meet and confer letter on November 19, 2018 and made no mention of the supplemental responses or any insufficiencies, instead, Plaintiff only requested that Interrogatory No. 2 (which is not subject to this Motion to Compel) be supplemented. *Manweiler Dec.*, ¶ 14.

Defendant provided its Second Supplemental Responses on November 21, 2018 and did not receive another meet and confer from counsel regarding Defendant's Second Supplemental Responses, nor was Defendant made aware that any of Defendant's Second Supplemental Responses were deficient until Plaintiff filed its Motion to Compel. *Manweiler Dec.*, ¶ 15, 16. Defendant provided its Third Supplemental Responses on March 4, 2019 which supplemented its responses to Requests for Production No. 6 and 7 by producing documents bates stamped as DEFENDANT000118-1148. *Manweiler Dec.*, ¶ 17, 18.

Defendant did not have an opportunity to amend or supplement its responses because it was not aware of any deficiencies in its discovery responses until this Motion to Compel was filed. *Manweiler Dec.*, ¶¶ 19, 20. Plaintiff has failed to adequately meet and confer, and Defendant has been truthful in its responses that certain items requested simply do not exist, thus, Plaintiff's Motion to Compel should be denied. *Manweiler Dec.*, ¶¶ 21, 22.

III. LEGAL STANDARD

Idaho Rule of Civil Procedure 37(a) requires a motion to compel contain “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain the information without court action.” Confer is defined as “to speak directly with opposing counsel or a self-represented litigant in person or by telephone, to identify and discuss disputed issues and to make a reasonable effort to resolve the disputed issues. The sending of an electronic or voice-mail communication does not satisfy the requirement to “confer.”” Dist. Idaho. Loc. Civ. R. 37.1.

IV. LEGAL ARGUMENT

Plaintiff seeks an order from this Court compelling Defendant to answer Interrogatory No. 3 and 20, Requests for Production No. 6, 7, and 24, and Requests for Admission No. 10, 12, and 17.

A. Interrogatories.

Plaintiff requests a motion to compel answers to Interrogatories No. 3 and 20. Plaintiff did not comply with the meet and confer requirement as to these Interrogatories and Defendant has already provided all information it has available.

i. Interrogatory No. 3

Plaintiff seeks a motion to compel from this Court with regard to Interrogatory No. 3. The interrogatory, response, and supplemental response are as follows:

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

ANSWER TO INTERROGATORY NO. 3: These items do not exist. Defendant reserves the right to supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI did not keep diaries, calendars, notes, journals, reports or other writings regarding work it did in Blaine County, Idaho. UCI kept invoices and statements, which have been provided previously as DEFENDANT00003-9.

After Defendant submitted its Supplemental Response to Interrogatory No. 3, Plaintiff did not contact nor communicate with Defendant regarding the response or any remaining deficiency. It was not until Plaintiff's Motion to Compel was filed with this Court and served on Defendant that Defendant as aware any deficiency still existed, therefore, Plaintiff has not met the requirement to meet and confer prior to filing a motion to compel.

Additionally, the documents and information Plaintiff seeks in Interrogatory No. 3 simply does not exist. After Defendant received the Meet and Confer letter on October 17, 2018, a phone conference was held between the undersigned and Lori Hickman for Plaintiff. During this conversation, the undersigned informed Ms. Hickman that Defendant did not keep any diaries, calendars, notes or journals and it was agreed that Defendant would supplement its response with that information, which Defendant did on November 6, 2018. Defendant has been truthful in its response that the items requested simply do not exist. Just because Plaintiff believes they exist

and is hopeful they exist, does not mean that they do. Defendant stands by its response and supplemental response to Interrogatory No. 3 and again reiterates that the items sought do not exist.

Plaintiff's motion to compel Interrogatory No. 3 should be denied because Plaintiff failed to make adequate meet and confer attempts before filing the Motion to Compel and because the documents and information sought by Plaintiff does not exist and this Court cannot compel information that does not exist.

ii. Interrogatory No. 20.

Plaintiff seeks a motion to compel from this Court with regard to Interrogatory No. 20.

The interrogatory, response, and supplemental response are as follows:

INTERROGATORY NO. 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;
- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

ANSWER TO INTERROGATORY NO. 20: Please see the Invoices, Estimates, and Work Orders from September 2010 to September 2018 provided herewith bates stamped as DEFENDANT000086 – 00113.

Plaintiff seeks a motion to compel a response to Interrogatory No. 20, however Plaintiff has not adequately met and confer with Defendant regarding any deficiency in Defendant's answer to Interrogatory No. 20. As identified in the Statement of Facts of this Opposition, no meet and confer letter was sent, nor discussions had, regarding Interrogatory No. 20.

Further, Defendant has produced everything and provided all information it has to adequately respond to Interrogatory No. 20. Thus, because Plaintiff did not properly meet and

confer with Defendant regarding Interrogatory No. 20, and because Defendant has already provided all information and documentation requested by Interrogatory No. 20, this Court should deny Plaintiff's motion to compel the response to Interrogatory No. 20.

B. Requests for Production.

Plaintiff seeks an order from this Court compelling Defendant to provide additional responses to Request for Production No. 6, 7, and 24.

i. Requests for Production No. 6 & No. 7

Defendant provided its Third Supplemental Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission on March 4, 2019. Defendant supplemented its response to Requests for Production No. 6 & 7 by producing DEFENDANT000118-1148. These requests have been complied with.

ii. Request for Production No. 24

Plaintiff seeks to compel an additional response to Request for Production No. 24, alleging that Defendant's response is deficient.

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: Please see the documents produced herewith bates stamped as DEFENDANT000086-00113.

Defendant sent its response to Request for Production No. 24 on November 19, 2018 and did not receive a meet and confer letter, conversation, or any communication regarding its alleged deficiency. Defendant provided the documents requested, thus fully complying with the Request. Because Plaintiff failed to adequately meet and confer with Defendant regarding the response, this Court should deny Plaintiff's Motion to Compel Request for Production No. 24.

C. Requests for Admission.

Plaintiff seeks an order requiring Defendant to modify and submit different answers to Requests for Admission No. 10, 12, and 17. Plaintiff failed to meet and confer with Defendant for each of the Requests for Admission contained in its Motion to Compel. For this reason alone, Plaintiff's Motion to Compel as to the Requests for Admission should be denied.

i. Request for Admission No. 10

REQUEST FOR ADMISSION NO. 10: Admit that You are doing business under the assumed business name "Gem State Roofing."

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Deny.

Plaintiff did not meet and confer with Defendant regarding its response to Request for Admission No. 10. As stated above, the meet and confer letter from Plaintiff was only for Requests for Admission No. 11, 22, and 24, to which Defendant timely supplemented its responses.

Defendant answered this Request for Admission truthfully and simply because Plaintiff does not agree with the response does not mean the Court should be requested to compel Defendant to respond differently. Defendant is not doing business as Gem State Roofing, and as such, this request for admission was denied.

ii. Request for Admission No. 12

REQUEST FOR ADMISSION NO. 12: Admit that since 2016, You have advertised, solicited, bid on, and performed roofing work in Blaine County under the assumed business name "Gem State Roofing."

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Deny.

Plaintiff did not meet and confer with Defendant regarding its response to Request for Admission No. 12. As stated above, the meet and confer letter from Plaintiff was only for Requests for Admission No. 11, 22, and 24, to which Defendant timely supplemented its responses.

Defendant answered this Request for Admission truthfully and simply because Plaintiff

does not agree with the response does not mean the Court should be requested to compel Defendant to respond differently. Defendant is not doing business as Gem State Roofing, and as such, this request for admission was denied.

iii. Request for Admission No. 17

REQUEST FOR ADMISSION NO. 17: Admit that despite Gem State's written demands that You cease conducting Your roofing business in Blaine County, You continue to advertise, solicit, bid on, and perform roofing work in Blaine County.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Deny.

Plaintiff did not meet and confer with Defendant regarding its response to Request for Admission No. 17. As stated above, the meet and confer letter from Plaintiff was only for Requests for Admission No. 11, 22, and 24, to which Defendant timely supplemented its responses.

Defendant answered this Request for Admission truthfully and simply because Plaintiff does not agree with the response does not mean the Court should be requested to compel Defendant to respond differently. Defendant is not doing business as Gem State Roofing, and as such, this request for admission was denied.

V. ATTORNEY FEES

Plaintiff seeks an award of attorney fees in having to file its Motion to Compel, however under the Idaho Rules of Civil Procedure, such an award is not appropriate if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

IRCP 37(a)(5).

An award of attorney fees to Plaintiff would be inappropriate because Plaintiff did not attempt in good faith to meet and confer, and because any objection and responses by Defendant were substantially justified.

Plaintiff, in bringing the Motion to Compel, has unnecessarily and unjustifiably caused Defendant to incur attorney fees in the filing and preparation of its Opposition, and as a result, Defendant seeks reimbursement of these expenses incurred in opposing Plaintiff's Motion to Compel.

VI. CONCLUSION

Based on the forgoing, Defendant respectfully requests this Court enter an order denying Plaintiff's Motion to Compel.

DATED: March 5, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DECLARATION OF TERRI PICKENS
MANWEILER IN SUPPORT OF
DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION TO COMPEL**

I, TERRI PICKENS MANWEILER make the following declaration pursuant to Idaho Code § 9-1406:

1. I am the attorney of record for Defendant, and as such, I have personal knowledge of the facts herein.
2. On September 4, 2018, I received Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission, which included Interrogatory No.'s 1 through 19, Requests for Production No.'s 1 through 23, and Requests for Admission No.'s 1 through 28.
3. On October 4, 2018, I caused Defendant's Answers to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission to be served on Plaintiff along with bates stamped documents marked as DEFENDANT0001-27.

4. On October 17, 2018, I received Plaintiff's Second Set of Interrogatories and Requests for Production of Documents which included Interrogatory No.'s 20 and 21, and Request for Production No.'s 24 and 25.

5. Also on October 17, 2018, I received a meet and confer letter from Lori Hickman regarding insufficient discovery responses. A true and accurate copy of the meet and confer letter is attached hereto as **Exhibit A**.

6. The meet and confer letter sought supplemental responses to Interrogatories 3, 4, 6, 10, 11, Requests for Production 4, 6, 7, 9, and Requests for Admission 11, 22, 24.

7. Upon receipt of the meet and confer letter, I arranged for a telephone conference to take place between myself and Ms. Hickman.

8. During the telephone conference on October 24, 2018, Ms. Hickman and I discussed the discovery deficiencies, and I agreed to supplement Defendant's Initial Responses by November 6, 2018.

9. During this conversation, I informed Ms. Hickman that as to Interrogatory No. 3, Defendant did not keep any diaries, calendars, notes or journals and it was agreed that Defendant would supplement its response with that information.

10. On November 6, 2018, I provided Defendant's First Supplemental Responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission.

11. Defendant's First Supplemental Responses provided supplemental responses to Interrogatory No.'s 3, 4, 6, 10, 11, Request for Production No. 4, Request for Admission No.'s 11, 22, 24 and also provided bates stamped documents marked as DEFENDANT00028-85.

12. I did not receive another meet and confer from counsel regarding Defendant's First Supplemental Responses, nor was I made aware that any of Defendant's First Supplemental Responses were deficient until Plaintiff filed its Motion to Compel.

13. On November 19, 2018, I caused Defendant's Answers to Plaintiff's Second Set of Interrogatories and Requests for Production to be served upon Plaintiff, serving with the responses bates stamped documents marked as DEFENDANT00086-113.

14. That same day, I received a second meet and confer letter from Ms. Hickman regarding Interrogatory No. 2. A true and accurate copy of the second meet and confer letter is attached hereto as **Exhibit B**.

15. On November 21, 2018, I caused Defendant's Second Supplemental Responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission to be served upon Plaintiff.

16. Defendant's Second Supplemental Responses provided supplemental responses to Interrogatory No.'s 2, 11, and 12, Requests for Production No.'s 16 and 23, and bates stamped documents marked as DEFENDANT000114-117.

17. On March 4, 2019, I caused Defendant's Third Supplemental Responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission, to be served upon Plaintiff.

18. Defendant's Third Supplemental Responses provided supplemental responses to Requests for Production No. 6 and 7 by producing documents bates stamped as DEFENDANT000118-1148.

19. I did not receive another meet and confer from counsel regarding Defendant's Second Supplemental Responses, nor was I made aware that any of Defendant's Second Supplemental Responses were deficient until Plaintiff filed its Motion to Compel.

20. Defendant did not have an opportunity to amend or supplement its responses because it was not aware of any deficiencies in its discovery responses until this Motion to Compel was filed.

21. Defendant has been truthful in its response that the items requested simply do not exist.

22. As such, Plaintiff has failed to adequately meet and confer and its Motion to Compel should be denied.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: March 5, 2019.

/s/ Terri Pickens Manweiler

TERRI PICKENS MANWEILER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

First Class Mail
 Facsimile – 208.895.1270
 Hand Delivery
 iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler

Terri Pickens Manweiler

EXHIBIT A



McFARLAND RITTER

17 October 2018

VIA U.S. MAIL

Terri Pickens Manweiler
Pickens Cozacos, P.A.
398 S. 9th Street, Ste. 240
Boise, ID 83701

Re: *Gem State Roofing, Incorporated v. United Components, Incorporated,*
dba Gem State Roofing - CV01-18-13437

Dear Ms. Manweiler,

This letter is sent pursuant to Idaho Rule of Civil Procedure 37(a)(1), and as a follow-up to the letter I sent you dated October 15, 2018. Request is hereby made for an in-person or telephone conference to meet and confer, preparatory to Mr. Silvia filing a Motion to Compel.

On September 4, 2018, I served you with Plaintiff Gem State Roofing's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission ("Discovery Requests"). On October 4, 2018 you served me with Defendant's Responses thereto (the "Discovery Responses"). Those Discovery Responses are materially deficient for the following reasons:

- Interrogatory No. 3 requires your client to identify all documents and other writings made prior to, contemporaneous with, or after the events alleged in the Complaint. You responded that these documents do not exist, which seems improbable, given that you have produced some invoices showing that your client has performed roofing work in Blaine County under the business name "Gem State Roofing." Demand is made that you make a full and complete response to this Interrogatory, as required by Idaho Rule of Civil Procedure 33(b)(3).
- Your client's objection to Interrogatory No. 4 is twofold: 1) that it is overly broad; and 2) the information requested is already in possession of Plaintiff because it was a party to the communications. These objections are not valid, however, because: 1) communications between your client and Plaintiff are likely limited in scope and number; and 2) Plaintiff's possession of tangible information or recollections regarding such communications does not obviate your client's duty to respond to this Interrogatory with its information and/or recollection of such communications.
- Interrogatory Nos. 6, 10 and 11 require your client to "identify every fact" which forms the basis for its continuing assertions that it is not a party to the Settlement Agreement nor is it GSR&AM's successor or assignee. Your client's responses simply restate these assertions without providing any supporting facts or basis for them.

Demand is made that your client cite every fact that supports these assertions as required by Idaho Rule of Civil Procedure 33(b)(3), including facts regarding Mr. Flynn's involvement in the negotiation and execution of the Settlement Agreement as Vice President of GSR&AM, and the subsequent assignment of the "Gem State Roofing" trademark from GSR&AM to UCI authorized by Mr. Flynn as both "Assignor" and "Assignee" (Def. 0017).

- Request for Production No. 4 requires production of "all agreements or other documents or tangible things" executed between GSR&AM and UCI. Your client's response that "no documents exist" is simply not credible given that at least one of the documents produced by your client - "Application for Registration of Assignment of Trademark-Service Mark" (Def. 0017) - is responsive to this request. Given this trademark assignment and Mr. Flynn's continuous ownership and operation of both GSR&AM and UCI, demand is made that your client produce all documents, agreements, or tangible things related to this request as required by Idaho Rule of Civil Procedure 34(b)(2)(E)(i).
- Requests for Production Nos. 6 and 7 require production of "all correspondence or other documents or tangible things" exchanged between your client and any former or potential customers in Blaine County. Your client's response that "no documents exist" for these requests is disingenuous in light of the four roofing jobs for which UCI has already produced invoices. All documents and correspondence related to these four roofing jobs must be produced, as well as documents related to any other Blaine County roofing jobs or bids not yet disclosed or identified.
- Your client's response to Request for Production No. 9 is another outright denial that documents exist. However, because this Request relates to Interrogatory No. 4, which is deficient for the reasons set forth above, demand is made that any and all documents regarding your client's information and/or recollection of the subject communications be produced.
- Your client denied Request for Admission No. 11 regarding UCI's filing of an Application of Registration of Assignment of the "Gem State Roofing" design mark with the Secretary of State because "Defendant is a corporation and not capable of filing documents." This Request used the capitalized pronoun "You" which term is broadly defined in the Discovery Requests as: "Defendant United Components, Incorporated ("UCI"), Your officers, directors, agents, representatives, employees, attorneys, insurers, and every person acting or purporting to act, or who has ever acted or purported to act on Your behalf (hereinafter, "Defendant" or "UCI"). Clearly the term "You" means more than just the corporate entity itself, and includes whoever acted on UCI's behalf and filed the Application. Moreover, your client's flippant denial does not "fairly respond to the substance of the matter" as required by Idaho Rule of Civil Procedure 36(a)(5). Demand is hereby made that your client amend its response to satisfy Rule 36(a)(5), or we will also file a motion regarding the sufficiency of your client's answer pursuant to Rule 36(a)(7).
- Your client denied Request for Admission Nos. 22 and 24 regarding annual reports filed with the Secretary of State's office on the bases that: 1) UCI is "unable to file documents" because it is a corporation; and 2) some highlighter marks on the copies of the two reports render them "untrue and incorrect." Once again, these denials do not satisfy Idaho Rule of Civil Procedure 36(a)(5) which states that a "denial must fairly respond to the substance of the matter and... the answer must specify the part admitted and qualify or deny the rest." Accordingly, demand is made that your client amend its

wholesale denials and provide a response that complies with the broad definition of "You" and "Your" in the Discovery Requests, and Rule 36(a)(5).

- You have failed to have your client verify its responses to the Interrogatories "under oath" as required by Rule 33(b)(5).

Please advise of your availability to meet and confer regarding these matters by October 25, 2018.

Sincerely,

SENT WITHOUT SIGNATURE
TO AVOID DELAY

Lori Hickman
Legal Counsel

EXHIBIT B



McFARLAND RITTER

19 November 2018

VIA U.S. MAIL
VIA FACSIMILE, 208-954-5099
VIA EMAIL: terri@pickenslawboise.com

Terri Pickens Manweiler
Pickens Cozacos, P.A.
398 S. 9th Street, Ste. 240
Boise, ID 83701

Re: *Gem State Roofing, Incorporated v. United Components, Incorporated,*
dba Gem State Roofing - CV01-18-13437

Dear Terry,

This letter is sent regarding the ongoing discovery in the above-referenced matter and pursuant to Idaho Rule of Civil Procedure 37(a)(1). On September 4, 2018, I served you with Plaintiff Gem State Roofing's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission ("Discovery Requests"). On October 4, 2018 you served me with Defendant's Responses thereto (the "Discovery Responses").

Interrogatory No. 2 requires your client to identify "each and every person" who has knowledge of this case, including all facts related to the allegations and claims set forth in the Complaint. Your client's answer to Interrogatory No. 2 fails to include Michelle Flynn, who was the president of Gem State Roofing & Asphalt Maintenance, Inc. and who signed the Trademark Settlement Agreement referenced in paragraphs 11 and 12 of the Complaint. Ms. Flynn clearly has knowledge of the facts related to this case and the claims set forth in the Complaint. Also, your responses do not provide the names and contact information of any other officer, shareholder, member, or employee of either Gem State Roofing & Asphalt Maintenance, Inc. or United Components, Inc. who may have had knowledge of the Settlement Agreement. Accordingly, please provide me the current employer, business and home address and telephone number as required by Interrogatory No. 2 for Michelle Flynn and any other officer, shareholder, member, or employee of either Gem State Roofing & Asphalt Maintenance, Inc. or United Components, Inc.

If you are not able to provide this information on or before Wednesday, November 21, 2018, please contact me to arrange for a telephone conference to further meet and confer on this issue.

Sincerely,

SENT WITHOUT SIGNATURE
TO AVOID DELAY

Lori Hickman
Legal Counsel

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., submits this Opposition to Plaintiff’s Motion for Partial Summary Judgment. This Memorandum is supported by the *Declaration of Terri Pickens Manweiler in Support of Defendant’s Cross Motion for Summary Judgment (“Manweiler Supp. Dec.”)*, and the *Declaration of Jeffery Flynn in Support of Defendant’s Cross Motion for Summary Judgment (“Flynn Dec.”)*, each filed previously with this Court.

I. INTRODUCTION AND STATEMENT OF FACTS

For purposes of brevity, Defendant United Components, Inc. (“UCI”) adopts its Introduction and Statement of Undisputed Facts from its underlying Memorandum in Support of

Cross Motion for Summary Judgment as if fully set forth herein. UCI provides the following statement of facts in response to Plaintiff's Undisputed Statement of Facts included in its *Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment* ("Plaintiff's Memorandum").

Jeffery Flynn was a 49% stockholder of Gem State Roofing & Asphalt Maintenance Inc. ("GSRAM") while it was in existence. *Flynn Supp. Dec.*, ¶ 2. Flynn's then wife, Michelle Flynn was the other 51% shareholder. During its existence, GSRAM became delinquent on payment of its employment taxes, that, coupled with the downturn in the economy rendered it unable at the time to fully repay the tax debt. *Flynn Supp. Dec.*, ¶ 3. Because of the tax debt, the IRS liened all of GSRAM's equipment and Mr. Flynn was instructed he could dissolve GSRAM and start a new entity that could purchase the equipment to pay off the IRS debt. *Flynn Supp. Dec.*, ¶ 4. And Mr. Flynn did just that; in October 2011, UCI was formed and GSRAM was dissolved. *Flynn Supp. Dec.*, ¶ 5. During that time, the Flynn's were divorced, and Michelle Flynn took no ownership interest in UCI. Michelle Flynn settled her obligations with the IRS through an offer of compromise. Mr. Flynn did not have the cash flow available to settle with the IRS and he is still currently working with the IRS to resolve the tax debt. Mr. Flynn did not try to evade or escape the IRS debt. *Flynn Supp. Dec.*, ¶ 6. Mr. Flynn was instructed that the new company, UCI, would not be responsible for the obligations of GSRAM. *Manweiler Supp. Dec.*, ¶ 4, Exhibit A.

The Trademark Settlement Agreement provides that GSRAM will not advertise or solicit business in Blaine County. *Manweiler Supp. Dec.*, ¶ 5, Exhibit B. The Trademark Settlement Agreement also provides that GSRAM "may advertise in the Twin Falls telephone directories which may be distributed in Blaine County, so long as it is not listed under any cities in Blaine County, and does not state or imply it performs services in Blaine County." *Manweiler Supp. Dec.*,

¶ 6. The Trademark Settlement Agreement was strictly between Gem State and GSRAM, signed by Michelle Flynn, not Jeffery Flynn. *Manweiler Supp. Dec.*, Exhibit B. UCI was never a party to the Trademark Settlement Agreement, nevertheless, neither GSRAM nor UCI advertised or solicited business in Blaine County and the advertisements in the Twin Falls telephone directory does not state or imply it performs services in Blaine County. *Flynn Supp. Dec.*, ¶ 8.

If a company or individual reaches out to UCI or GSRAM and that company or individual happens to have a project in Blaine County or requests an estimate for a project in Blaine County, Mr. Flynn did not consider that to be soliciting, because UCI is not a party to the Trademark Settlement Agreement, and even if it were, UCI and GSRAM were not soliciting the business or advertising to solicit business. *Manweiler Supp. Dec.*, ¶ 7. Plaintiff alleges GSRAM (and incorrectly UCI) violated the Trademark Settlement Agreement in the dealings with the following:

Standard Plumbing Supply (Deposition Exhibit 31 and 35),
Kerry Armstrong, (Deposition Exhibit 44, 47),
Pioneer West Property Management (Deposition Exhibit 33 and 34),
Bruce Bothwell, (Deposition Exhibit 59),
ESI Construction (Deposition Exhibit 42),
Snow Mountain Apartments (Deposition Exhibit 36, 37),
McAlvain Construction (Deposition Exhibits 50, 55, 56, 57, 61, 65),
Larry Isham (Deposition Exhibit 16),
Shay Construction (Deposition Exhibits 17 and 18),
Brashears & Sons (Deposition Exhibit 14).

Plaintiff's Memorandum, pg. 16. None of these companies or customers were solicited by GSRAM or UCI nor do they constitute a breach of the Trademark Settlement Agreement. *Flynn Supp. Dec.*, ¶ 24.

As to Standard Plumbing Supply, UCI provided a seal coat job, not a roofing job; the Trademark Settlement Agreement does not prohibit seal coat jobs and further, UCI was under no obligation to refer business to Plaintiff because it was not a party to the Trademark Settlement Agreement, but even if it were, UCI could not refer this job to Plaintiff because Plaintiff does not

do seal coat jobs. *Flynn Supp. Dec.*, ¶ 11. As to Kerry Armstrong, Ms. Armstrong called UCI for an emergency repair the day after thanksgiving, UCI did not solicit work from Ms. Armstrong. *Flynn Supp. Dec.*, ¶ 12. As to Pioneer West Property Management, UCI did not solicit any work from Pioneer West, in fact Pioneer West took over for Advanced Maintenance Services who is named in the Trademark Settlement Agreement as a customer that GSRAM could continue doing work for. *Flynn Supp. Dec.*, ¶ 13. UCI handled the roof repair for Advanced Maintenance because GSRAM originally did the roof and it was believed to be a warranty job. *Flynn Supp. Dec.*, ¶ 14.

Bruce Bothwell contacted UCI for an estimate in May 2018, no services were rendered to Mr. Bothwell from UCI. *Flynn Supp. Dec.* ¶ 15. Mr. Bothwell found UCI through the phonebook which showed Twin Falls Idaho as the business location and per the Trademark Settlement Agreement, any advertisements must not show that GSRAM (not UCI) was conducting business in Blaine County. *Manweiler Supp. Dec.*, ¶ 9, Exhibit D. ESI Construction reached out to UCI for an estimate in February 2017, UCI did not provide any services to ESI, only the estimate. *Flynn Supp. Dec.*, ¶ 16. UCI has done work for ESI throughout all of Idaho and was a long-time customer of GSRAM and now UCI. *Flynn Supp. Dec.*, ¶ 17.

Snow Mountain Apartments received an estimate from UCI in August 2016, however no services were performed, and UCI certainly did not solicit or reach out to Snow Mountain Apartments. *Flynn Supp. Dec.*, ¶ 18. Snow Mountain Apartments initially called for an asphalt estimate, and then sought out a roofing estimate. *Flynn Supp. Dec.*, ¶ 19. Plaintiff also provided an estimate to Snow Mountain Apartments, so any damages claimed to be suffered by Plaintiff as a result of UCI submitting an estimate are moot. *Manweiler Supp. Dec.*, ¶ 10, Exhibit E.

McAlvain Construction is a longtime customer of UCI and UCI has done projects for McAlvain Construction throughout all of Idaho. *Flynn Supp. Dec.*, ¶ 20. McAlvain Construction

reached out to UCI because of a prior job UCI completed in Valley County, Idaho. *Flynn Supp. Dec.*, ¶ 21, Exhibit A. UCI did not solicit work from McAlvain, they contacted UCI for work on the Animal Shelter in Blaine County. *Flynn Supp. Dec.*, ¶ 22. UCI had no restrictions for working in Blaine County, so it did the job.

As to Larry Isham, Shay Construction, and Brashears & Sons, UCI did not solicit its services because UCI was not yet incorporated at the time of the estimates and invoices ¹. *Flynn Supp. Dec.*, ¶ 23. Thus, any breach of the Trademark Settlement Agreement as to Mr. Isham, Shay Construction, and Brashears & Sons should have been filed against GSRAM, not UCI.

Plaintiff also contends UCI dramatically increased its presence in Blaine County in 2016 and began to “openly and aggressively violate the terms of the Settlement Agreement” (*Memorandum*, page 6, ¶ 17). First and foremost, UCI is not a party to the Trademark Settlement Agreement. Second, Plaintiff fails to provide any factual evidence that UCI did increase its presence in Blaine County, the blanket assertion is not supported by actual data. Finally, UCI has not dramatically increased its presence in Blaine County, nor did it ever openly or aggressively violate the terms of the Settlement Agreement. *Flynn Supp. Dec.*, ¶ 25.

The Trademark Settlement agreement provides that the parties (Plaintiff and GSRAM) will direct the customer to the other party if such service would violate the terms of the Trademark Settlement Agreement. Plaintiff incorrectly contends that UCI failed to do this. Despite having no requirement to do so, Mr. Flynn testified in his deposition that UCI has in fact referred customers to Plaintiff. *Manweiler Supp. Dec.*, ¶ 12, Exhibit F. Some of the projects, such as the Standard Plumbing Supply project could not be referred to Plaintiff because it was for an asphalt seal coat job and Plaintiff does not do asphalt seal coats. *Flynn Dec.*, ¶ 10. UCI did not solicit

¹ UCI was incorporated on October 25, 2011; GSRAM provided Mr. Isham an estimate on June 20, 2011, provided Brashears & Sons an estimate on September 30, 2010, and Shay Construction and estimate and invoice in July 2011.

business in violation of the Trademark Settlement Agreement, nor was UCI even a party to the Trademark Settlement Agreement.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

UCI adopts its Standard of Review from the previously filed Memorandum in Support of Cross Motion for Summary Judgment.

III. LEGAL ARGUMENT

Plaintiff seeks partial summary judgment on its causes of action for 1) breach of contract, 2) breach of covenant of good faith and fair dealing, and 3) unjust enrichment. Plaintiff claims that UCI was a successor corporation to GSRAM and as such is bound by the terms of the Trademark Settlement Agreement, and such successor liability is the basis for which Plaintiff seeks partial summary judgment. UCI is not a successor to GSRAM, which means UCI cannot be liable for breach of contract, breach of covenant of good faith and fair dealing, or unjust enrichment.

1. UCI is Not a Successor Corporation to GSRAM.

Although there is no Idaho law directly on point regarding liability of a successor corporation liability, the general rule under Idaho law is that, “[a]n assignee’s assumption of an assignor’s liabilities is never presumed, and the burden of proof is upon the party who asserts that there has been an assumption. *Murr v. Selag Corporation*, 113 Idaho 773, 7809, 747 P.2d 1302, 1309 (Ct. App. 1987). The well-settled general rule of successor liability is that where one company sells or otherwise transfers all or substantially all of its assets to another company, the latter is not liable for the debts and liabilities of the transferor. 15 Fletcher’s Cyclopedia on Corporations § 7122 (2017 update). There are four generally recognized exceptions to a successor’s non-liability:

- (1) the buyer expressly or impliedly agrees to assume such liability;

- (2) the transaction amounts to a de facto consolidation or merger;
- (3) the buyer corporation is merely a continuation of the seller corporation; or
- (4) the transaction is entered into fraudulently for the purpose of escaping liability.

Welco Indus., Inc. v. Applied Cos., 1993-Ohio-191, 67 Ohio St. 3d 344, 346-47, 617 N.E.2d 1129, 1132.

Each of these four exceptions require a transfer of assets in order to hold the acquiring company liable. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1457 (Cir. 1985). Thus, the first issue to determine before any of the four exceptions are addressed is if a transfer of assets between UCI and GSRAM occurred. GSRAM's assets were liened by the IRS, which meant GSRAM did not have any assets that could be sold to another company. Upon its incorporation, UCI purchased the assets from the IRS and by that time, GSRAM was already dissolved. GSRAM did not sell or transfer its assets to UCI, thus, UCI is not a successor to GSRAM.

If this Court is not persuaded by this argument, the exceptions to successor non-liability are addressed as follows. Plaintiff argues that the third exception (the buyer corporation is merely a continuation of the seller corporation) applies to UCI. Plaintiff combines the second and third exceptions by arguing that if UCI is a mere continuation of GSRAM, then a de facto merger has taken place. The de facto merger doctrine and the mere continuation doctrine are separate doctrines and although courts have previously analyzed the two as a single doctrine because of their similarities², each will be addressed as a separate doctrine as follows.

A. No De Facto Merger Took Place.

The de facto merger doctrine is an equitable doctrine that recognizes successor liability may attach where one corporation is absorbed by another, but without compliance with statutory

² *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 atfn.3 (2d Cir.2003).

requirements for a merger. *United States v. Sterling Centrecorp Inc.*, 960 F.Supp.2d 1025, 1041 (E.D. Cal.2013). When a de facto merger is alleged, the court must determine “the substance of the agreement [regardless of] the title put on it by the parties.” *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F.Supp. 1010 (D. Mass. 1989). In this case, there is no agreement between UCI and GSRAM for this Court to analyze, thus, the Court can look to the following factors to determine if a de facto merger has occurred:

- (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

United States v. Sterling Centrecorp, Inc., 960 F.Supp.2d 1025, 1042 (2013).

As to the first element, UCI is not disputing that it is operating out of the same location as GSRAM. That is where Mr. Flynn was already operating. Mr. Flynn further admitted that he kept much of the personnel of GSRAM, with the exception of ownership and management of UCI. Finally, while GSRAM and UCI both businesses provide roofing and asphalt maintenance, the continuity of the enterprise changed slightly with the change in management and ownership.

The second element requires the stockholders to purchase the acquired corporation with shares of stock – this did not take place. Several courts have held that “[a] consolidation or merger always involves a transfer of the assets and business of one corporation to another **in exchange**

for its securities.” *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, (Cir. 1985) (emphasis added). UCI did not buy GSRAM’s assets for stock, thus, this element is not satisfied. Furthermore, the two companies do not have the same ownership, GSRAM was Michelle and Jeff Flynn. UCI is Jeffery Flynn and two other shareholders unrelated to Michelle Flynn, further establishing that this element has not been met.

As to the third element, while it is undisputed that GSRAM dissolved in 2011, there is a dispute as to the cessation of its ordinary business operations. GSRAM did not go through a formal winding up process after the IRS liened all of its assets and the two shareholders were divorced. GSRAM did not operate as UCI, but part of the business operation included satisfying the IRS debts, something that has still arguably yet to be done. Thus, this element is not satisfied.

As to the fourth element, UCI, the purchasing company of GSRAM assets from the IRS, did not assume the liabilities of GSRAM. There was no contract or purchase agreement between UCI and GSRAM where such assumption of liabilities was agreed to. UCI did continue to use and pay for the same services GSRAM had used and paid for, but there was no express assumption of liabilities. Refusing to reinvent the wheel for the roofing and asphalt company does not mean that UCI assumed all of the liabilities of GSRAM when it started operating. Without some written agreement or uncontroverted assumption, the fourth element is not satisfied.

A de facto merger did not take place because each of the four elements listed above cannot be satisfied. “Even if the corporation sells to another corporation its entire business operation and all its assets, in exchange for some consideration other than stock, **the two corporate entities remain distinct and intact.**” *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (Cir. 1985) (emphasis added). GSRAM and UCI are distinct and separate because no exchange of stock

or shares took place as consideration between the entities and no consideration was given to Michelle Flynn by UCI or Jeff Flynn to dissolve GSRAM.

B. UCI is Not a Mere Continuation of GSRAM.

The mere continuation doctrine applies when a purchasing corporation is merely a continuation or reincarnation of the selling corporation. *Id.* “The gravamen of the traditional mere continuation exception is the continuation of the corporate entity rather than the continuation of the business operation.” *Martin v. TWP Enters.*, 227 Md. App. 33, 57, 132 A.3d 361, 375 (2016). The key element of a mere continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporations.” *Bud Antle*, at 1459.

Jeff Flynn and Michelle Flynn were the owners and stockholders of GSRAM prior to its dissolution. UCI’s stockholders are Jeff Flynn, Kerrie Kuhn, and Robert Hayden; Jeff Flynn is the only common shareholder between the two entities. Although Kerrie Kuhn and Robert Hayden were employees of GSRAM, and are now stockholders of UCI, mere employment is insufficient to warrant the application of the continuation exception. *Id.* Because Jeff Flynn is the only continuation of GSRAM, and because his continuation from GSRAM to UCI was not resultant from the paying for GSRAM assets with shares of his stock, the common identities of GSRAM and UCI are different and as such, UCI is not a mere continuation of GSRAM.

2. UCI Has Not Breached the Trademark Settlement Agreement.

As argued above, UCI is not a successor to GSRAM, thus it is not a party to the Trademark Settlement Agreement. UCI argued in its Memorandum in Support of Cross Motion for Summary Judgment the elements necessary to prove breach of contract, and for the sake of brevity, will not repeat that argument here, but adopts that argument as if restated fully herein. Because UCI is not

a party to the Trademark Settlement Agreement, Plaintiff's breach of contract claim cannot succeed.

Additionally, if this Court determines UCI to be a party to the Trademark Settlement Agreement, UCI did not breach the Trademark Settlement Agreement, because as testified by Jeff Flynn, accepting estimates from customers that reach out to GSRAM does not constitute soliciting so long as he, or the company, did not advertise to, or solicit those customers. Each of the customers that Plaintiff claims constitute a breach of contract (Standard Plumbing Supply, Kerry Armstrong, Pioneer West Property Management, Bruce Bothwell, ESI Construction, Snow Mountain Apartments, McAlvain Construction, Larry Isham, Shay Construction, Brashears & Sons) were either existing customers of GSRAM or reached out on their own to GSRAM or UCI for an estimate (See *Flynn Supp. Dec.*, ¶¶ 11-24). Thus, there has not been a breach of contract, and Plaintiff's Motion for Partial Summary Judgment should be denied.

3. UCI Has Not Breached the Covenant of Good Faith and Fair Dealing.

As with the breach of contract, UCI fully briefed and argued this in its Memorandum in Support of Cross Motion for Summary Judgment and adopts that argument as if restated fully herein. UCI owes no covenant of good faith and fair dealing to Plaintiff because it is not a party to the Trademark Settlement Agreement.

And as stated in Section 2 above, GSRAM and UCI acted within the understanding of the Trademark Settlement Agreement, and Mr. Flynn's understanding of the agreement was that it is not considered soliciting if the customer first contacts UCI or GSRAM. Thus, Plaintiff's breach of covenant of good faith and fair dealing cannot succeed, and Plaintiff's Motion for Partial Summary Judgment should be denied.

4. UCI Has Not Been Unjustly Enriched.

UCI also briefed its argument for this cause of action in its Memorandum in Support of Motion for Partial Summary Judgment and adopts that argument as if stated in full herein. Plaintiff cannot meet the elements of an unjust enrichment claim because no benefit was conferred upon UCI by Plaintiff, thus, this cause of action cannot succeed, and Plaintiff's Motion for Partial Summary Judgment should be denied.

V. CONCLUSION

Based on the forgoing, genuine issues of material fact exist, and Defendant respectfully requests this Court deny Plaintiff's Motion for Partial Summary Judgment.

DATED: March 5, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**SUPPLEMENTAL DECLARATION
OF JEFFREY FLYNN**

I, JEFFREY FLYNN make the following declaration pursuant to Idaho Code § 9-1406:

1. I am the President of Defendant United Components Incorporated and have personal knowledge to the matters herein.
2. I was a 49% stockholder in Gem State Roofing & Asphalt Maintenance Inc. (“GSRAM”) while it was in existence.
3. During its existence, GSRAM became delinquent on payment of its employment taxes, that, coupled with the downturn in the economy rendered it unable at the time to fully repay the tax debt.

4. Because of the tax debt, the IRS liened all of GSRAM's equipment and I was instructed I could dissolve GSRAM and start a new entity that could purchase the equipment to pay off the IRS debt.

5. In October 2011, UCI was formed and GSRAM was dissolved.

6. I did not try to evade or escape the IRS debt.

7. Plaintiff alleges GSRAM and UCI tried to advertise or solicit business in Blaine County.

8. Neither GSRAM nor UCI advertised or solicited business in Blaine County and the advertisements in the Twin Falls telephone directory do not state or imply the businesses performs services in Blaine County.

9. Plaintiff provides a list of customers it alleges GSRAM and UCI solicited or did work for in violation of the Trademark Settlement Agreement.

10. UCI is not a party to the Trademark Settlement Agreement so any work it has done since incorporation is not in violation of the Trademark Settlement Agreement.

11. As to Standard Plumbing Supply, UCI provided a seal coat job, not a roofing job; the Trademark Settlement Agreement does not prohibit seal coat jobs and further, UCI could not refer this job to Plaintiff because Plaintiff does not do seal coat jobs.

12. As to Kerry Armstrong, Ms. Armstrong called UCI for an emergency repair the day after thanksgiving, UCI did not solicit work from Ms. Armstrong.

13. As to Pioneer West Property Management, UCI did not solicit any work from Pioneer West, in fact Pioneer West took over for Advanced Maintenance Services who is named in the Trademark Settlement Agreement as a customer that GSRAM could continue doing work for.

14. UCI handled the roof repair for Advanced Maintenance because GSRAM originally did the roof and it was believed to be a warranty job.

15. Bruce Bothwell contacted UCI for an estimate in May 2018, no services were rendered to Mr. Bothwell from UCI.

16. ESI Construction reached out to UCI for an estimate in February 2017, UCI did not provide any services to ESI, only the estimate.

17. UCI has done work for ESI throughout all of Idaho and is a long-time customer of GSRAM and UCI.

18. Snow Mountain Apartments received an estimate from UCI in August 2016, however no services were performed, and UCI certainly did not solicit or reach out to Snow Mountain Apartments.

19. Snow Mountain Apartments initially called for an asphalt estimate, and then sought out a roofing estimate.

20. McAlvain Construction is a longtime customer of UCI and UCI has done projects for McAlvain Construction throughout all of Idaho.

21. McAlvain Construction reached out to UCI because of a prior job UCI completed in Valley County, Idaho. A true and accurate copy of the letter from Tracy with McAlvain Construction regarding UCI's work in Blaine County is attached hereto as **Exhibit A**.

22. UCI did not solicit work from McAlvain, they contacted UCI for work on the Animal Shelter in Blaine County.

23. As to Larry Isham, Shay Construction, and Brashears & Sons, UCI did not solicit its services because UCI was not yet incorporated at the time of the estimates and invoices.

24. None of these companies or customers were solicited by GSRAM or UCI nor do they constitute a breach of the Trademark Settlement Agreement.

25. UCI has never dramatically increased its presence in Blaine County, nor did it ever openly or aggressively violate the terms of the Settlement Agreement.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: March 5, 2019.

/s/ Jeffery Flynn

JEFFERY FLYNN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

First Class Mail
 Facsimile – 208.895.1270
 Hand Delivery
 iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler

Terri Pickens Manweiler

EXHIBIT A



Equal Opportunity Employer

November 12, 2018

Kerrie Kuhn
United Components, Inc DBA: Gem State Roofing
417 Remington Street #2
Garden City, ID 83714

Re: Animal Shelter of the Wood River Valley

Dear Kerrie,

This letter is being provided to explain to those whom it may concern of our relationship with Gem State Roofing and our position with their work in the Wood River Valley.

McAlvain Construction, Inc. is working with the Animal Shelter of the Wood River Valley to build a 29,000 square foot new construction project in Hailey, Idaho. In May of 2017, McAlvain went out to bid and received bids from three bidders: 1) Dricon Roofing; 2) Signature Roofing; and 3) Professional Roofing. Our project budget was based on the low bid from Dricon Roofing in the amount of \$247,000. We entered into contract with Dricon Roofing on November 7, 2017.

On January 11, 2018, McAlvain held a preconstruction meeting at 8:30 AM with the envelope consultant for the project, PIE Consulting, as well as applicable subcontractors including Dricon Roofing. The envelope consultant that was hired by the Owner reviewed the project expectations and reiterated the design specifications that require installation per all manufacturer written instructions. On January 11, 2018 at 12:44 PM, McAlvain received an email from the estimator at Dricon Roofing expressing concerns with the requirements of the project with regards to the means and methods for installing Ice and Water shield (they wanted to use nails to install Ice and Water Shield which is against the manufacturer's instructions) as well as their concern with the schedule through the winter. In this email dated January 11, Dricon suggested that McAlvain contract with a different Contractor for this project. After attempting to have temporary protection only installed, it was apparent the best option was to cancel the Subcontract with Dricon and enter into Contract with another roofing company. The other two bids that we received were not within our budget.

A handwritten signature in black ink, appearing to be 'JK' or similar initials.

DEFENDANT000116

As our Construction Schedule states, the project was ready for temporary roofing/plastic as early as January 4, 2018. Gem State Roofing of Boise, Idaho is a Contractor that had recently completed a successful project for our Whitetail Clubhouse project in McCall, Idaho. This Clubhouse project was managed by the same Superintendent (John Hanson) and Project Manager (myself) as the team for the Animal Shelter of the Wood River Valley. On January 18, 2018, Gem State Roofing was contacted by McAlvain in the hopes of receiving a bid that would work within our budget. The Contract with Dricon was canceled on February 5, 2018 and McAlvain entered into Contract with Gem State Roofing for the full scope of roofing work on February 16, 2018.

Should you have any questions, please feel free to contact me at (208) 908-5990.

Sincerely,

A handwritten signature in cursive script that reads "Tracey Felix".

Tracey Felix
Project Manager

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
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GEM STATE ROOFING,
INCORPORATED,
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v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**SUPPLEMENTAL DECLARATION
OF TERRI PICKENS MANWEILER**

I, TERRI PICKENS MANWEILER make the following declaration pursuant to Idaho
Code § 9-1406:

1. I am the attorney of record for Defendant, and as such, I have personal knowledge of the facts herein.
2. On December 20, 2018, I attended the deposition of Jeffrey Flynn.
3. Attached hereto are true and accurate copies of the relevant portions of the deposition transcript of Jeffrey Flynn.

4. Mr. Flynn testified in his deposition that he was instructed by the IRS that the new company he set up was the separate and distinct, a different corporate veil of GSRAM. See **Exhibit A** attached hereto, page 38:3-7.

5. The Trademark Settlement Agreement provides that GSRAM will not advertise or solicit business in Blaine County. A true and accurate copy of the Trademark Settlement Agreement is attached hereto as **Exhibit B**.

6. The Trademark Settlement Agreement also provides that GSRAM “may advertise in the Twin Falls telephone directories which may be distributed in Blaine County, so long as it is not listed under any cities in Blaine County, and does not state or imply it performs services in Blaine County.”

7. Mr. Flynn testified in his deposition that if a company or individual reaches out to UCI or GSRAM and that company or individual happens to have a project in Blaine County or requests an estimate for a project in Blaine County, Mr. Flynn did not consider that to be soliciting, because UCI and GSRAM were not soliciting the business or advertising to solicit business. See **Exhibit C** attached hereto, page 77:8-15.

8. On January 15, 2019, my office received a copy of the documents Plaintiff received in response to the third-party subpoenas.

9. One of the documents within the third-party subpoena production was an email and photograph from Bruce Bothwell regarding how he found GSRAM to request an estimate. A true and accurate copy of the email and photograph is attached hereto as **Exhibit D**.

10. Also, in the third-party subpoena document production was a copy of estimates from Plaintiff to Snow Mountain Apartments. True and accurate copies of these estimates are attached hereto as **Exhibit E**.

11. Plaintiff claims it suffered damages because of UCI, however it appears on at least one job, the Snow Mountain Apartments, Plaintiff had equal opportunity to submit an estimate, so any damages claimed to be suffered by Plaintiff as a result of UCI submitting an estimate are moot.

12. The Trademark Settlement agreement provides that the parties will direct the customer to the other party if such service would violate the terms of the Trademark Settlement Agreement; Plaintiff contends UCI failed to do this, however Mr. Flynn testified in his deposition that they have in fact referred customers to Plaintiff. See **Exhibit F** attached hereto, page 78:22-25, 79:1.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: March 5, 2019.

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

First Class Mail
 Facsimile – 208.895.1270
 Hand Delivery
 iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT A

1 start up a new company. They said change the name. So
2 we went with United Components. That is how UCI
3 surfaced. They let us keep the Gem State brand. And
4 they let us keep the Asphalt Maintenance brand. We had
5 to change the corporate veil to keep those companies.

6 Q. When you say "they" --

7 A. The IRS.

8 Q. Did you have anything in writing from the IRS
9 saying that you could keep the Gem State name?

10 A. I'm sure we have got something. It went all
11 through litigation with the IRS. They controlled the
12 whole destiny of the whole process at that point.

13 Q. I'll represent to you, sir, that nothing in
14 this litigation has been produced from the IRS related
15 to them allowing you to keep the name. I would ask you,
16 and I would ask your counsel, if you would look for that
17 documentation, provide it to your counsel, and she can
18 provide it to me. Would you do that, sir?

19 A. That's fine.

20 MS. PICKENS MANWEILER: We'll certainly look.
21 I don't know what authority the IRS has to do that.

22 MR. MCFARLAND: Neither do I. I'm relying on
23 your client's testimony.

24 THE WITNESS: You don't really tell the IRS
25 what to do. They tell us what to do.

1 Q. At some point I assume --
2 A. I'm telling you no, because I didn't.
3 Q. I assume at some point there will be a
4 resolution with the IRS and you?
5 A. At some point. One year, 20 years, 30 years.
6 I have no idea.

7 Q. Have any payments been made on that --

8 A. Yes.

9 Q. When was the last time any payment was made on
10 that debt?

11 A. I just made a payment this summer towards the
12 OIC. And that was July, August. Somewhere in there.

13 Q. Do you know whether you wrote a check
14 personally?

15 A. I wrote a check.

16 Q. Or whether UCI wrote a check?

17 A. I wrote a check.

18 Q. You wrote a personal check?

19 A. Yes.

20 Q. Is the tax issue between the IRS and you
21 personally?

22 A. It was against the corporation. But I was the
23 head of the corporation. So they attached me.

24 Q. And the corporation, of course, being GSR?

25 A. That's correct.

1 Q. (BY MR. MCFARLAND) If you have something in
2 writing about them telling you that you can dissolve, or
3 that you can start a new company, or that you can use
4 the Gem State Roofing name, I would like to see that
5 paper if you have it?

6 A. I couldn't tell you if there is something that
7 they wrote down or if they just told us to do that.
8 They just told us to do it. You are going to do this
9 and that's it.

10 Q. Will you ask your tax lawyer and tax
11 accountant about that?

12 A. Yes, I will.

13 Q. So, to your knowledge, nothing ever happened
14 with Michelle's stock? The company just dissolved?

15 A. It just dissolved. She went through offers in
16 compromise on hers and they settled out on her side. We
17 were separated at that point. We were divorced.

18 Q. Has she paid that tax liability, do you know?

19 A. Yes, she did.

20 Q. Did you help her with that?

21 A. No.

22 Q. Did Gem State Roofing help her with that?

23 A. No.

24 Q. Did UCI help her with that?

25 A. No.

1 Q. There is no fight between UCI --
2 A. No.
3 Q. -- and the IRS?
4 A. None whatsoever.
5 Q. What happened first? The closing of GSR? Or
6 the opening of UCI? Or did they happen at the same
7 time?

8 A. It was pretty much sequential.

9 Q. By sequential you mean they happened at the
10 same time?

11 A. Yes. You got to close one and open the other.

12 Q. You closed one door and you opened the other?

13 A. Correct.

14 Q. Did you have to lay anybody off during that
15 time?

16 A. Just in the wintertime we always lay guys off.

17 Q. But that was due to the season --

18 A. Yes.

19 Q. -- and not due to the closing of one door and
20 opening of another?

21 A. No.

22 Q. Before GSR closed its doors did it have trucks?

23 A. Yes.

24 Q. Did it have other equipment?

25 A. Yes.

EXHIBIT B

TRADEMARK SETTLEMENT AGREEMENT

THIS AGREEMENT, effective as of the date the last of the parties hereto executes this Agreement below, is entered into by and between Gem State Roofing & Asphalt Maintenance, Inc., and Gem State Roofing, Inc.

RECITALS

- A. Gem State Roofing & Asphalt Maintenance, Inc. is an Idaho Corporation in good standing duly organized on May 30, 1995 as Flynn, Inc., having amended its name to Gem State Roofing and Asphalt Maintenance, Inc., on December 28, 1998, and having filed a Certificate of Assumed Business Name as "Gem State Roofing" on July 19, 1999, and which provides roofing and asphalt services primarily in the Boise and Twin Falls areas.
- B. Gem State Roofing, Inc. is an Idaho Corporation in good standing duly organized on December 18, 2000, which is the successor in interest of Richard Silvia, who filed a Certificate of Assumed Business Name as "Gem State Roofing" on August 12, 1997, and which provides roofing services primarily in the Blaine County area.
- C. The parties' names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services.
- D. Gem State Roofing & Asphalt Maintenance, Inc., represents that it has not performed any work in Blaine County during the time period of May 26, 2002, to May 26, 2005, other than the jobs disclosed in the Affidavit of Michelle Flynn dated May 27, 2005, a true and correct copy of which and accompanying exhibits is attached hereto as Exhibit A and incorporated herein by this reference. Gem State Roofing & Asphalt Maintenance, Inc., further represents that from June 1, 2005, until the date of execution of this Agreement, it has not performed any work in Blaine County other than that which was disclosed in said Affidavit, and that it has not undertaken any efforts to solicit advertising directed toward the Blaine County market, including but not limited to soliciting advertising in the *Names and Numbers* and *Sun Valley Directory* telephone directories.
- E. Gem State Roofing & Asphalt Maintenance, Inc. represents that it has provided roofing and asphalt services in Valley County, Idaho for the customers identified on Exhibit B attached hereto and incorporated herein by this reference.
- F. Gem State Roofing, Inc., represents that it has not performed any work in any of those counties identified in subparagraph 2(a) below within the last three (3) years other than for those customers identified in subparagraph 4(a) below. Gem State Roofing, Inc.,

COPY

further represents that from June 1, 2005 until the date of execution of this Agreement, it has not undertaken any efforts to solicit advertising directed toward any of the counties listed in subparagraph 2(a).

- G. The parties wish to resolve this matter without litigation by agreeing not to do business or advertise in the other's primary market.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN, THE PARTIES AGREE AS FOLLOWS:

1. Commencing immediately upon execution of this Agreement, Gem State Roofing & Asphalt Maintenance, Inc., agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County. Radio or television advertising on a Boise or Twin Falls station that happens to reach Blaine County is permissible so long as it does not state or imply that Gem State Roofing & Asphalt Maintenance, Inc., performs services in Blaine County. Gem State Roofing & Asphalt Maintenance, Inc., may advertise in Twin Falls telephone directories which may be distributed in Blaine County so long as it is not listed under any cities in Blaine County, and does not state or imply that it performs services in Blaine County.
2. Commencing immediately upon execution of this Agreement, Gem State Roofing, Inc., agrees that it will not advertise or solicit business in the counties listed in subparagraph 2(a), including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in said counties. Radio or television advertising on a Blaine County station that happens to reach said counties set forth in subparagraph 2(a) is permissible so long as it does not state or imply that Gem State Roofing, Inc., performs services in said counties. Gem State Roofing, Inc., may advertise in the Twin Falls Yellow Book and the Qwest Dex Twin Falls directories so long as it is listed only under cities in Blaine County and does not state or imply that it performs services in the counties set forth in subparagraph 2(a).
 - a. Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.
3. Gem State Roofing & Asphalt Maintenance, Inc., shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is

TRADEMARK SETTLEMENT AGREEMENT - 2

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put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing & Asphalt Maintenance, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the photographs of the service vehicles attached hereto as Exhibit C and incorporated herein by this reference.

- a. Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.
4. Gem State Roofing, Inc., shall not perform any services in the counties listed in paragraph 2(a) except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 4(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the attached Exhibit D.
 - a. Wells Fargo Bank (in Shoshone, Idaho only), Tonya White (Twin Falls County), Mike Blank (Twin Falls County), Mitch Matteson (Twin Falls County), and John Ward (Valley County).
 5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.
 6. It is understood and agreed that this Agreement affects the parties' respective rights only in Blaine County and the counties listed in subparagraph 2(a). No agreement is reached regarding the parties' respective rights outside these counties.
 7. Neither party shall oppose the other party's state of Idaho trademark registrations dated May 2, 2002 in the case of Gem State Roofing, Inc., and dated December 29, 2004 in the case of Gem State Roofing & Asphalt Maintenance, Inc. Gem State Roofing & Asphalt Maintenance, Inc., agrees and consents to Gem State Roofing, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in Blaine County; Gem State Roofing, Inc., agrees and consents to Gem State Roofing & Asphalt Maintenance, Inc.'s concurrent use and registration of the word mark "Gem State Roofing" effective in the counties listed in subparagraph 2(a).
 8. Except as otherwise provided in this Agreement, this Agreement is solely for the benefit of the parties hereto and no other person or entity is entitled to rely upon or benefit from this Agreement or any term herein, except by a writing signed by all of the parties hereto, or as stated in paragraph 13.

9. The waiver or failure to enforce any provision of this Agreement shall not operate as a waiver of any further breach of any such provision or any other provision herein.
10. This Agreement (including the Recitals, all Exhibits attached hereto, all of which are hereby expressly incorporated herein by this reference) constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all prior understandings, if any, with respect hereto.
11. If any litigation or proceeding is commenced between or among the parties or their representatives arising out of, or relating to, this Agreement, including, without limitation, a breach of any covenant, condition, representation, warranty, agreement, or provision of this Agreement, the prevailing party shall be entitled, in addition to such other relief as may be granted, to have and recover from the other party reasonable attorneys' fees and all costs of such action.
12. The terms of this Agreement may not be modified, amended, or otherwise changed in any manner, except by an instrument in writing executed by each of the parties.
13. This Agreement shall be binding upon and shall inure to the benefit of the successors, assigns, personal representatives, heirs, and legatees of the respective parties.
14. The provisions of this Agreement shall be construed and enforced in accordance with the laws of the State of Idaho. Any action for breach of this agreement shall be brought and litigated in the district court of the state of Idaho, in the county in which the alleged breach occurred. Time is of the essence. Each party hereby acknowledges, represents, and warrants that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the drafting, preparation, and negotiation of this Agreement; (iii) each party has been represented by its own legal counsel; and (iv) any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement, or any portion herein.
15. Each party to this Agreement warrants that it had independent counsel review the terms and conditions of this Agreement, and enters into this Agreement knowingly based on the advice of independent counsel. Each party further acknowledges and represents that it fully understands the meaning and ramifications of this Agreement, and no implication shall be drawn against any party by virtue of the drafting of this Agreement, since this Agreement was drafted by both parties. With regard to the drafting of this Agreement, each party shall bear its own attorney fees and costs.
16. Each party has the requisite power and authority to enter into this Agreement, to perform

its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any an all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this 20 day of October, 2005.


Michelle Flynn
President of Gem State Roofing &
Asphalt Maintenance, Inc.

DATED this _____ day of _____, 2005.

Rick Silvia
President of Gem State Roofing, Inc.

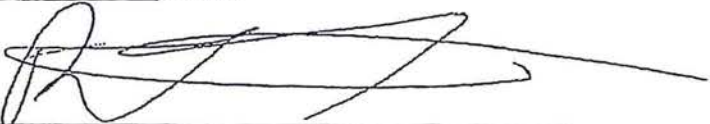
its obligations herein, and to consummate the transactions contemplated herein. The execution and delivery of the Agreement by the parties and the consummation by the parties of the transactions contemplated herein have been duly approved by each party. No other proceedings on the part of each party are necessary to authorize the execution of this Agreement and the transactions contemplated herein.

- 17. Each party hereto, for itself, its successors, legal representatives, agents and assigns, remises, releases, acquits, and forever discharges the other party hereto, its successors, legal representatives, agents and assigns, and any and all persons acting for, by, with or through or in any way on behalf of them, of and from any an all costs, expenses, claims, controversies, demands, damages, losses, liabilities, actions, and causes of action of every and whatever kind, name or nature, known or unknown, either in law or in equity, on account of, arising out of, or in any way growing out of the infringing use or claim of infringing use of the GEM STATE name or mark in any way prior to the date of this Agreement.
- 18. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but together which shall constitute one and the same instrument. An executed version of this Agreement which has been signed and transmitted by facsimile or other electronic or mechanical means shall be deemed an original. At the request of either party, the parties will confirm a facsimile transmission of an executed document by signing an original document.

DATED this _____ day of _____, 2005.

 Michelle Flynn
 President of Gem State Roofing &
 Asphalt Maintenance, Inc.

DATED this 19th day of October, 2005.



 Rick Silvia
 President of Gem State Roofing, Inc.

EXHIBIT A – AFFIDAVIT OF MICHELLE FLYNN

TRADEMARK SETTLEMENT AGREEMENT - 6

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STATE OF IDAHO)

COUNTY OF ADA)

Michelle Flynn having been first duly sworn deposes and says:

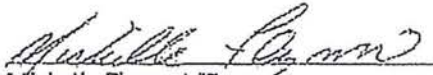
1. I am over the age of 18 and competent to testify and make the following statements based on my own personal knowledge.
2. I am the President of Gem State Roofing and Asphalt Maintenance, Inc., a duly incorporated Idaho Corporation.
3. I am the custodian of the business records for Gem State Roofing and Asphalt Maintenance, Inc.
4. I have conducted a review of the business records for Gem State Roofing and Asphalt Maintenance, Inc. for the purpose of ascertaining the extent of the work undertaken by Gem State Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho during the three (3) year period from May 26, 2002 through May 26, 2005.
5. I found the following documents that are attached hereto which reflect the jobs that Gem State Roofing and Asphalt Maintenance in fact performed during the aforesaid period. Said attached records reflect the profits that were made from said jobs.
6. After a search of my business records during this three year period, I am confident that there were no other jobs performed by Gem State

Roofing and Asphalt Maintenance, Inc. in the Wood River Valley, Idaho.

- 7. At present I have one pending job in the Wood River Valley that has been estimated but no work has commenced. The anticipated profits from our \$ 13, 220 estimate is approximately \$ 3,000.

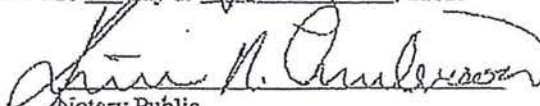
FURTHER YOUR AFFIANT SAITH NOT.

DATED this 27 day of May, 2005.


 Michelle Flynn, Affiant

Sworn to and subscribed before me this 27th day of May, 2005.




 Notary Public
 Residing At: Boise
 My Commission Expires: 9-18-09

DATED this 27th day of May, 2005.


 JOHN SULLIVAN

05 27 2005 FRI 04:13 FAX 8534

ANGSTMAN LAW PLLC
ELLE

PEDERSEN AND COMPANY
21 3 8481

0005 012
PAGE 05/09
p.4

Kelly Herrera, Called office I always answer the phone" Gen State Roofing and Asphalt Maintenance this is Michelle." Know mention of Rick was ever made and she now we were coming from Boise.

Material: \$220.00

Vehicle and Gas: \$100.00

Employee's: \$200.00 with taxes and insurance

Profit: \$120.00

JELLE

Estimate

DATE	ESTIMATE #
02/2004	5544

NAME / ADDRESS
Kelly Herra P.O. Box 6435 Ketchikan Id 99901 720-4479 788-1392 Fax

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of 163 Spur Lane, Ketchikan Id:</p> <ol style="list-style-type: none"> 1. Drill pilot holes for installation of snow clips on front entry. 2. Install approximately ten snow clips to shingle roof system. 3. Fasten with sinker screws set in caulk seal at pilot holes. 4. Any other roof repairs at time and materials over snow clip price. <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gen State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be assessed only upon written order, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workman's Compensation and Public Liability insurance on above work to be taken out by Gen State Roofing.</p>	540.00

We look forward to doing business with you.	TOTAL 540.00
---	---------------------

SIGNATURE _____

Spring Condo's

Material: 39,221.98
Ply wood and other: \$12,853.07
Subcontractors: \$9,550.00
Payroll: 11,451.12
Taxes: 4936.34
Perdium: 2,520.00
Hotel: 1,440.00
Other fee's dump: 1098.20
Vehicles: 2,500.00
Insurances: 2,817.75
Vehicle Insurance: 498.00
Liability: 700.00

Other business expenses: 3,000.00

Profit: 11,550.54 which pay other expense occurred over time.

Mrs. Lipton, The same as Kelly Heran called office worked with her for a month to get scheduled so that her husband could be there.

Material: \$ 1,258.74

Payroll: \$2039.83

Taxes: \$699.04

Insurance: \$562.58

Vehicles: \$210.00

Subcontractor Foremen: \$875.00

Profit: \$743.81

LLC

20 08 461

Estimate

DATE	ESTIMATE #
5/4/2004	3822

NAME / ADDRESS
Mrs. Lipton 3940 Middle Valley Dr. Bloom Field Hills, MI 48302 248-642-6529 Fax 248-514-5294 cell 208-720-2601 Ketchum

DESCRIPTION	TOTAL
<p>We hereby propose to furnish all the materials and perform all the labor necessary for the completion of the roof system at 460 N. Washington, Ketchum Id. Chester and Lakes</p> <ol style="list-style-type: none"> 1. Tear off existing roof system to ply wood decking. 2. Install 1/2 inch recovery board 3. Install single ply mechanically fastened roof system. Use existing coping cap. 4. Lower deck on back. Install single ply with custom metal around perimeter. 5. Exclusion: Ply wood decking that may need to be replaced. This will not be known until old roof is removed. Ply wood cost is \$55.00 per sheet over cost of estimate you will be notified first. <p>Ten year manufacturer warranty. On single ply that is mechanical roof system not included. All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made the same day of completion unless otherwise stated by Gen State Roofing. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by Gen State Roofing.</p>	6,200.00

We look forward to doing business with you.	TOTAL 56,261.00
---	------------------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3804

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shock P.O. Box 3722 Ketchum Id 83340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
We hereby propose to furnish all the materials and perform all the labor necessary for the completion of roof system at Springs Condo's located at 125 Howard Ketchum, Id 83340:	
1. Tear off tile roof to existing deck.	
2. Remove all existing tile roof nailer and curbs.	
3. Install ice and water shield to entire sub straight or ply wood deck.	
4. Rebuild cricket at chimney chase on large building where six pipes existing for fireplace area.	525.00
5. Remove and rebuild Boston to code all new product. Boston is roof ventilation system.	4,200.00
6. Install all new pipe flashings with caps. Plumbing pipes to be addressed by plumber.	
7. Envelope all counter flashings at skylights and eve areas with ice and water shield.	
8. Install drip edge around entire perimeter and at terminations.	
9. Apply fifty year architectural shingle either Elk or Certinteed to entire sub straight surface and Boston areas top and bottom.	64,975.00
10. Extra cost for upgrade to Presidential Shake TL Charcoal Black.	4,700.00
11. Roof system to be high wind nailed or six nailed.	
12. Job site safety high profile.	
13. Install five hundred snow clips to roof system. Five hundred should be sufficient. If 1,000 are installed price is \$6,000.00. For fifteen hundred \$9,000.00.	3,000.00
14. Reading permit through city of Ketchum. Project to last approximately 14-21 days weather permitting.	1,062.00
Alternate to upgrade SBS High Profile Ridge to hips ridge and rakes versus metal drip edge. Deduct if not accepted on rake \$3,450.	1,725.00
Alternate on roof siding and corner trim. Remove and replace for proper installation of counter flashing and ice and water shield not to exceed.	10,275.00
Plumbing pipes, heating pipes, and exhaust pipe penetrating roof to be secured and rebuilt by heating and plumbing company. Gem State Roofing is not responsible for this phase of work.	
Any unforeseen circumstances under roof deck or metal will become an extra cost over contract.	

We look forward to doing business with you.	TOTAL
---	--------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Sheek P.O. Box 3722 Ketchikan Id 99940 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
Gem State Roofing to be in full contact with gutter contractor, electrical contract, or any subs as per heating and plumbing on roof system.	
Gem State Roofing scope of roof construction.	
All demo to roof system metal, existing snow bracing, tile roof, and siding for proper installation.	
All siding, trim, and Boston rebuild by Gem State Roofing. Any decking or structure damage unforeseen will also be executed by Gem State Roofing in writing of change order.	
Insulation of ice and water shield, counter flashing, drip edge, skylight flashings, wall flashings, valley metal, roofing product, Presidential TL Lifetime shingles, elevation ridge SBS modified high profile hip and ridge color Charcoal Black roof and ridge.	
Demol cricket behind large fireplace flue area. Rebuild cricket for proper drainage.	
Over build frame work above skylight on east building. West side of roof for proper construction of new roof system.	
Elevation ridge- on life time warrantee life of warrantee of roof system field.	
Any deck damage plywood remove and replace \$50.00 per sheet 318 sheets worst case scenario, all new decking \$15,900.00.	12,600.00
Prep solarium metal on parapet walls. Pressure wash metal, primer seal acrylic sealant, and paint elastomeric paint. Twelve hours labor.	900.00
Plus paint. Not to exceed.	175.00

We look forward to doing business with you.	TOTAL
---	--------------

SIGNATURE _____

Estimate

DATE	ESTIMATE #
5/7/2003	3604

NAME / ADDRESS
Advanced Maintenance Services Attention: Scott Shack P.O. Box 3722 Ketchikan Id 99340 720-1773 788-2242 Fax

DESCRIPTION	TOTAL
<p>Please keep in mind that this project is a complete roof rebuild any unforeseen damage to beams and trusses decking to be extra cost over contract.</p> <p>Exclusions: Deck damage, fascia damage, structure damage, siding, and parapets.</p> <p>Barricades: Ground monitor safety man at all times of work. Shovel for debris removal supplied by Gem State Roofing. Job site to be kept clean and organized at all times. All change orders in writing by Gem State Roofing and Representative for the Springs Condoms should be readily available. All manufacturer warranty information supplied by Gem State Roofing.</p> <p>All material is guaranteed to be as specified, and the above work to be performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner.</p> <p>Payment to be made 1/2 upon acceptance of contract due to special order of materials. Check to be written to supplier and Gem State Roofing. Lien release to be provided for materials at that time. Balance due upon completion of project. Lien release for full project to be signed at that time. Once estimate is signed it becomes a binding contract. Any breach of contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract.</p> <p>Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Workman's Compensation and Public Liability Insurance on above work to be taken out by Gem State Roofing.</p>	

We look forward to doing business with you.	TOTAL	\$104,137.00
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SIGNATURE _____

EXHIBIT B – GEM STATE ROOFING & ASPHALT MAINTENANCE, INC. VALLEY
COUNTY JOBS

TRADEMARK SETTLEMENT AGREEMENT - 7

M:\Clients\Gem State Roofing & Asphalt Maintenance - 36211\36211.0003 - Trademark Infringement\Agreement Final 101705.doc

Brundage Realty, 118 N. Main, Donnelly, Idaho 83638 09/28/04 Invoice #1738

Norm & Robert Haliday, 180 Shadow Tailor Between Cascade and Donnelly, Id 09/10/04 and 10/27/03 Invoice #3956 & 1606

Carl Thompson 365 Knights Rd., McCall, Id 09/30/02 Estimate #3558

Craig Mozkis 14135 Jefferson Rd. McCall Id 83638 06/29/04 Estimate #3874

Dick Darmody, Forest Hayes McCall, 09/28/04 Invoice #1774

Ellsworth Construction 254 McCall Id 10/19/03 Invoice # 1122

Dale Bergeson 1211 Boro's New Meadows, Id 05/17/04 Invoice #1693

Mike Churchill 300 Mission St. McCall Id 09/30/02 Estimate #3557

Richard Harvey 255 Brook Dr. McCall Id 10/15/03 Estimate #3712

Perception Construction, Rick Winkeller, 02/11/05 Off plans Estimate #4050

State Wide Construction, Brian Warner, 7/28/04 Invoice # 1740

Scott McDaniels, LarMac, McCall Id 07/01/04 Repeat Customer, Invoice #3885

Scott Jones, 4902 Blue Grass 04/30/05 Estimate # 4130

Rocky Mountain CTR, 3580 Warren Wagon Rd. 10/21/02 Invoice 3562

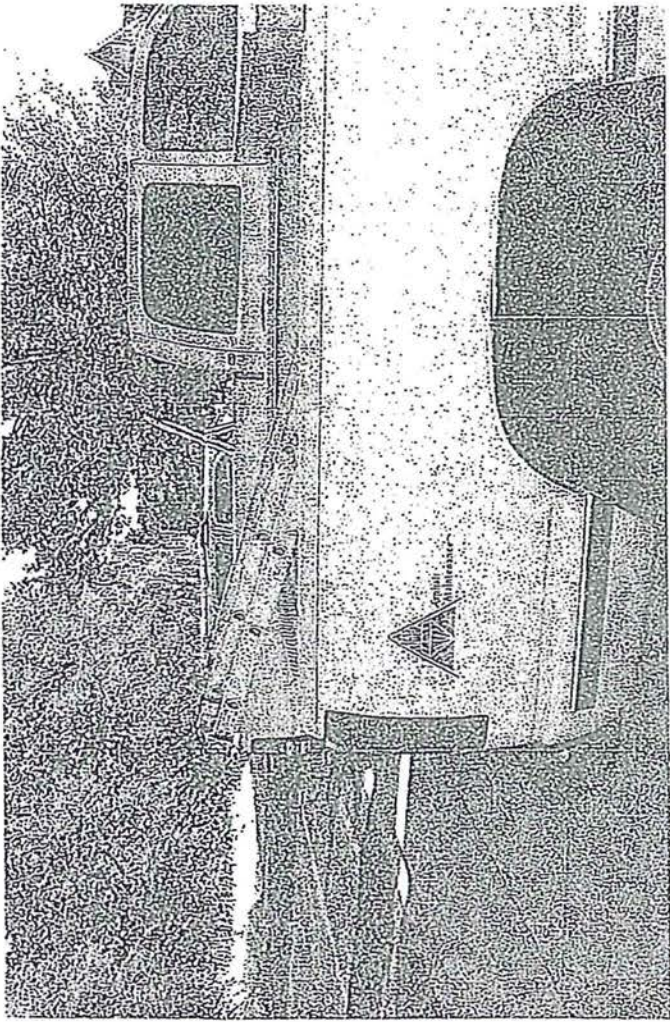
World Marc out of Washington Bid work in McCall 05/01/02 Estimate # 3477

John Dahl 2450 Sheri Lane McCall, Long time friend we have worked for in 03 and 04.

Berry Bloom Meadow Creed in 1998 under Ellsworth Construction different invoice than above.

Forrester's, Lynn Mitchell, long time friend off and on in 03 and 04

EXHIBIT C – PHOTOGRAPH OF GEM STATE ROOFING & ASPHALT LOGO ON
SERVICE VEHICLES



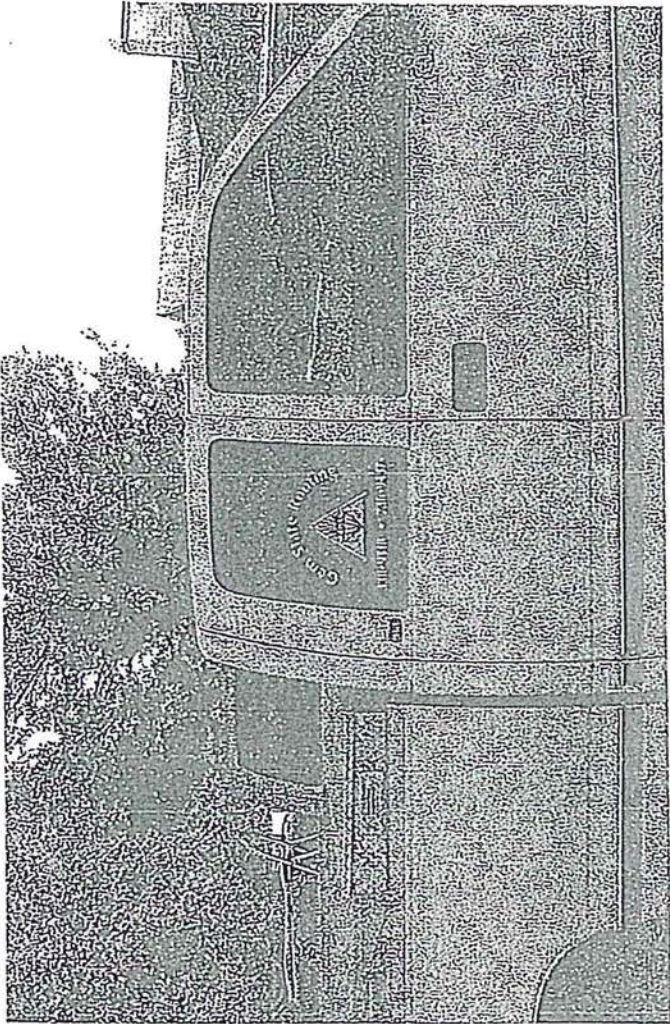
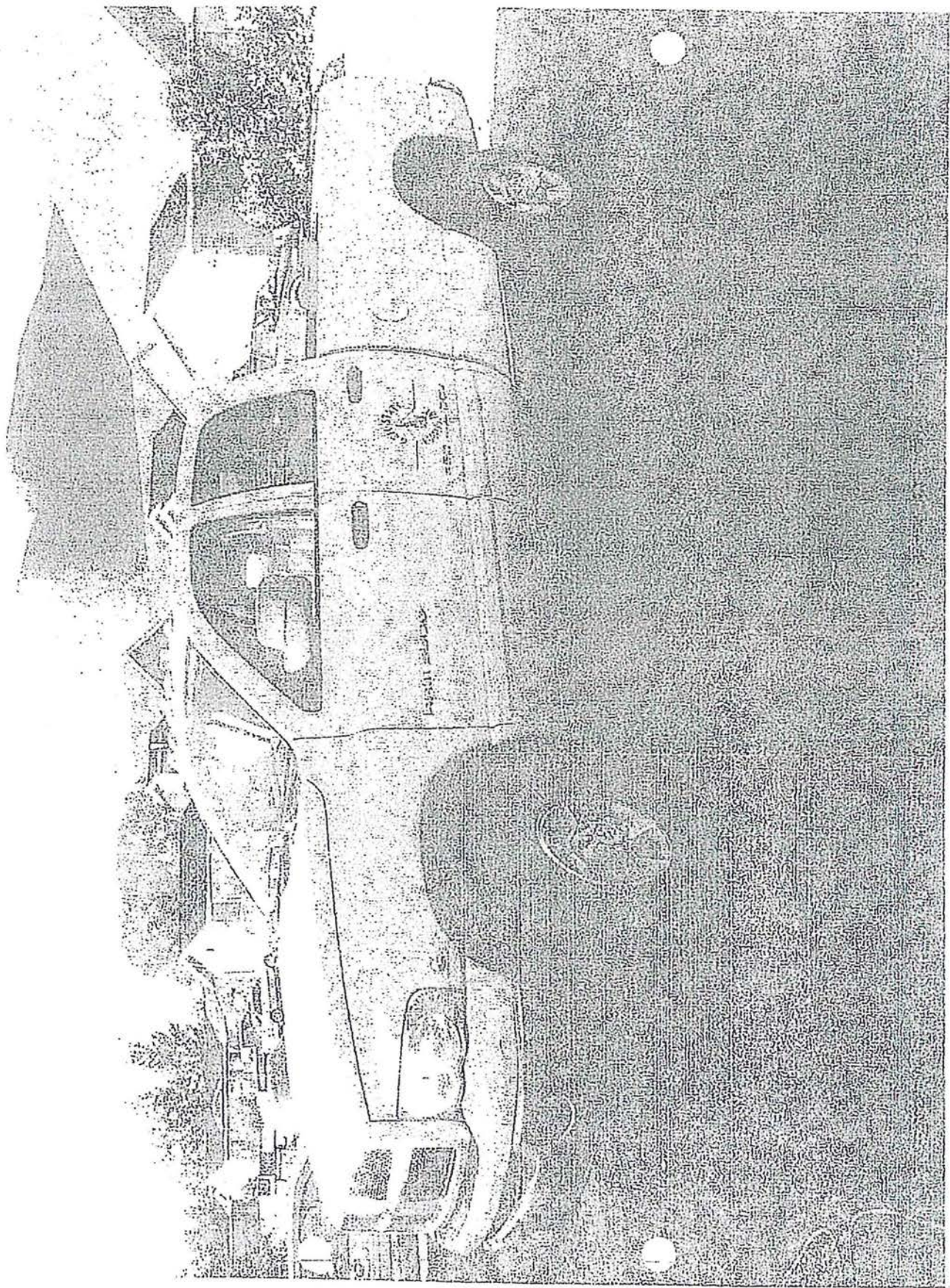


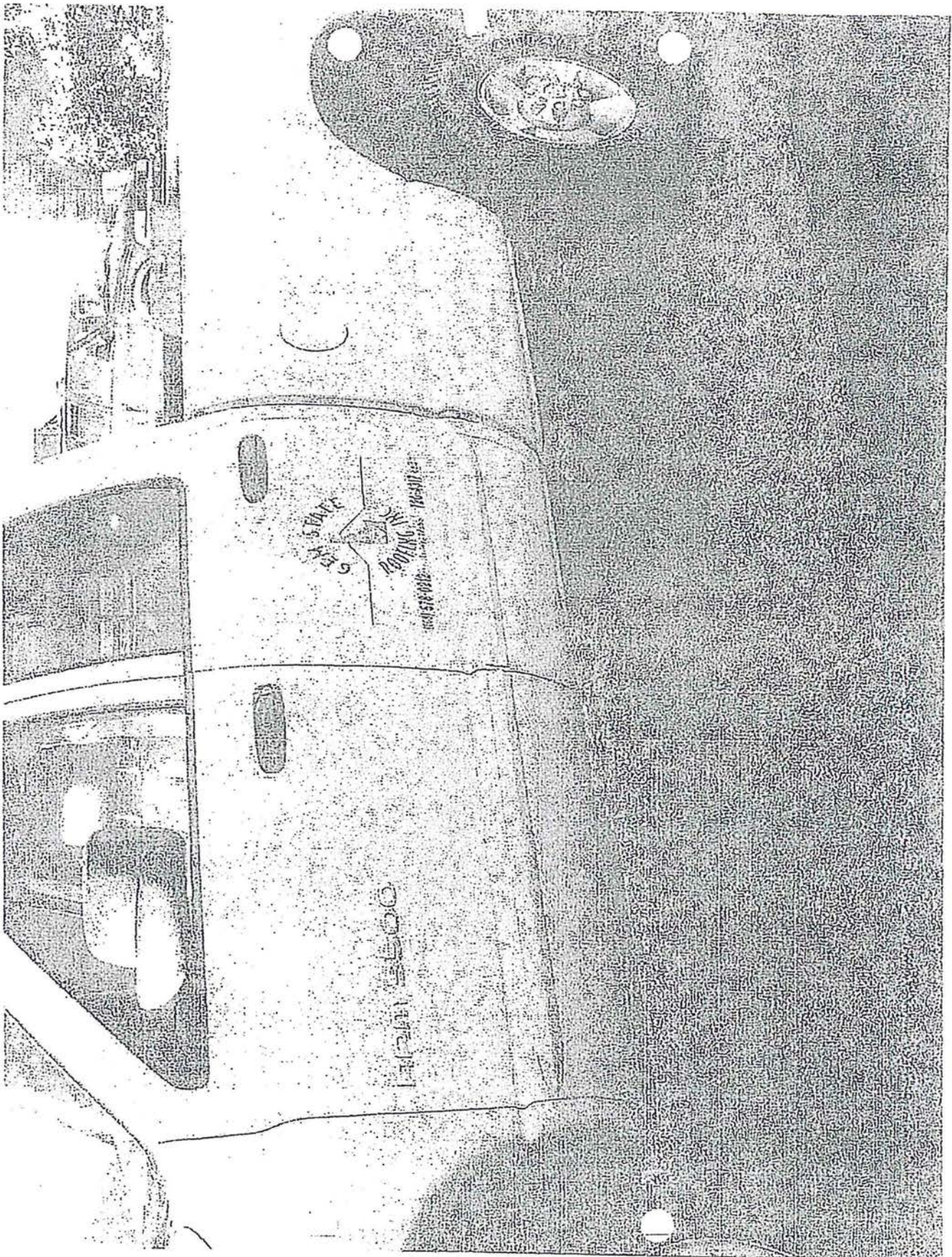
EXHIBIT D – PHOTOGRAPH OF GEM STATE ROOFING, INC. LOGO ON SERVICE
VEHICLE

TRADEMARK SETTLEMENT AGREEMENT - 9

M:\Clients\Gem State Roofing & Asphalt Maintenance - 36211\36211.0003 - Trademark Infringement\Agreement Final 101705.doc



000335



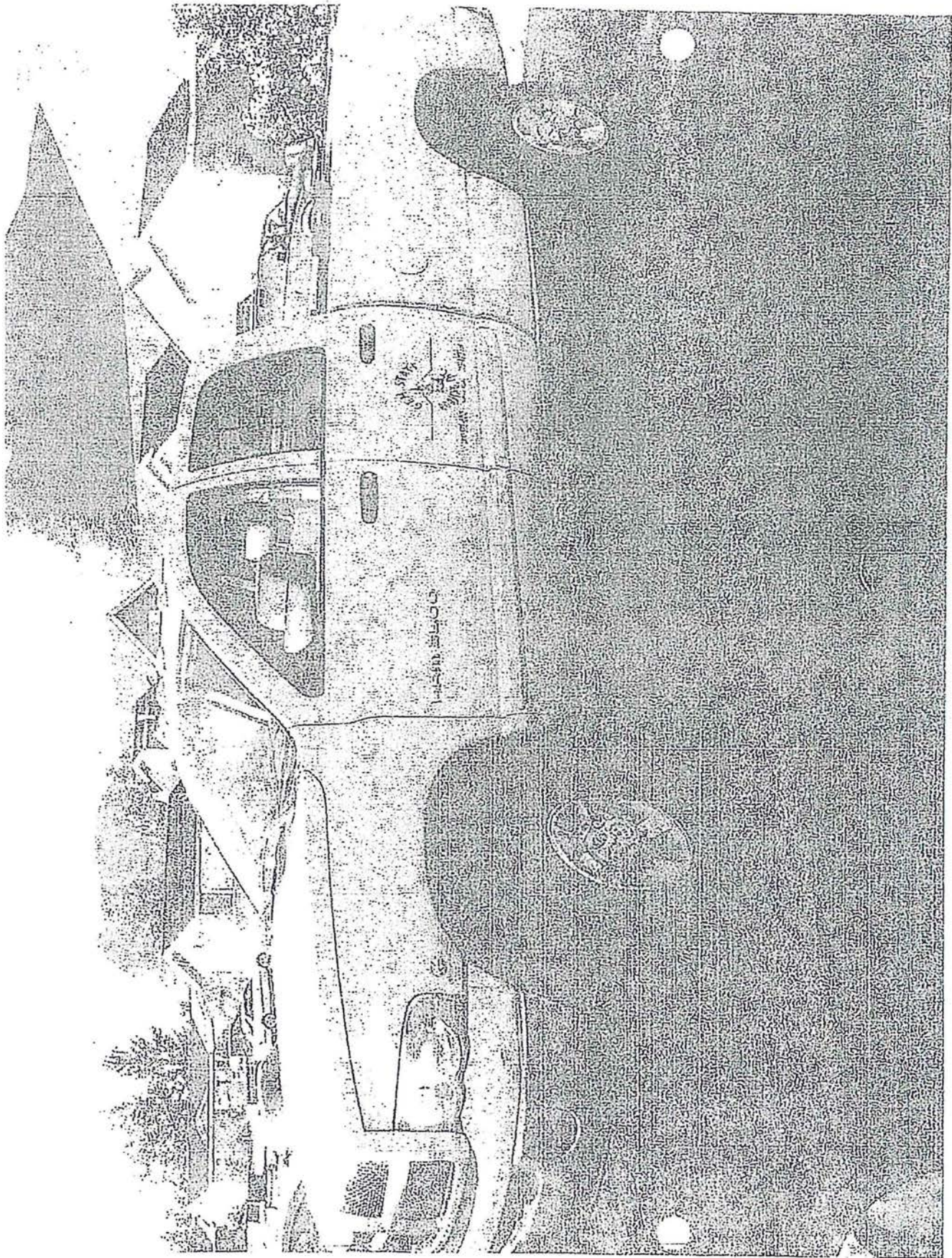


EXHIBIT C

1 document. So about a third of the way down. Your name
 2 is listed as vice-president. Do you see that?
 3 A. Yes.
 4 Q. Was that your accurate title as of 2004?
 5 A. As far as I can recall, yes.
 6 Q. Do you recall applying for a state trademark
 7 in Gem State Roofing?
 8 A. Yeah, I remember a conversation; yes.
 9 Q. Direct your attention to page two of Exhibit
 10 No. 11. What is that?
 11 A. It's a business card with a letterhead logo.
 12 Q. And that is an accurate copy of what your
 13 business card looked like in 2004?
 14 A. As far as I can recall, yes.
 15 (Exhibit 12 marked.)
 16 Q. (BY MR. MCFARLAND) Sir, I'll hand you what
 17 has been marked as Exhibit 12 to this deposition. Do
 18 you have that in front of you?
 19 A. Yes.
 20 Q. Do you recall ever seeing that document
 21 before?
 22 A. I don't.
 23 Q. Do you recall that the State of Idaho issued
 24 you a Registration of Trademark-Service Mark for the
 25 diamond shape, including the words Gem State Roofing?

1 Q. Take all of the time you need.
 2 A. Yeah, I don't recall seeing this. It says it
 3 is a trade agreement. I have never been through it.
 4 Q. I'm going to draw your attention to page one,
 5 Paragraph A. It starts with the words "Gem State
 6 Roofing & Asphalt Maintenance, Inc. is an Idaho
 7 corporation in good standing duly organized on May 30,
 8 1995 as Flynn, Inc." Do you see that?
 9 A. Yes.
 10 Q. Is that accurate that Gem State Roofing &
 11 Asphalt Maintenance was a continuation of Flynn, Inc.?
 12 A. Yes.
 13 Q. I'm going to invite you to turn to page two
 14 of that document. There is a Paragraph No. 1. Do you
 15 see that?
 16 A. Yes.
 17 Q. The first line states, "Commencing immediately
 18 upon execution of this agreement, Gem State Roofing &
 19 Asphalt Maintenance Inc., agrees it will not advertise
 20 or solicit business in Blaine County." Do you see that?
 21 A. Yes.
 22 Q. Do you recall after the execution of that
 23 agreement whether Gem State Roofing & Asphalt
 24 Maintenance, Inc. advertised or solicited business in
 25 Blaine County?

1 A. Yes.
 2 Q. Do you have any reason to doubt the
 3 authenticity of that document?
 4 A. No.
 5 (Exhibit 13 marked.)
 6 Q. (BY MR. MCFARLAND) Sir, you have been handed
 7 what has been marked as Exhibit 13 to this deposition.
 8 Do you have that in front of you?
 9 A. Yes.
 10 Q. Do you know what that is?
 11 A. Trademark Settlement Agreement.
 12 Q. Do you recall ever seeing that document before
 13 today, sir?
 14 A. Yeah, but I don't recall what is in it. But I
 15 do recall seeing it.
 16 Q. Just before the break we talked about a
 17 settlement agreement -- I think you called it a non-
 18 compete that your then-wife Michelle had signed related
 19 to Gem State Roofing in Blaine County.
 20 Do you recall that conversation between you
 21 and I a few minutes ago?
 22 A. Yes.
 23 Q. Is this that agreement that you were
 24 referencing?
 25 A. I need to look at it.

1 A. We did not solicit business in that county.
 2 The advertisements are reciprocal from the Twin Falls
 3 phonebooks to the Hailey area.
 4 Q. Just so we are using the same language. What
 5 do you understand the term solicit business to mean?
 6 A. Going after customers, reaching out, faxing
 7 and e-mailing for more business in that area.
 8 Q. Would providing an estimate or a bid
 9 constitute soliciting business?
 10 A. If somebody had called us -- no, not
 11 soliciting business. That is somebody contacting us. A
 12 previous customer possibly. Clientele from here. That
 13 is no soliciting when somebody reaches out to us to give
 14 a bid. That is not soliciting as far as I know the law.
 15 I don't know 100 percent.
 16 Q. I want to understand your testimony. Your
 17 testimony is if a person in Blaine County reached out to
 18 you for work that would in your mind not be soliciting
 19 business. Is that what you are saying?
 20 A. I haven't given any bids there. I personally
 21 myself haven't been soliciting business there. If that
 22 is what you are asking me.
 23 Q. I'm asking you a hypothetical question. If a
 24 customer called your business, whether Flynn, Inc., Gem
 25 State, UCI, if a customer called whatever business you

EXHIBIT D

From: [Bruce Bothwell](#)
To: ryan@mcfarlandritter.com
Date: Tuesday, December 11, 2018 5:35:26 PM
Attachments: [IMG_3047.jpg](#)
[Untitled attachment 00434.bt](#)

Here's where we found them

Ads

Idaho Roofing Contractors - Roofers idahoroofingcontractor...
Your Local Roofers. Installation, Leaks & Repairs. We Do It All!

Roofing Contractors www.HomeAdvisor.com
Locate Five-Star Rated Roofing Pros. Read Reviews Before You

Gem State Roofing

Roofing Contractor

★★★★★ 0 reviews on Yahoo

Is this your business? [Verify your listing](#)

Twin Falls, ID 83301

(208) 736-9437

[Directions](#)

Reviews

We currently don't have any reviews for **Gem State Roofing**

Ads

Idaho Roofing Contractors - Roofers - We Do It All

idahoroofingcontractors.com

Your Local Roofers. Installation, Leaks & Repairs. We Do It All!

Reroofing Services

Roof Inspections

Roof Installations

Roofing Contractors | homeadvisor.com

www.HomeAdvisor.com

★★★★★ 18062 reviews

Locate Five-Star Rated Roofing Pros. Read Reviews Before You Hire!

Roofing Contractors

Shingle Roof Repairs

Asphalt Shingle Roofers

Roof Replacement

Flat Roof Experts

Winter Projects

Gem State Roofing - Search for Gem State Roofing. | GoLocal.guru

www.GoLocal.guru/Gem State Roofing

Compare Top Rated Local Businesses. Find Services in Your Area & Get Results Now

Local Roofing Contractors - Find 2018 Deals | modernize.com

modernize.com/Local/Roofing

★★★★★ 80 reviews

Free & Easy Quotes Available From Top Contractors In Your Area - Act Now & Save!

Roofers Near You

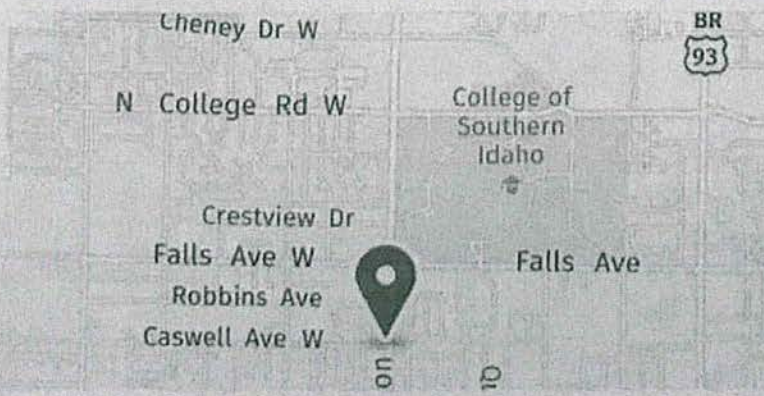
Affordable Local Roofing

Cheap Local Roofing

Free Quotes From Top Pros

Free \$10,000 Guarantee

Find Local Roofers



Find Nearby: ATMs · Hotels · Night Clubs · Parkings · Movie Theatres · Similar Roofing Contractors

Categories: Roofing Contractor

Payment Types: Credit Card

Cards Accepted: Discover, Amex, Mastercard, Visa

000342

EXHIBIT E

Gem State Roofing Inc

PO Box 3916
Hailey, ID 83333-3916
208-578-0212

Proposal

Proposal Date: 10/26/2018

Proposal #: 2871

Project:

Bill To:

Snow Mountain Apartments
P.O. Box 1566
Hailey, ID 83333

E-mail gemroof1@qwestoffice.net

FAX# 1-208-578-0234

Description	Quantity	Rate	Total
<p>We hereby propose to remove the existing roofs off of all buildings with the exception of the "B" building which has already been re-roofed. We will apply a new 30 Year Landmark Architectural composition shingle with new 24 gauge Dark Bronze Kynar metal flashings where applicable. Includes applying Grace Ice & Water Shield to all roof to walls, pipe jacks, and a minimum of 6 feet up all eaves of the buildings. Bid includes a "High Profile" Mountain Ridge option. Bid includes all dump fees and building permits.</p>			
Landmark 30 Year Architectural Composition shingle. (per sq.)	283	104.16	29,477.28
Landmark 116 Starter Strip. (per bndl.)	16	55.00	880.00
Landmark 30 Ridge Cap. (per bndl.)	26	56.00	1,456.00
Grace Ice & Water Shield. (per 2sq. box)	48	227.00	10,896.00
Style "D"- metal. (per ft)	2,730	0.58	1,583.40
24 gauge 6"x 6" Kynar step flashing.	428	2.92	1,249.76
24 gauge Kynar "L"- metal. (per ft.)	90	2.92	262.80
#30 GMX synthetic roof felt. (per roll)	19	155.00	2,945.00
24 gauge Kynar Stucco Diverters.	35	15.00	525.00
24 gauge Kynar coated "V"- valley metal. (per ft.)	5	5.84	29.20
Coil nails. 1.25" (per box)	17	36.58	621.86
slap staples	26	5.00	130.00
1" Plasticaps. (per box)	7	26.00	182.00
Vulkem, Geocell	44	7.50	330.00
Universal pipe jack.	53	7.38	391.14
Dump Fee. (per 12 yds.)	33	190.00	6,270.00
Labor	1	63,452.00	63,452.00
4" J-vent.	36	9.31	335.16
"J"- Vent. (6")	5	13.00	65.00
Building Permit.	1	78.00	78.00
TERMS:			
Thank you for choosing Gem State Roofing, Inc. for this estimate	Total		

SIGNATURE

Gem State Roofing Inc

PO Box 3916
Hailey, ID 83333-3916
208-578-0212

Proposal

Proposal Date: 10/26/2018

Proposal #: 2871

Project:

Bill To:

Snow Mountain Apartments
P.O. Box 1566
Hailey, ID 83333

E-mail gemroofl@qwestoffice.net

FAX# 1-208-578-0234

Description	Quantity	Rate	Total
* 50% upon start up of job, 20% upon delivery of shingles to all buildings, and 30% upon completion of the job.		0.00	0.00
* Any bad decking found during removal of existing roof will be replaced @ Time and Materials above existing proposal price. This stipulation is per building code and cannot be estimated until existing roof is removed.		0.00	0.00
* Bid does not include snow removal.		0.00	0.00
Thank you for choosing Gem State Roofing, Inc. for this estimate		Total	\$121,159.60

SIGNATURE _____

EXHIBIT F

1 are operating and said I would like you to come out and
2 do work, or I would like you to come out and give a bid,
3 is that soliciting business?

4 A. That is not soliciting to me, no.

5 Q. If you, under whatever business name you are
6 operating under at the time, if you or someone from your
7 company traveled to Blaine County and provided a written
8 estimate, or a written bid to a potential customer,
9 would that constitute soliciting business under your
10 understanding?

11 A. No.

12 Q. I would like you to turn to page three, sir.
13 Paragraph No. 5 on page three. It states, "If either
14 party receives a request for work that is prohibited
15 from performing under this agreement, it will direct the
16 person or entity requesting the work to the other
17 party." Do you see this?

18 A. Yes, I do see that.

19 Q. Did you, or any of your companies, to your
20 knowledge, ever direct a potential customer to my
21 client, Gem State Roofing, in Blaine County?

22 A. Did we direct a potential customer to him?

23 Q. Yes, sir. That is my question.

24 A. We have had calls for wanting us to do work up
25 there before and we told them we couldn't work in that

1 document. Do you see Michelle's signature on page five?

2 A. Yes.

3 Q. Does that appear to be an accurate copy of her
4 signature?

5 A. Yes.

6 Q. Do you have any reason to believe she did not
7 sign that document?

8 A. No.

9 Q. Starting on page -- the page numbering get
10 kind of crazy. But after Mr. Sylvia's signature page is
11 the beginning of Michelle Flynn's affidavit. Do you see
12 that?

13 A. Yes.

14 Q. The first page of her affidavit, Paragraph 5,
15 states, "I found the following documents that are
16 attached hereto, which reflect the jobs that Gem State
17 Roofing and Asphalt Maintenance in fact performed during
18 the aforesaid period, said attached records reflect the
19 profits made from said jobs." Do you see that?

20 A. What page?

21 Q. First page of Michelle's affidavit.

22 A. I got it.

23 Q. And below that Paragraph No. 6. Do you see
24 that?

25 A. Yes.

1 area. And we referred stuff back to him. Yes, we have.

2 Q. Can you identify any particular customer?

3 A. I can't. That is just through the office.

4 What they have told me. Hey, we have had calls. And we
5 weren't doing anything up there. I haven't done
6 anything up there. I have new business partners that
7 weren't clear on the whole process.

8 Q. Have you personally ever told a customer, or a
9 potential customer, or referred Gem State Roofing in
10 Blaine County. You personally?

11 A. I have not.

12 Q. Do you recall approximately when the last time
13 was that someone from your company referred --

14 A. I don't recall.

15 Q. Let me finish my question. Do you know
16 approximately when someone from your company referred a
17 customer or a potential customer --

18 A. No.

19 Q. Can I just finish so the record is clear. I
20 will start again. Do you know when approximately you or
21 someone from your company referred a customer or a
22 potential customer to Gem State Roofing in Blaine
23 County?

24 A. No.

25 Q. I invite you to turn to page five of that

1 Q. "After search of my business records during
2 this three year period I am confident there were no
3 other jobs performed by Gem State Roofing and Asphalt
4 Maintenance, Inc. in the Wood River Valley, Idaho."
5 Do you see that?

6 A. Yes, I do.

7 Q. And there follows a number of documents. Most
8 of which are estimates. And I want to ask you about
9 each one of those.

10 A. Okay.

11 Q. So the first estimate I'm looking at it looks
12 like it is for maybe a Kelly Herara for \$640. Am I
13 reading that correctly?

14 A. I have no idea. This is the first time I have
15 seen this.

16 Q. Do you know whether that is an estimate from
17 one of your companies?

18 A. It doesn't have a letterhead on it. It looks
19 like our font and the layout.

20 Q. Do you recall a Kelly Herara in Ketchum,
21 Idaho?

22 A. I don't recall.

23 Q. Do you have any reason to think that is not an
24 estimate from your company?

25 A. It looks to be one. Like I said, there is no

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**REPLY IN FURTHER SUPPORT OF
DEFENDANT’S CROSS MOTION
FOR SUMMARY JUDGMENT**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., submits this Reply in Further Support of Defendant’s Cross Motion for Summary Judgment.

I. RESPONSE TO PLAINTIFF’S ARGUMENT

Both Plaintiff Gem State Roofing, Inc. (“Plaintiff”) and Defendant United Components Incorporated (“UCI”) filed motions for summary judgment, contending that they were respectively entitled to judgment as a matter of law. As set forth in UCI’s underlying motion and opposition to Plaintiff’s Motion for Partial Summary Judgment (“Plaintiff’s Motion”), UCI alleges that it was not a party to the Trademark Settlement Agreement, thus, Plaintiff’s causes of action against UCI fail as a matter of law. UCI further contends there are no genuine issues of material fact that would

preclude entry of judgment against Plaintiff and in favor of UCI because 1) UCI is not a successor corporation to Gem State Roofing and Asphalt Maintenance (“GSRAM”), and 2) Plaintiff cannot establish the necessary elements of claims for breach of contract, breach of covenant of good faith and fair dealing, trademark infringement, unjust enrichment, and preliminary or permanent injunction.

After considering all of the pleadings, declarations, and affidavits, UCI respectfully requests this Court enter summary judgment in favor of UCI because Plaintiff has failed to raise any genuine issues of material fact as to UCI’s cross motion for summary judgment and UCI is entitled to judgment as a matter of law dismissing Plaintiff’s causes of action.

A. Defendant Has Complied with IRCP 56(c)

Plaintiff argues in its Memorandum in Opposition to Defendant’s Cross Motion for Summary Judgment (“*Plaintiff’s Memorandum*”) that UCI has failed to meet the rigorous standard for summary judgment set forth in IRCP 56(c). *Plaintiff’s Memorandum*, page 2. IRCP 56(c)(1) provides:

Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- A. **citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,** stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- B. showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(emphasis added).

Plaintiff’s Memorandum repeatedly states that the statements contained in Mr. Flynn’s declaration and deposition transcript are UCI’s “sole support” for the facts which UCI alleges as true. The Idaho Rules of Civil Procedure do not require multiple sources of support for a factual statement,

nor do the rules provide that a sworn statement in a declaration or deposition is insufficient for purposes of a motion for summary judgment. Additionally, IRCP 56 provides:

Affidavits. An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Mr. Flynn's declaration filed in support of UCI's Cross Motion for Summary Judgment complies with the above cited standard. Mr. Flynn's declaration contains statements based on his personal knowledge and statements that are admissible in evidence. Mr. Flynn's statements in his declaration and deposition were sworn statements, made under penalty of perjury; such statements are sufficient for UCI's Cross Motion for Summary Judgment and fully comply with IRCP 56.

B. Plaintiff Has Not Proven UCI is a Party to the Trademark Settlement Agreement.

The issue central to this litigation is whether or not UCI is a party to the Trademark Settlement Agreement; UCI is not a party to the Trademark Settlement Agreement, thus, there is no way it can be found to have breached the Trademark Settlement Agreement. Simply put, because it is not a party to the Trademark Settlement Agreement, Plaintiff's causes of action for Breach of Contract, Breach of Duty of Good Faith and Fair Dealing, and Unjust Enrichment must be dismissed.

C. Plaintiff Has Not Proven UCI Breached the Trademark Settlement Agreement.

Even if this Court determines that UCI is a party to the Trademark Settlement Agreement by way of successor liability, there has not been a breach of the Trademark Settlement Agreement by UCI. Plaintiff's allegations of UCI's breach of the Trademark Settlement Agreement are not breaches because UCI did not solicit business in Blaine County. Blacks Law dictionary defines solicit as: "To seek or to plead, to entreat and ask. 2. To lure or tempt a person." Mr. Flynn testified in his deposition

that if a customer or potential customer contacts UCI, that does not constitute solicitation because UCI did not ‘seek out’ the customer.

Plaintiff’s argument that UCI’s breach of the Trademark Settlement Agreement is largely based upon UCI’s acceptance of a project in Blaine County for the animal shelter. As stated in the Supplemental Declaration of Jeffery Flynn, ¶ 22 filed March 5, 2019, UCI did not seek out the project or customer; McAlvain Construction reached out to UCI because of a prior project UCI completed for McAlvain in Valley County. Additionally, Plaintiff has not shown that it suffered any damages as a result of any breach or actions by UCI, thus it cannot prevail on its claim for Breach of Contract.

D. Plaintiff Cannot Prove Trademark Infringement.

Plaintiff claims UCI infringed upon its trademark, however, there has been no trademark infringement. Mr. Flynn stated in his deposition that he started using the name Gem State Roofing in or around 1985 – and although Plaintiff seems to think this sworn statement is insufficient and that Mr. Flynn must provide alternate proof, this statement is in fact enough to prove that Mr. Flynn was first in use with regard to the trademark.

Further, the name “Gem State” cannot be trademarked, it is a common title of Idaho, which is the Gem State. Trademarks cover the logo or symbol of a company, and the logo of Plaintiff versus the logo of UCI are not similar in nature to cause any confusion. The Certificate of Registration showed that the trademark assigned to Plaintiff was the following:



Declaration of Terri Pickens Manweiler, ¶ 10, Exhibit D, filed February 13, 2019.

The Certificate of Registration showed that the Trademark assigned to Gem State Roofing and Asphalt Maintenance (which was later assigned to UCI) was the following:



Declaration of Terri Pickens Manweiler., ¶ 14 Exhibit F, filed February 13, 2019.

The two are not similar in any manner except for the name, which again, the name cannot be trademarked because it is a common title in the State of Idaho.

Lastly, to prevail on its claim for trademark infringement, Plaintiff must have suffered damages, and Plaintiff has yet to show that it suffered any damages. Thus, because there not been an infringement of Plaintiff's trademark and because Plaintiff has not suffered any damages, Plaintiff's claim for trademark infringement should be dismissed.

V. CONCLUSION

Based on the forgoing, because UCI is not a party to the Trademark Settlement Agreement and because no genuine issues of material fact exist, Defendant respectfully requests this Court enter judgment dismissing each of Plaintiff's causes of action.

DATED: March 11, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT’S MOTION TO STRIKE
AFFIDAVIT OF RICK SILVIA IN
SUPPORT OF REPLY IN SUPPORT
OF PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., pursuant to Idaho Rule of Civil Procedure 56, hereby moves this Court for an Order striking the March 11, 2019 Affidavit of Rick Silvia in Support of Reply in Support of Plaintiff’s Motion for Partial Summary Judgment (“Affidavit”). This Motion is supported by the papers and pleadings on file herein. This Motion is made on the grounds and for the reasons that it is untimely filed. This Affidavit was filed only 7 days prior to the time set for hearing and does not afford the opposing party an opportunity to respond. Accordingly, the Affidavit should be stricken.

Oral argument is requested.

DATED: March 12, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

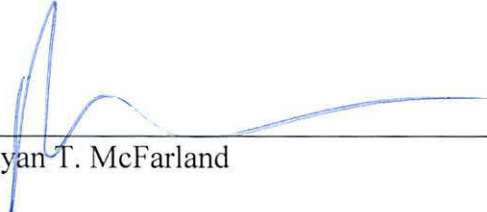
GEM STATE ROOFING, INCORPORATED, )	)	Case No. CV01-18-13437
Plaintiff,))	
vs. )	)	AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, )	)	MCFARLAND IN SUPPORT OF REPLY
INCORPORATED, DBA GEM STATE )	)	IN SUPPORT OF PLAINTIFF'S
ROOFING; )	)	MOTION TO COMPEL
Defendant.))	
_____))	

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated (“Gem State”) in the above referenced matter. I make this Affidavit based upon my own personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of Defendant’s Third Supplemental Responses to Plaintiff’s First Set of Interrogatories, Requests for Production, and Requests for Admission served on me on or about March 5, 2019.

Further your affiant sayeth naught.

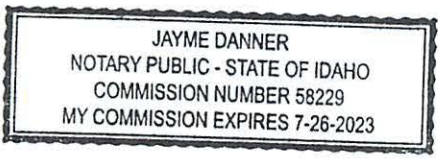


Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 13th day of March, 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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



Jayme Danner

Notary Public for Idaho
Residing at: Nampa, Idaho
My commission expires: 7/26/23

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
Terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing



Ryan T. McFarland

EXHIBIT A

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S THIRD
SUPPLEMENTAL ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the "Discovery Requests"), to the extent that they are inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 6: Please produce All correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: No documents exist.

SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 6: Please see the documents produced herewith bates stamped as DEFENDANT000118-1148.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: No documents exist.

SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 7: Please see the documents produced herewith bates stamped as DEFENDANT000118-1148.

DATED: March 4, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 4, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendant.)

Case No. CV01-18-13437
ORDER GRANTING PLAINTIFF’S
MOTION TO COMPEL


Following oral argument and a review of the matters on file herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff’s Motion to Compel is GRANTED. Defendants must provide a full and complete response to Plaintiff’s Interrogatory Nos. 3 and 20 and Requests for Production No. 6, 7, and 24 no later than March 29, 2019. Plaintiff’s request for an award of costs and attorneys’ fees incurred in connection with the Motion to Compel under Idaho Rules of Civil Procedure 37(a)(5)(A), and with respect to Request for Admission Nos. 10, 12, and 17 under Idaho Rule of Civil Procedure 37(c)(2), is deferred until the conclusion of the matter.

#####

DATED THIS _____ day of March 2019.

Signed: 3/25/2019 09:38 AM

By  _____
The Honorable Samuel A. Hoagland
District Judge

CERTIFICATE OF SERVICE

Signed: 3/25/2019 10:09 AM

I HEREBY CERTIFY that on this ___ day of March 2019, I caused to be served a true copy of the foregoing ORDER GRANTING PLAINTIFF’S MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

MCFARLAND RITTER PLLC
Ryan McFarland
PO Box 1335
Meridian, Idaho 83680

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
ryan@mcfarlandritter.com
paralegal@mcfarlandritter.com
- iCourt
- Telecopy:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
terri@pickenslawboise.com
shannon@pickenslawboise.com
- iCourt
- Telecopy:

PHIL MCGRANE
Clerk of the District Court


Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

vs.

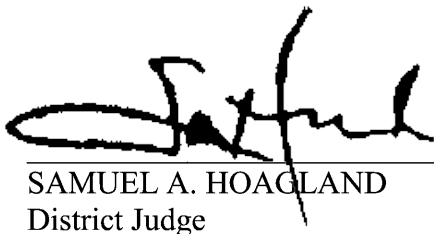
UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendants.

Case No. CV01-18-13437

AMENDED ORDER GRANTING
PLAINTIFF'S MOTION TO COMPEL

THIS MATTER came before the Court on Plaintiff's Motion to Compel, filed through counsel on January 28, 2019. A hearing was held on March 19, 2019, wherein the Court granted the Motion, but deferred ruling on an award of costs and attorney fees. Defendants must provide full and complete responses to Plaintiff's Interrogatory Nos. 3 and 20 and Requests for Production Nos. 6, 7, and 24, on or before April 18, 2019.

IT IS SO ORDERED.


SAMUEL A. HOAGLAND
District Judge

Signed: 4/3/2019 02:15 PM

Date

CERTIFICATE OF MAILING

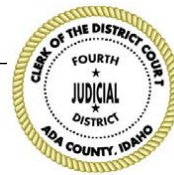
I hereby certify that on Signed: 4/3/2019 02:37 PM, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

MEMORANDUM DECISION AND ORDER

THIS MATTER comes before the Court on Plaintiff's Motion for Summary Judgment (filed Feb. 6, 2019) and Defendant's Motion for Summary Judgment (filed Feb. 13, 2019). A hearing was held on March 19, 2019.¹ The matter was taken under advisement on March 26, 2019.² For the reasons set forth herein the parties' Motions are GRANTED in part and DENIED in part.

UNDISPUTED FACTS

This case primarily concerns the binding effect of a settlement agreement entered into between two companies that operate under the same name. In 2005, following the realization that their roofing companies were operating under the same name, the owners of Gem State Roofing Incorporated ("Gem State Blaine") and Gem State Roofing & Asphalt Maintenance, Inc. ("Gem State Boise") entered into a Trademark Settlement Agreement ("Settlement Agreement")

¹ Plaintiff's Motion to Compel (filed Jan. 28, 2019) was also addressed at the hearing; however, the Court ruled on the record and a separate order was entered with respect to that Motion. *See* Amended Order Granting Pl.'s Mot. to Compel (filed April 3, 2019). In addition, Defendant's Motion to Strike (filed March 12, 2019) Rick Silvia's Affidavit (filed March 11, 2019) for untimeliness was addressed at the hearing. The Court DENIED the Motion to Strike and gave Defendant an additional seven days (or until March 26, 2019) to respond to the untimely Affidavit. Nothing further has been filed by the Defendant.

² *See supra* note 1.

delineating boundaries for where each company could solicit and do business. Gem State Boise was eventually dissolved and its owner created United Components Incorporated (“UCI”), which continued to operate under the business name, “Gem State.” Gem State Blaine contends that UCI is a successor to Gem State Boise, is bound by the Settlement Agreement, and has violated the Agreement. UCI asserts that it is not a successor to Gem State Boise, and even if it were, it has not violated the Settlement Agreement.

(1) Gem State Boise

Jeffrey Flynn (“Flynn”) started a roofing company in the early 1980s in Nampa, Idaho, which he called Gem State Roofing. Flynn put the name of the company on business cards, invoices, estimates, flyers, company vehicles, and phone book advertising. Flynn moved to Boise in 1987 and added asphalt maintenance to his roofing business. In 1995, Flynn filed a Certificate of Incorporation for Flynn, Inc. In 1998, Flynn filed an Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance. In 1999, Flynn’s wife, Michelle Flynn (“Michelle”), filed a Certificate of Assumed Business Name stating that Gem State Roofing & Asphalt Maintenance would do business under the name Gem State Roofing. Flynn testified that he and his wife were the sole officers, initially, with Michelle owning 51% and Flynn owning 49% of Gem State Boise. Flynn testified that Michelle was designated as the president of Flynn, Inc. in order to take advantage of the “women-owned business.”³

In 2010, Flynn and Michelle’s marriage dissolved, and at the same time, Gem State Boise had incurred significant tax liability. Flynn testified that the IRS placed liens on all of Gem State

³ Flynn Dep. 69:16-22.

Boise's equipment. In order to resolve the tax liability with the IRS, Flynn testified that the IRS directed him to dissolve Gem State Boise and start up a new company with a new name. Flynn testified that the IRS let him keep the Gem State and Asphalt Maintenance brand, but that he had "to change the corporate veils to keep those companies."⁴ Michelle and Flynn divorced and Michelle's stock dissolved with Gem State Boise.⁵

Almost immediately upon the dissolution of Gem State Boise, Flynn created UCI and gave two former employees of Gem State Boise ownership interests in UCI – Bob Hayden owns 20% and Kerrie Kuhn owns 10%.⁶

Q. What happened first? The closing of [Gem State Boise]? Or the opening of UCI? Or did they happen at the same time?

A. It was pretty much sequential.

Q. By sequential you meant they happened at the same time?

A. Yes. You got to close one and open the other.

Q. You closed one door and you opened the other?

A. Correct.⁷

Flynn testified that he did not have to lay any workers off due to the transition, but rather due to the winter, which is when he always had to lay people off.⁸ Flynn testified that UCI was able to keep the same equipment Gem State Boise utilized by paying the IRS:

Q. Before [Gem State Boise] closed its doors did it have trucks?

A. Yes.

Q. Did it have other equipment?

A. Yes.

Q. What other equipment?

A. It had trucks, an old paver, roller. And that was part of the Asphalt Maintenance side. The two companies were pretty much combined. They are under one veil. We run the same crew. Some of the roofing guys work on the paving side. Some of the paving guys worked on the roofing side. We had

⁴ *Id.* at 37:25, 38:1-7.

⁵ *Id.* at 39:13-17.

⁶ *Id.* at 98:11-21; 61:9.

⁷ *Id.* at 41:5-13.

⁸ *Id.* at 41:14-18.

equipment. The IRS made us buy the equipment back. And we had to pay roughly 40-some-thousand-dollars to buy our old equipment back that was old and dilapidated. It was junk basically. We had to purchase it to stay in business at that point.

Q. You purchased it back from the IRS?

A. That's correct.

Q. They took it and you purchased it back?

A. They never took it. But they liened it. We purchased it back through the United Components side.

Q. UCI purchased it back?

A. That's correct.

Q. So if I understand you right the IRS took the equipment from [Gem State Boise] –

A. They never took it.

Q. Sorry. They put a lien on it when it was under [Gem State Boise's] name?

A. That's correct.

Q. You closed [Gem State Boise's] doors. At the same time you opened UCI doors. And you paid 40-some-thousand-dollars –

A. They let us purchase it back.

Q. And the lien was gone?

A. Yes.

Q. And you continued to use the same equipment?

A. Yes.⁹

The Gem State logo remained on the trucks that were subsequently purchased by UCI.¹⁰ Flynn did not notify his clients that Gem State Boise closed its doors and that UCI opened its doors. Flynn testified that at the time of the transition, his business was impacted by the recession and he lost a lot of clients “like everybody else did in the construction industry.”¹¹ However, since then, a lot of Flynn's previous customers have come back, and he continues to do work for clients that he has worked with for 25 or 30 years.¹² There was no real break in operations when Gem State Boise transitioned to UCI. Most of the same employees continued to work for UCI that previously worked for Gem State Boise. UCI used the same office space, office equipment,

⁹ *Id.* at 41:22-25, 42:1-25, 43:1-8.

¹⁰ *Id.* at 43:18-22.

¹¹ *Id.* at 44:11-15.

¹² *Id.* at 44:15-18.

and kept the same phone number that was used by Gem State Boise.¹³ UCI took on several debts of Gem State Boise, including phone ads, “miscellaneous material accounts, [and] the business in general to keep rolling from one business to the other.”¹⁴

(2) Gem State Blaine

In 1997, Rick Silvia (“Silvia”), the president and owner of Gem State Blaine, filed a Certificate of Assumed Business Name for his roofing construction business, which declared that his company was operating under the name “Gem State Roofing.” In 2000, Silvia filed an Articles of Incorporation for Gem State Blaine. Gem State Blaine has primarily done business in Blaine County, Idaho.

(3) Trademarks

On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Blaine stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. There is no evidence that the trademark has been renewed since 2012. The Certificate of Registration shows the trademark assigned to Gem State Blaine is as follows:



¹³ *Id.* at 49:1-16.

¹⁴ *Id.* at 49:21-25, 50:1-2.

In 2004, a Certificate of Registration of Trademark Service Mark was issued to Gem State Boise stating that the first use of the trademark was in 1985 and that the trademark would expire on December 29, 2014. The Certificate of Registration showed that the Trademark assigned to Gem State Boise is as follows:



On December 1, 2014, the above trademark was assigned to UCI and renewed until December 29, 2024.

(4) Trademark Settlement Agreement

After discovering that Gem State Blaine and Gem State Boise operated under the same name, on October 20, 2005, the parties entered into a “Trademark Settlement Agreement.” The first paragraph of the Agreement states that it was entered into between Gem State Boise and Gem State Blaine and is signed by Michelle as president of Gem State Boise and by Silvia as president of Gem State Blaine. The Recitals of the Agreement state that the “parties’ names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services” and that the parties “wish to resolve this matter without litigation by agreeing not to do business or advertise in the other's primary market.”

The Agreement provides in relevant part as follows:

1. Commencing immediately upon execution of this Agreement, Gem State Roofing & Asphalt Maintenance, Inc., agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County. Radio or television advertising on a Boise or Twin Falls station that happens to reach Blaine County is permissible so long as it does not state or imply that Gem State Roofing & Asphalt Maintenance, Inc., performs services in Blaine County. Gem State Roofing & Asphalt Maintenance, Inc., may advertise in Twin Falls telephone directories which may be distributed in Blaine County so long as it is not listed under any cities in Blaine County, and does not state or imply that it performs services in Blaine County.

2. Commencing immediately upon execution of this Agreement, Gem State Roofing, Inc., agrees that it will not advertise or solicit business in the counties listed in subparagraph 2(a), including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in said counties. Radio or television advertising on a Blaine County station that happens to reach said counties set forth in subparagraph 2(a) is permissible so long as it does not state or imply that Gem State Roofing, Inc., performs services in said counties. Gem State Roofing, Inc., may advertise in the Twin Falls Yellow Book and the Qwest Dex Twin Falls directories so long as it is listed only under cities in Blaine County and does not state or imply that it performs services in the counties set forth in subparagraph 2(a).

a. Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.

3. Gem State Roofing & Asphalt Maintenance, Inc., shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing & Asphalt Maintenance, Inc., shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the photographs of the service vehicles attached hereto as Exhibit C and incorporated herein by this reference.

a. Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.

4. Gem State Roofing, Inc., shall not perform any services in the counties listed in paragraph 2(a) except (i) warranty and maintenance work and repeat customer

business for the former customers listed in paragraph 4(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing, Inc. , shall not display signs or otherwise display the name, "Gem State Roofing," or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, "Gem State Roofing," so long as the print is not larger, brighter, or in any way more prominent than that shown in the attached Exhibit D.

a. Wells Fargo Bank (in Shoshone, Idaho only), Tonya White (Twin Falls County), Mike Blank (Twin Falls County), Mitch Matteson (Twin Falls County), and John Ward (Valley County).

5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.

...

7. Neither party shall oppose the other party's state of Idaho trademark registrations dated May 2, 2002 in the case of Gem State Roofing, Inc., and dated December 29, 2004 in the case of Gem State Roofing & Asphalt Maintenance, Inc. Gem State Roofing & Asphalt Maintenance, Inc., agrees and consents to Gem State Roofing, Inc. 's concurrent use and registration of the word mark "Gem State Roofing" effective in Blaine County; Gem State Roofing, Inc., agrees and consents to Gem State Roofing & Asphalt Maintenance, Inc.' s concurrent use and registration of the word mark "Gem State Roofing" effective in the counties listed in subparagraph 2(a).

...

13. This Agreement shall be binding upon and shall inure to the benefit of the successors, assigns, personal representatives, heirs, and legatees of the respective parties.

...

(5) Instant Dispute

Silvia testified that in June 2016 he noticed some UCI trucks with the Gem State Roofing logo parked at a job site in Hailey, Idaho. He “stopped to tell the UCI employees that they could not be working in Blaine County, and in response the employee attempted to expose his genitals to me.”¹⁵

¹⁵ Silvia Aff. ¶ 5 (filed Feb. 6, 2019).

Flynn testified that in the last three years, UCI, operating under the name Gem State Roofing, has bid on and performed work in Blaine County.¹⁶ Flynn testified UCI has submitted bids and performed roofing work for various new clients that were not included in the Settlement Agreement, including accepting an over \$200,000 roofing project for the Wood River Valley's new animal shelter.¹⁷

On June 22, 2018, Gem State Blaine, through its attorney, sent a cease and desist letter to UCI. UCI, via counsel, responded a few days later stating that it will not use its dba "Gem State Roofing" in Blaine County, but that UCI is not a party to the Settlement Agreement and the Settlement Agreement is not enforceable against UCI.

On July 20, 2018, Gem State Blaine filed the instant action against UCI alleging (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) trademark infringement, (4) unjust enrichment, (5) preliminary injunction, and (6) permanent injunction.

LEGAL STANDARD

Summary judgment may be entered only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The Court "liberally construes the facts and existing record in favor of the non-moving party" in making such determination. *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). "If reasonable people could reach different conclusions or inferences from the evidence, the motion

¹⁶ Flynn Dep. 58:24-25, 59:1-9.

¹⁷ *Id.* at 112:25-115:15, 116:6-18, 125:6-25, 127:9-24, 129:23-130:25, 134:4-18, 135:19-136:4, 137:1-14, 139:2-13, 139:15-24, 140:6-17, 142:11-23, 145:6-16, 141:1-20.

must be denied.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Moreover, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment.” *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001) (citations omitted).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. *See Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

A party opposing a motion for summary judgment “may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 114, 306 P.3d 197, 199 (2013). Such evidence may consist of affidavits or depositions, but “the Court will consider only that material . . . which is based upon personal knowledge and which would be admissible at trial.” *Harris v. State, Dep’t of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

The mere fact that the parties have filed cross motions for summary judgment does not necessitate a finding that there are no genuine issues of material fact; however, “[w]here the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment.” *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). “The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits.” *Id.* “[W]hen an action will be tried before the trial court without a jury, the court can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. This is permissible because under such circumstances the court would be responsible for resolving the conflict between those inferences at trial. Even with this permission, however, conflicting evidentiary facts must still be viewed in favor of the nonmoving party.” *Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 408 P.3d 68, 71 (2017).

ANALYSIS

Gem State Blaine moved for partial summary judgment on its first three claims for relief: breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment. UCI has moved for summary judgment on all of Gem State Blaine’s claims for relief. The primary issue presented by both Motions is whether the Settlement Agreement is enforceable against UCI.

a. The Settlement Agreement is enforceable against UCI.

Gem State Blaine contends that the Settlement Agreement is enforceable against UCI as UCI is Gem State Boise's successor, UCI is a mere continuation of Gem State Boise, and a de facto merger took place. UCI contends that it is not a continuation of Gem State Boise and a de facto merger did not take place.

Idaho has not addressed the liability of a successor corporation where the successor corporation is a mere continuation of the predecessor. However, both parties analyze the issue under the same rules.

Other states recognize that generally "when one corporation sells all of its assets to another corporation the purchaser is not liable for the debts of the seller." *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 112 P.3d 1082, 1087 (Nev. 2005) (citing *West Texas Refining & D. Co. v. Commissioner of Int. Rev.*, 68 F.2d 77 (10th Cir. 1933); *Ozan Lumber Co. v. Davis Sewing Mach. Co.*, 284 F. 161 (D. Del. 1922)). However, there are four "well recognized exceptions" to the general rule:

- (1) where the purchaser expressly or impliedly agrees to assume such debts;
- (2) where the transaction is really a consolidation or a merger;
- (3) when the purchasing corporation is merely a continuation of the selling corporation; and
- (4) where the transaction was fraudulently made in order to escape liability for such debts.

Id.

UCI contends that none of the exceptions apply because they all require a transfer of assets, and here, the IRS placed a lien on Gem State Boise's assets and UCI then purchased the assets from the IRS.

UCI's argument makes a distinction without a difference. UCI obtained Gem State Boise's assets by way of purchasing them from the IRS. Flynn testified that in order to satisfy his debts with the IRS, he was ordered to create a different company veil. UCI cites no authority specifying that a transfer of assets via a third party does not in fact constitute a transfer of assets from one entity to another. What in fact occurred was a transfer of Gem State Boise's assets to UCI. The transfer just occurred through the IRS. Thus, the Court finds that a transfer of assets occurred.

The issues then are whether a de facto merger occurred or whether UCI is merely a continuation of Gem State Boise. The Court finds both exceptions are met in this case.

To determine whether there has been a de facto merger, courts apply a four-factor test and consider:

- (1) whether there is a continuation of the enterprise,
- (2) whether there is a continuity of shareholders,
- (3) whether the seller corporation ceased its ordinary business operations, and
- (4) whether the purchasing corporation assumed the seller's obligations.

See United States v. Sterling Centrecorp Inc., 960 F. Supp. 2d 1025, 1042 (E.D. Cal. 2013); *Vill. Builders 96, L.P.*, 112 P.3d at 1087; *Keller v. Clark Equipment Co.*, 715 F.2d 1280, 1291 (8th Cir.1983); *Atlas Tool Co., Inc. v. C.I.R.*, 614 F.2d 860, 870–71 (3d Cir.1980); *Sylvester Bros. Dev. Co. v. Burlington Northern*, 772 F.Supp. 443, 447–48 (D.Minn.1990); *Kleen Laundry &*

Dry Cleaning v. Total Waste Mgt., 817 F.Supp. 225, 230 (D.N.H.1993); *Ulanet v. D'Artagnan, Inc.*, 170 F.Supp.2d 356, 358 (E.D.N.Y.2001).

At the outset, we note that courts take varying approaches to weighing the four factors. For instance, some courts give great weight to the question of whether the consideration given by the seller consists of shares of the seller's own stock. These courts emphasize this requirement because when two companies merge, the shareholders of the seller become shareholders of the buyer. As a result, these individuals share in the successor corporation's profits making it just to attach the seller's liabilities to the buyer to avoid any inequity that might result from allowing a shareholder to shed liability but retain profit. However, when this factor is not present these courts have concluded that sound policy does not support imposing the predecessor's liabilities upon the successor “ ‘when it has already paid a substantial price for the assets of the predecessor.’ ”

In contrast, other courts have determined that the factors should be weighed equally, and therefore no single factor is “ ‘either necessary or sufficient to establish a de facto merger.’ ” This approach is more reasonable because it properly balances the successor corporation's rights to be free from liabilities incurred by its predecessor, with the important interest involved in ensuring that ongoing businesses are not able to avoid liability by transferring their assets to another corporation that continues to operate profitably as virtually the same entity. We conclude that this approach is consistent with the principles underlying the de facto merger exception, which “is a judge-made rule that rests on general equitable principles.” The New York appellate court in *Sweatland v. Park Corp.* noted that:

Public policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred (see, *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F.Supp. 834), those factors alone should not be determinative.

This rationale is persuasive, and therefore we will weigh equally all of the factors to determine if a plaintiff established a prima facie case for de facto merger.

Vill. Builders 96, L.P., 112 P.3d at 1087–88 (citations omitted).

Courts have held that “[n]o one of these factors is either necessary or sufficient to establish a de facto merger.” *Acushnet River*, 712 F.Supp. at 1015 (citations omitted). See also *Atlas Tool Co., Inc. v. Commissioner of Internal Revenue*, 614 F.2d 860, 870 (3d Cir.1980) (“[E]very factor is not essential for applying the [de facto merger] doctrine.”); *Menacho v. Adamson United Co.*, 420 F.Supp. 128, 133 (D.N.J.1976) (“Not all of these factors are needed to demonstrate a merger; rather,

these factors are only indicators that tend to show a de facto merger.”); *Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1535 (S.D.N.Y.1985).

Sterling Centrecorp Inc., 960 F. Supp. 2d at 1042.

As to the first factor, courts look to whether there is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations. *Sterling Centrecorp Inc.*, 960 F. Supp. 2d at 1043. Here, UCI does not dispute the first factor has been met. UCI operated its business out of the same location as Gem State Boise and had the same office equipment and phone number. Flynn admitted he kept most of the same personnel from Gem State Boise. The general business operations are similar. Flynn testified that there was no real break in operations from one company to the other.

The second factor looks to whether there is a continuity of shareholders. Gem State Boise consisted of Michelle and Flynn, while UCI consists of Flynn and two other shareholders that do not include Michelle. However, the two other shareholders were employees of Gem State Boise and are minority shareholders in UCI. Although the shareholders are not the same, there is a continuity of shareholders in Flynn. It is also clear that Flynn considered himself the owner of both Gem State Boise and UCI and that he ran both as “his” companies.¹⁸

The third factor looks to whether the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible. *Id.* Here, it is undisputed that Gem State Boise is dissolved.

¹⁸ See generally Flynn Dep.

The fourth factor is whether the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. *Id.* Flynn testified that UCI took on several debts of Gem State Boise, including phone ads, “miscellaneous material accounts, [and] the business in general to keep rolling from one business to the other.”¹⁹

On balance, the above factors weigh in favor of finding that a de facto merger occurred. Cases direct that no one factor is “either necessary or sufficient to establish a de facto merger.” Here, the undisputed facts indicate that UCI is a mere continuation of Gem State Boise, and Flynn testified as much. UCI purchased Gem State Boise’s assets (via the IRS), Flynn was the founder and owner of both entities, the same type of work was conducted through both businesses, Gem State Boise’s trademark was transferred to UCI, UCI retained the same office, phone number, equipment, and most of the same employees as Gem State Boise, clients were not notified that Gem State Boise was dissolved and UCI was the new company, and UCI operated under the dba Gem State Roofing in Blaine County until it received a cease a desist letter.

For the same reasons that the Court finds a de facto merger exists, the Court also finds that UCI is a “mere continuation” of Gem State Boise.

The “mere continuation” exception applies to hold liable “the purchasing corporation [that] maintains the same or similar management and ownership but wears a ‘new hat.’ ” The exception permits recovery against the successor corporation where the successor is essentially the same corporate entity as the predecessor corporation. The exception is “designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors.”

Martin v. TWP Enterprises Inc., 132 A.3d 361, 373 (Md. App. 2016).

¹⁹ *Id.* at 49:21-25, 50:1-2.

Accordingly, the Court finds that at least two exceptions are met with respect to UCI's successor liability and that the Settlement Agreement is enforceable against UCI as it is a successor to Gem State Boise. The next issue is whether UCI breached the Settlement Agreement.

b. UCI breached the Settlement Agreement.

Gem State Blaine asserts that UCI breached the following portions of the Settlement Agreement:

Commencing immediately upon execution of this Agreement, [Gem State Boise] agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County

...

3. [Gem State-Boise] shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for . . . former customers . . . and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors.

...

5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party

Gem State Blaine contends that Gem State Boise began violating these terms in 2010 by issuing three estimates and an invoice for three different roofing jobs in Blaine County. In 2016, UCI commenced soliciting and performing various roofing and asphalt jobs in Blaine County. Gem State Blaine contends none of the jobs were considered warranty and maintenance work, work for former customers, or work for a public entity and that no referrals were made to Gem State Blaine. Flynn also testified as follows:

Q. Has your company UCI, acting under the name of Gem State Roofing, bid on work in

Blaine County?

A. Yes, I have.

Q. Have you, Jeff Flynn, performed any roofing work in Blaine County under the name

Gem State Roofing in the last three years?

A. Yes.

Q. And has your company UCI performed work in Blaine County under the name Gem

State Roofing in the last three years?

A. Yes.²⁰

Flynn also testified that UCI bid on and has done work on the new Wood River Valley Animal Shelter, which was not a preexisting customer.

UCI asserts it did not breach the Settlement Agreement, because accepting estimates from customers that reach out to it does not constitute soliciting so long as Flynn, or the company, did not advertise to, or solicit those customers. UCI contends that the customers it did business with were preexisting or reached out to UCI.

UCI has failed to establish a genuine issue of material fact that it did not breach the Settlement Agreement. The evidence shows numerous instances of work performed in Blaine County that was not warranty, maintenance, or work for returning customers. In addition, the un rebutted evidence shows that Flynn did not direct work to Gem State Blaine when he received requests for work. Accordingly, the Court finds that UCI has breached the Settlement Agreement.

c. UCI breached the covenant of good faith and fair dealing.

Although Gem State Blaine moved for summary judgment on its claim for breach of the covenant of good faith and fair dealing, it did not provide any legal authority or argument as to

²⁰ Flynn Dep. 58:21-59:10.

how UCI breached the covenant of good faith and fair dealing. However, UCI moved for summary judgment on this claim asserting that it should be dismissed. UCI argued that the covenant of good faith and fair dealing is not applicable because it was not bound by the Settlement Agreement. In response, Gem State Blaine argued that (1) UCI breached the Settlement Agreement and (2) it notified UCI twice that it was violating the Agreement.

“Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242, 108 P.3d 380, 389 (2005) (internal citation omitted).

No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. *First Security Bank of Idaho v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988); *Clement v. Farmers Ins. Exchange*, 115 Idaho 298, 766 P.2d 768 (1988) (an implied covenant of good faith and fair dealing cannot override an express provision in a contract). The covenant requires “that the parties perform in good faith the obligations imposed by their agreement,” *Badgett v. Security State Bank*, 116 Wash.2d 563, 807 P.2d 356, 356 (1991), and a violation of the covenant occurs only when “either party ... violates, nullifies or significantly impairs any benefit of the ... contract...” *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 669, 799 P.2d 70, 75 (1990); *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989).

Thurston Enterprises, Inc. v. Safeguard Bus. Sys., Inc., 164 Idaho 709, 435 P.3d 489, 503 (2019) (citing *Idaho First Nat’l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991)).

Here, Gem State Boise’s breach of contract claim is based on express violations of the Settlement Agreement. UCI asserted it was not a party to the Settlement Agreement; however, as set forth previously, the Court finds it is liable as a successor to Gem State Boise. Based on

UCI's violations of the Settlement Agreement, the Court finds that UCI has also violated the covenant of good faith and fair dealing.

d. The doctrine of unjust enrichment does not apply.

Again, although Gem State Blaine moved for summary judgment on its claim for unjust enrichment, it did not provide any legal authority or argument as to how UCI was unjustly enriched. However, UCI moved for summary judgment on this claim asserting that it should be dismissed. UCI contends that no benefit was conferred on UCI by Gem State Blaine. Gem State Blaine asserts that although it did not intend to confer a benefit on UCI, it did so in that UCI benefitted from working under Gem State Roofing's good reputation.

“A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.” *Vanderford Co. v. Knudson*, 144 Idaho 547, 558, 165 P.3d 261, 272 (2007). “The substance of an action for unjust enrichment lies in a promise, implied by law, that a party will render to the person entitled thereto that which in equity and good conscience belongs to the latter.” *Smith v. Smith*, 95 Idaho 477, 484, 511 P.2d 294, 301 (1973).

Unjust enrichment is an equitable remedy. *Stevenson v. Windermere Real Estate/Capital Grp., Inc.*, 152 Idaho 824, 829, 275 P.3d 839, 844 n. 4 (2012). “It is well-established that equitable

remedies will not be allowed if adequate remedies are available at law.” *Vreeken v. Lockwood Eng’g, B.V.*, 148 Idaho 89, 105, 218 P.3d 1150, 1166 (2009) (finding an award based on equitable indemnity improper where the party had an adequate remedy available to them under the contract for breach of the implied covenant of good faith and fair dealing).

Here, the Court finds Gem State Blaine has an adequate remedy at law available to it based on UCI’s breach of the Settlement Agreement and the implied covenant of good faith and fair dealing. Accordingly, the claim for unjust enrichment is hereby DISMISSED.

e. Registration of a Trademark is not required.

UCI argued that Gem State Blaine cannot prevail on its trademark infringement claim because its registration expired in 2012, and its trademark is not registered with the “principal register,” but rather only with the Idaho Secretary of State. Gem State Blaine contends that summary judgment is not proper because the law does not require registration to possess a valid trademark.

Trademarks are “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others.” 15 U.S.C. § 1127. The Lanham Act provides a civil cause of action against anyone employing an imitation of it in commerce when such use “is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1125(a)(1).

Under the Lanham Act, trademarks that are “used in commerce” may be placed on the “principal register,” that is, they may be federally registered. 15 U.S.C. § 1051(a)(1). However, registration of a trademark is **not** required in order to have a valid and enforceable trademark, and an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. *Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“The Lanham Act protects both registered and unregistered trademarks.”).

Accordingly, under the Lanham Act, and case law interpreting the Lanham Act, registration is not required in order to have a valid and enforceable trademark. UCI only moved for summary judgment on the narrow basis that the trademark was not registered, and is thus, unenforceable.²¹ Whether Gem State Blaine has a valid and enforceable trademark is yet to be determined. The Court will go no further than to find, at this time, that the fact that Gem State Blaine’s trademark was unregistered does not (alone) render it invalid.

f. Injunctive Relief.

UCI contends there is no basis to issue a permanent or preliminary injunction under Rule 56(e), because it was not a party to the Settlement Agreement and it has not infringed on Gem State Blaine’s trademark.

²¹ In response, Gem State Blaine argued that registration is not required and that it has a protectable trademark (in Blaine County) as it has been using its trademark continuously in Blaine County since 1997. There is evidence that Gem State Boise began using its trademark as early as 1985 in the Boise area. In reply, UCI argued that the trademark fails for various other reasons, not raised in its initial Motion for Summary Judgment. The Court finds that the other issues regarding the validity or priority of the trademarks have not been adequately raised, argued, and briefed. Again, UCI’s sole basis for dismissing the trademark claim was based on the fact that it was not registered on the federal register. The Court will decline to address the additional arguments raised by UCI in its Reply brief, as Gem State Blaine has not had an adequate opportunity to respond.

Gem State Blaine contends dismissal is premature as it has not yet moved for injunctive relief.

There are five grounds for issuing a preliminary injunction, the first of which is “when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.” I.R.C.P. 65(e)(1). As set forth previously, the Court finds that UCI is bound by the Settlement Agreement as a successor to Gem State Boise and that it has breached the Agreement. The nature and extent of that breach is still fully to be determined as well as the remedy for that breach.

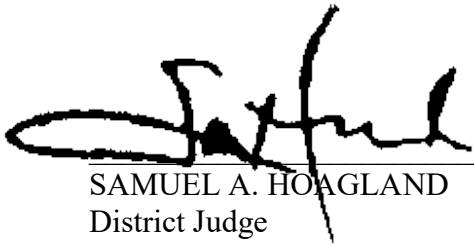
Accordingly, the Court finds UCI’s Motion to dismiss Gem State Blaine’s claims for injunctive relief as premature, and they will not be dismissed at this time.

CONCLUSION

Gem State Blaine’s Motion for Summary Judgment is GRANTED in part and DENIED in part. The Court finds that UCI is a successor to Gem State Boise, and therefore, the Settlement Agreement is enforceable against UCI. The Court finds that UCI breached the Settlement Agreement. Gem State Blaine’s Motion is denied as to the breach of covenant of good faith and fair dealing and unjust enrichment claims, because Gem State Blaine did not provide argument or evidence on these claims.

UCI's Motion for Summary Judgment is GRANTED in part and DENIED in part. It is granted only with respect to Gem State Blaine's claim for unjust enrichment and denied as to the remaining claims. The Court finds that UCI breached the covenant of good faith and fair dealing by breaching the terms of the Settlement Agreement. Finally, there are genuine issues of material fact regarding the claims for trademark infringement and injunctive relief.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 4/26/2019 01:07 PM

Date

CERTIFICATE OF MAILING

Signed: 4/26/2019 01:50 PM

I hereby certify that on _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendant.)
_____)

Case No. CV01-18-13437

MOTION FOR SANCTIONS UNDER
IDAHO RULE OF CIVIL PROCEDURE
RULE 37(b)

Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”), by and through its attorneys of record, McFarland Ritter PLLC, moves this Court, under Idaho Rule of Civil Procedure 37(b), for sanctions against Defendant United Components, Incorporated (“UCI”) for failing to comply with this Court’s Order Granting Motion to Compel, filed March 25, 2019.

This Motion is supported by the Memorandum in Support and the Affidavits of Ryan T. McFarland and Rick Silvia filed concurrently herewith.

DATED THIS 30th day of May 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2019, I caused to be served a true copy of the foregoing MOTION FOR SANCTIONS UNDER RULE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff,))	
vs. )	)	MEMORANDUM IN SUPPORT OF
UNITED COMPONENTS, )	)	MOTION FOR SANCTIONS UNDER
INCORPORATED, dba GEM STATE )	)	IDAHO RULE OF CIVIL PROCEDURE
ROOFING, )	)	37(b)
Defendant.))	

Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”), by and through its attorneys of record, McFarland Ritter PLLC, files this Memorandum in Support of Motion for Sanctions under Idaho Rule of Civil Procedure 37(b).

I. INTRODUCTION

After Defendant United Components, Incorporated (“UCI”) refused to answer certain written discovery requests propounded by Gem State-Blaine, Gem State-Blaine filed a Motion to Compel. UCI steadfastly opposed this motion – including its oral argument at the hearing – but this Court rejected UCI’s objections and on April 3, 2019, ordered UCI to provide “full and complete responses” to Gem State-Blaine’s written discovery on or before April 18, 2019 (the

“Order”). Despite this Court’s Order, UCI has provided no additional substantive response to Gem State-Blaine’s discovery requests. On April 17, 2019, UCI produced its Fourth Supplemental Answers to Gem State-Blaine’s first set of discovery, and UCI’s First Supplemental Answers to Gem State-Blaine’s second set of discovery; in both documents, UCI referred Gem State-Blaine to document previously produced and stated that “UCI does not have an electronic record keeping system in place to maintain . . . emails. . . . UCI conducted a diligent search for any electronic records that may have existed related to Blaine County projects, but no additional documents exist . . .” In short, UCI did not produce any additional documents (beyond what had been produced prior to the hearing), and a number of estimates and invoices and emails produced by third parties have never been produced by UCI. Because UCI has clearly not performed a thorough search of its emails, there may be customers which Gem State-Blaine has not been able to discover.

On April 26, 2019, this Court issued its Memorandum Decision and Order on Gem State-Blaine’s Motion for Summary Judgment, finding that UCI is liable for breaching the Trademark Settlement Agreement. The only thing left to prove at trial, then, is damages – which are measured by UCI’s gains from violating the trademark settlement agreement. Records establishing those gains are in possession of Defendant, who refuses to produce them. While Gem State-Blaine can prove some damages based on what third parties have produced, it is impossible for Gem State-Blaine to prove all of its damages. This Court should sanction Defendant by refusing to allow it to produce evidence on the issue of damages, and ordering that the jury should take as established the following fact: that, had UCI (or its predecessor Gem

State-Boise) not violated the Trademark Settlement Agreement by working in Blaine County, Gem State-Blaine would have obtained the Blaine County jobs that UCI obtained.

II. BACKGROUND

This Court's Amended Order Granting Plaintiff's Motion to Compel (the "Order to Compel") ordered UCI to "provide full and complete responses" to Interrogatories 3 and 20, and Requests for Production 6, 7, and 24, which state as follows:

Interrogatory 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

See Affidavit of Ryan T. McFarland in Support of Motion to Compel, filed January 28, 2019 ("Compel Aff."), ¶ 3, Exh. B.

Interrogatory 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;
- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

Id., at ¶ 5, Exh. D.

REQUEST FOR PRODUCTION NO. 6: Please produce all correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

Id., at ¶ 3, Exh. B.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

Id.

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20 [each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests].

Id., at ¶ 5, Exh. D.

Each of these discovery requests was designed to get at Gem State-Blaine’s damages, including revenue and costs (so as to evaluate profit). Gem State-Blaine filed its Motion to Compel as to these discovery requests because (i) UCI had produced very few documents in response, (ii) Gem State-Blaine had been forced to serve 11 third-party subpoenas on customers (or presumed customers) of UCI, and (iii) the subpoenas resulted in the production of multiple documents evidencing UCI’s work in Blaine County that UCI had not produced – thus having not given a full response to Interrogatories 3 and 20, or Requests for Production 6, 7, and 24.

Gem State-Blaine is in possession of the following documents related to UCI’s (and Gem State-Boise before it) work in Blaine County:

Date	Customer (Location)	Amount (Invoice/Estimate)	Produced by Customer	Produced by UCI
12/4/2009	Snow Mountain Apartments (Hailey)	\$217.35 (Invoice 9223*)	Yes	No
12/4/2009	Snow Mountain Apartments (Hailey)	\$208.85 (Invoice 9225*)	Yes	No

9/30/2010	Brashears & Sons (Carey)	\$15,840.00 (Estimate 12152)	No	Yes
9/30/2010	Brashears & Sons (Carey)	\$18,840.00 (Estimate 12153)	No	Yes
6/20/2011	Isham, Larry (Hailey)	\$10,500.00 (Estimate 12627)	No	Yes
7/12/2011	Shay Construction (Carey)	\$17,424.00 (Estimate 12680)	No	Yes
5/5/2016	Standard Plumbing Supply (Hailey)	\$2,481.00 (Invoice 2820)	Yes	Yes
7/29/2016	Pioneer West Property Mgmt (Ketchum)	\$1,950.00 (Invoice 1614)	No	Yes
8/17/2016	Standard Plumbing Supply (Hailey)	\$2,481.00 (Invoice 1621)	Yes	Yes
8/17/2016	Snow Mountain Apartments (Hailey)	\$54,000.00 (Estimate 2982*)	Yes	No
8/17/2016	Snow Mountain Apartments (Hailey)	\$21,340.80 (Estimate 2983)	Yes	Yes
2/15/2017	ESI Construction (Hailey)	\$84,950.00 (Estimate 3112)	No	Yes
12/5/2017	Kerry Armstrong (Ketchum)	\$750.00 (Invoice 2024)	No	Yes
3/7/2018	McAlvain Construction (Hailey)	\$279,540.00 (Various Invoices and Change Orders)	Yes	Yes
5/25/18	Bruce Bothwell (Bellevue)	\$13,600.00 (Estimate 3928)	No	Yes

* Documents attached as Exhibit A to the Affidavit of Ryan T. McFarland filed concurrently herewith (the “McFarland Aff.”).

On April 17, 2019, and in response to this Court’s Order to Compel, UCI served Defendant’s Fourth Supplemental Answers to Plaintiff Gem State Roofing Incorporated’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission (McFarland Aff., ¶ 3, Exh. B) and Defendant’s First Supplemental Answers and Responses to Plaintiff Gem State Roofing Incorporated’s Second Set of Interrogatories and Requests for

Production of Documents (McFarland Aff., ¶ 4, Exh. C). Defendants produced no new documents, and its Second Supplemental Answer to Interrogatory No. 3 is typical:

UCI does not have an electronic record keeping system in place to maintain electronic communications (emails) with vendors, suppliers, customers, and clients. UCI conducted a diligent search for any electronic records that may have existed related to Blaine County projects, but no additional documents exist that have not already been produced or obtained through subpoena.

McFarland Aff., ¶ 3, Exh. B.

III. ARGUMENT

A. UCI Has Yet to Provide a Complete Response to the Court’s Order Granting Motion to Compel.

In the roughly two months after Gem State-Blaine issued its discovery requests, UCI produced 117 pages of documents. Four months later, and just days before the hearing on the Motion to Compel, UCI produced over 1,000 pages – almost all related to its work on one Blaine County project: the animal shelter. UCI even included a few emails about that project (no emails had been produced previously). What was most notable about those late-served responses was what it failed to include. There are no other UCI emails, documents or other writings for any of the “alleged events which are the subject of the Complaint and Your Answer” as required by Interrogatory No. 3, nor are there any other UCI emails, documents other writings for “each and every” Blaine County job it solicited or performed between October 2005 and November 2018 as required by Interrogatory No. 20 and the related Requests for Production.

Gem State-Blaine’s discovery requests seek relevant information regarding all of UCI’s bids and actual work performed in Blaine County. Just because it appears UCI may have begrudgingly complied with these Discovery Requests for one of its Blaine County jobs – the McAlvain Construction/Animal Shelter project – that compliance does not satisfy the terms of

this Court's Order. For example, Gem State-Blaine deposed the President and owner of UCI, Jeffery Flynn, in December 2018. Exhibit Nos. 32, 38 and 39 to the Deposition of Jeffery Flynn consist of emails sent or received by and between UCI and Standard Plumbing in 2016 regarding UCI's work for Standard Plumbing in Blaine County. McFarland Aff. ¶ 5, Exh. D. These emails were produced *by Standard Plumbing* in response to a third party subpoena duces tecum. UCI has yet to produce its copies of these emails or any other emails it sent to or received from Standard Plumbing, or any emails, documents or other writings with its other Blaine County customers, including Pioneer West Property Management, Snow Mountain Apartments, ESI, Kerry Armstrong, and Bruce Bothwell (all of whom produced estimates or invoices in response to third party subpoenas). It is violative of the Court Order for UCI to maintain that a thorough review and production of all of its email accounts and other customer records resulted in no emails from or to any Blaine County customer other than McAlvain.

UCI's argument that it "does not have an electronic record keeping system in place to maintain electronic communications (emails) with vendors, suppliers, customers, and clients" is nonsensical. It has an email address; therefore, it merely has to search its sent and received emails for communications regarding Blaine County projects. The only way the emails would be absent is if UCI actively deleted them. UCI has not made a good faith effort to produce all responsive documents.

B. Rule 37(b) Authorizes the Levy of Sanctions for Failing to Comply with a Court Order.

Idaho Rule of Civil Procedure 37(b)(2)(A) states in relevant part as follows:

If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 35, or 37(a), the court where the

action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination and initiating contempt proceedings.

i. Sanctions are Necessary.

This Court's April 26, 2019 Memorandum Decision and Order on Summary Judgment established UCI's liability; now, all that is left to prove is damages. Under Idaho law, damages from the violation of a non-competition agreement (which the Trademark Settlement Agreement fundamentally is) is arrived at by showing two things: (i) the plaintiff's lost profits, and (ii) the defendant's corresponding gains:

The measure of damages for loss of profits is rarely susceptible of accurate proof. Therefore, the law does not require accurate proof with any degree of mathematical certainty. Any claim of damages for prospective loss contains an element of uncertainty, but that fact is not fatal to recovery. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. The party seeking to recover lost profits is not required to obtain the testimony of the customers allegedly lost as a result of the wrongdoer's conduct. There only need be sufficient evidence in the record to allow the jury to conclude that the inference linking the wrongdoer's conduct to the claimant's damages is more probable

than the inference connecting such loss to other factors. Factors that the jury may consider include the claimant's profits for a reasonable period prior to the breach of the covenant not to compete, leaving it for the other party to show that, by depression in trade or other causes, they would have been less, *the relationship between the increase in profits by the party breaching the covenant and the losses sustained by the claimant during the period of the breach*, and all of the surrounding facts and circumstances.

Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 334 P.3d 780, 790 (Idaho 2014)

(emphasis added; internal citation and quotations omitted).

Gem State-Blaine can show its lost profits – see the Affidavit of Rick Silvia filed concurrently herewith; however, UCI has withheld documents, and thereby taken away Gem State-Blaine’s ability to correspond those losses to UCI’s gains. That prejudice to Gem State-Blaine is unfair, and is chargeable entirely to UCI’s unjustified failure to comply with its discovery obligations. The information Gem State-Blaine needs is exclusively in the possession of UCI and its customers. While Gem State-Blaine has gone to extraordinary lengths – serving eleven (11) third party subpoenas to get some of that information – it is obvious that UCI is withholding information. For starters, UCI has not even produced the invoices and estimates and emails that some of its customers have produced. Beyond that, Gem State-Blaine does not know what other Blaine County customers UCI has not disclosed, or what additional invoices it may have issued that third parties have not produced. Given this, it is impossible for Gem State-Blaine to present its case on damages.

ii. The Least Oppressive Sanctions.

The least oppressive, appropriate sanction, would be to prohibit UCI “from supporting . . . or from introducing . . . in evidence” on the issue of damages, and simply allow Gem State-

Blaine to produce such invoices as it has possession of. Also, UCI should be prohibited from entering evidence of work done in Blaine County (other than those documents it already produced) in an effort to establish its trademark priority date. Presumably, this will not be unfairly prejudicial to UCI: if UCI is to be believed, it is not in possession of any additional evidence relative to work in Blaine County, anyway. It would be surprising indeed if UCI was suddenly able, at trial to produce additional evidence relative to damages or work done in Blaine County.

Relatedly, this Court should also instruct the jury to take it as established that, but for UCI's (and its predecessor Gem State-Boise's) violation of the Trademark Settlement Agreement, Gem State-Blaine would have obtained the Blaine County jobs that UCI and Gem State-Boise obtained. That instruction is critical in light of UCI's refusal to produce any (non-McAlvain) emails. Those emails might have disclosed why UCI (or Gem State-Boise) was contacted in the first place – was the customer looking for Gem State-Blaine, for example? There is a reasonable chance that the communication between the various Blaine County customers and UCI (and Gem State-Boise) could have yielded important information to help Gem State-Blaine establish its damages; UCI should not be permitted to benefit from failing to produce that information.

The Idaho Supreme Court has sustained such sanctions in a similar case:

To sustain the imposition of sanctions, the trial court must make specific findings to support the award. It is evident from the magistrate's findings that there is a clear pattern of delay on the part of the plaintiff. The magistrate had previously sanctioned the plaintiff by awarding attorneys fees against him to encourage compliance with discovery, all to no avail. Further, the delay was caused by the plaintiff's intentional and deliberate failure to produce the answers and documents requested. No adequate

excuse was ever given to the magistrate court, the district court, or this Court explaining the reason for the delay. Therefore, we affirm the dismissal of the plaintiff's complaint and the striking of his response to the counterclaim.

Blaser v. Riceci, 810 P.2d 1120, 1122 (Idaho 1991) (internal citation omitted). The Court is authorized to take this step because the Court has tried lesser sanctions, which have not worked: "These lesser sanctions were patently inadequate, as appellants subsequently failed to file responsive Answers. An award of costs and explicit warnings are among the appropriate preliminary measures which a trial court may take to force compliance with procedural rules before taking the drastic measure of dismissal with prejudice." *Ashby v. W. Council, Lumber Prod. & Indus. Workers*, 791 P.2d 434, 437 (Idaho 1990). The Court's exercise of its discretion will not be overturned on appeal, absent abuse:

Idaho Rule of Civil Procedure 37(b) lists the types of sanctions available for failure to comply with discovery orders, including dismissal of the action. The imposition of sanctions under that rule is committed to the discretion of the trial court, and that ruling will not be overturned on appeal absent a manifest abuse of discretion.

Id. at 436.

This Court should also award Gem State-Blaine its costs and attorneys fees incurred herein, including those incurred on discovery, third-party discovery, and discovery motions. Rule 37(b)(2)(C) provides:

Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Neither UCI nor its counsel have provided any justification whatsoever for UCI's recalcitrance and disobedience. Accordingly, the Court should order UCI to pay Gem State-Blaine's reasonable expenses and attorneys' fees.

IV. CONCLUSION

For the reasons set forth herein, Gem State-Blaine requests that the Court sanction UCI under Rule 37(b) by entering an Order prohibiting UCI from presenting evidence on damages at the trial of this matter. This Court should also award Gem State-Blaine its costs and attorneys' fees on discovery, third party discovery, and the discovery motions.

DATED THIS 30th day of May 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2019, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS UNDER RULE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. CV01-18-13437
Plaintiff,))	
vs. )	)	AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, INC. dba GEM )	)	MCFARLAND IN SUPPORT OF
STATE ROOFING, )	)	MOTION FOR SANCTIONS UNDER
Defendant. )	)	IDAHO RULE OF CIVIL PROCEDURE
_____ )	)	37(b)

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”) in the above referenced matter. I make this Affidavit based upon my own personal knowledge.

2. Attached hereto as Exhibit A are true and correct copies of estimates and invoices produced in response to third party subpoenas, which documents were not produced by UCI.

3. Attached hereto as Exhibit B is a true and correct copy of Defendant’s Fourth Supplemental Answers to Plaintiff Gem State Roofing Incorporated’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, served on me on April 17, 2019.

4. Attached hereto as Exhibit C is a true and correct copy of Defendant's First Supplemental Answers and Responses to Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and Requests for Production of Documents, served on me on April 17, 2019.

5. Attached hereto as Exhibit D are true and correct copies of Exhibits from the Deposition of Jeffery Flynn taken in this case in December 2018.

Further your affiant sayeth naught.

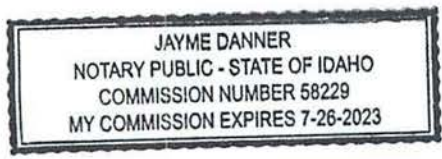


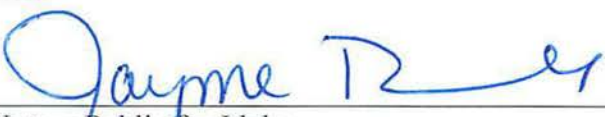
Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 30th day of May 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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





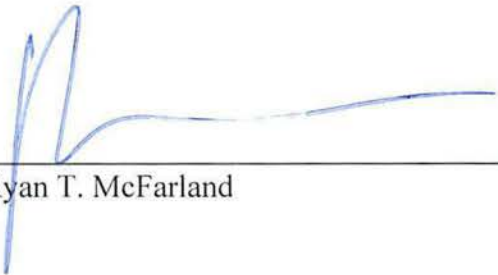
Notary Public for Idaho
Residing at: Nampa, Idaho
My commission expires: 7/26/23

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF MOTION FOR SANCTIONS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing



Ryan T. McFarland

EXHIBIT A



Gem State Roofing Inc
 PO Box 3916
 Hailey, ID 83333-3916

DEC 10 2009

Invoice

Date	Invoice #
12/4/2009	9223

Bill To
Snow Mountain Apartments P.O. Box 1566 Hailey, ID 83333

Phone # 1-208-578-0212
Fax # 1-208-578-0234

P.O. No.	Terms	Project
1685	Net 15	

Description	Qty	Rate	Amount
<p>This is an invoice for repairing the East building with the damaged drip-edge that the tree branch fell on. Repair will consist of applying a new piece of drip-flashing and applying new 3-tab shingles to match the existing shingles as close as possible.</p>			
30 year 3-tab composition shingle. (per sq.-Delivered)	0.33	75.00	24.75
Grace Ice & Water shield.	0.1	136.00	13.60
Journeyman roofer @ \$41.00/hr.	4	41.00	164.00
Custom 26 ga. Brown Metal drip-edge. (per foot)	10	1.50	15.00
		ENTERED	
Thank you for your business.		Total	\$217.35



Gem State Roofing Inc
 PO Box 3916
 Hailey, ID 83333-3916

DEC 1 0 2009

Invoice

Date	Invoice #
12/4/2009	9225

Bill To
Snow Mountain Apartments P.O. Box 1566 Hailey, ID 83333

Phone # 1-208-578-0212
Fax # 1-208-578-0234

P.O. No.	Terms	Project
1686	Net 15	

Description	Qty	Rate	Amount
This is an invoice for repairing the second building (west) that we looked at on 29 October 2009. Repair consists of fixing the Northeast bottom corner of the building where shingles are missing.			
30 year 3-tab composition shingle. (per sq.-Delivered)	0.33	75.00	24.75
Grace Ice & Water shield.	0.1	136.00	13.60
Journeyman roofer @ \$41.00/hr.	4	41.00	164.00
Vulkem, Geocell	1	6.50	6.50
ENTERED			
Thank you for your business.			Total \$208.85



United Components, Incorporated

DBA: Gem State Roofing
DBA: Asphalt Maintenance & Paving
417 Remington Street #2
Garden City Idaho 83714

Estimate

Date	Estimate #
8/17/2016	2982

Name / Address
Snow Mountain Apartments 2011 Woodside Blvd Hailey Idaho 83333

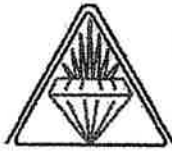
Phone Number
208-405-9871

Description	Total
We hereby propose to furnish all the materials and perform all the labor necessary for the completion of 2011 Woodside Blvd, Hailey:	
Building J 1. Tear off existing 2-layer roof system 2. Install Ice and Water shield on all valleys, rakes and eaves 2' up from exterior wall 3. Install synthetic underlayment 4. Install new drip edge, pipe jacks and vents 5. Install Limited Lifetime Architectural shingles 6. Ant damaged plywood removed and replaced at \$50.00 per sheet 7. All debris to be hauled off by Gem State Roofing. 8. 10 Year workmanship warranty	18,000.00
Building I 1. Tear off existing 2-layer roof system 2. Install Ice and Water shield on all valleys, rakes and eaves 2' up from exterior wall 3. Install synthetic underlayment 4. Install new drip edge, pipe jacks and vents 5. Install Limited Lifetime Architectural shingles 6. Ant damaged plywood removed and replaced at \$50.00 per sheet 7. All debris to be hauled off by Gem State Roofing. 8. 10 Year workmanship warranty	18,000.00
Building H 1. Tear off existing 2-layer roof system 2. Install Ice and Water shield on all valleys, rakes and eaves 2' up from exterior wall	

We look forward to doing business with you. Contractor License Number RCE-32821	Total
--	--------------

Signature _____

Phone #	Fax #	E-mail	Web Site
2083389318	208-388-8461	gemstateroofing@gmail.com	www.gemstateroofing.net



United Components, Incorporated

DBA: Gem State Roofing
DBA: Asphalt Maintenance & Paving
417 Remington Street #2
Garden City Idaho 83714

Estimate

Date	Estimate #
8/17/2016	2982

Name / Address
Snow Mountain Apartments 2011 Woodside Blvd Hailey Idaho 83333

Phone Number
208-405-9871

Description	Total
3. Install synthetic underlayment 4. Install new drip edge, pipe jacks and vents 5. Install Limited Lifetime Architectural shingles 6. Ant damaged plywood removed and replaced at \$50.00 per sheet 7 All debris to be hauled off by Gem State Roofing. 8. 10 Year workmanship warranty All material is guaranteed to be as specified and above work to be performed in accordance with the specifications submitted for above work. The work to be completed in a substantial workman like manner. Payment to be made is 1/2 down and the balance upon completion unless otherwise stated by United Components, Inc. DBA: Gem State Roofing. All deposits are non refundable. Once the estimates is signed it becomes a binding contract. Any breach of the contract will result in a minimum charge of 25% and may be subject to 100% of the total cost of the contract. A service charge of 1-1/2 % per month will be charged on all accounts past due. This is expressed as an annual percentage charge of 18%. In the event that any account is placed with a third party collection, customer agrees to pay all cost including reasonable attorney fees, administrative fees, court costs, and finance charges. Any alteration or deviation from above specifications involving unforeseen costs, will be executed only upon written orders, and will become an extra charge over and above the estimate set forth herein. All agreements contingent upon God, accidents or delays beyond our control. Owner to carry fire and other necessary insurance upon above work. Our employee's are fully covered by Workmen's Compensation and Public Liability Insurance. Engineer fees and permit fees (if applicable) will be an addendum to contract or billed separately.	18,000.00

We look forward to doing business with you.
Contractor License Number RCE-32821

Total

Signature _____

Phone #	Fax #	E-mail	Web Site
2083389318	208-388-8461	gemstateroofing@gmail.com	www.gemstateroofing.net



United Components, Incorporated
 DBA: Gem State Roofing
 DBA: Asphalt Maintenance & Paving
 417 Remington Street #2
 Garden City Idaho 83714

Estimate

Date	Estimate #
8/17/2016	2982

Name / Address
Snow Mountain Apartments 2011 Woodside Blvd Hailey Idaho 83333

Phone Number
208-405-9871

Description	Total
Note: Estimate is valid for fifteen days due to material price changes.	

We look forward to doing business with you. Contractor License Number RCE-32821	Total \$54,000.00
--	--------------------------

Signature _____

Phone #	Fax #	E-mail	Web Site
2083389318	208-388-8461	gemstateroofing@gmail.com	www.gemstateroofing.net

EXHIBIT B

Terri Pickens Manweiler, ISB No. 5828
Shannon N. Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S FOURTH
SUPPLEMENTAL ANSWERS TO
PLAINTIFF GEM STATE ROOFING
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the "Discovery Requests"), to the extent that they are inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

ANSWER TO INTERROGATORY NO. 3: These items do not exist. Defendant reserves the right to supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI did not keep diaries, calendars, notes, journals, reports or other writings regarding work it did in Blaine County, Idaho. UCI kept invoices and statements, which have been provided previously as DEFENDANT00003-9.

SECOND SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI does not have an electronic record keeping system in place to maintain electronic communications (emails) with vendors, suppliers, customers, and clients. UCI conducted a diligent search for any electronic records that may have existed related to Blaine County projects, but no additional documents exist that have not already been produced or obtained through subpoena. UCI did not maintain or keep many of the records that were provided through subpoena, and UCI does not have a method of recovery for deleted electronic files. All documents that could be recovered have now been produced as DEFENDANT000114-01148.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 6: Please produce All correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: No documents exist.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

Please see the documents bates stamped as DEFENDANT000114-01148.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: No documents exist.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Please see the documents bates stamped as DEFENDANT000114-01148.

DATED: April 17, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT C

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant.

Case No. CV01-18-13437

**DEFENDANT'S FIRST
SUPPLEMENTAL ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S SECOND SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and Requests for Production of Documents*, dated September 17, 2018, pursuant to Rules 26, 33 and 34 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents (hereafter, the "Discovery Requests"), to the extent that they are

inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;

- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

ANSWER TO INTERROGATORY NO. 20: Please see the Invoices, Estimates, and Work Orders from September 2010 to September 2018 provided herewith bates stamped as DEFENDANT000086 – 00113.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 20: UCI was not in the business of providing roofing services in 2005. UCI did not solicit business in Blaine County from the date of its formation, October 25, 2011, to present. UCI has already identified the projects it provided estimates for or completed in Blaine County, none of the projects were subject to the Trademark Settlement Agreement as alleged by Gem State Roofing Hailey. The work was either warranty work or existing customers of UCI seeking additional services from UCI. None of the work was solicited by UCI and none of the work violated the Trademark Settlement Agreement.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: Please see the documents produced herewith bates stamped as DEFENDANT000086-00113.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 24:
Please see the documents produced herewith bates stamped as DEFENDANT000114-01148.

DATED: April 17, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT D

From: Richard Reese <rreese@standardplumbing.com>
Sent: Saturday, June 04, 2016 11:09 PM
To: Romney Miles; bo.manager@standardplumbing.com; tf@standardplumbing.com; sv@standardplumbing.com; bu@standardplumbing.com; Gem State Roofing
Subject: Asphalt Projects to Begin per bid

Gem State Roofing/Asphalt Maintenance and Paving:

Please begin on the following jobs per estimates 2817 at Standard Plumbing Supply Locations:

Yes - 145 North Curtis. Boise, ID 69020 Square feet.

Note: Please advise if this includes the fenced tenant area in the 69,020 square feet

Yes - 167 Eastland Drive. Twin Falls, ID. 32,250 Square Feet

Note: Please confirm with Miles Romney that the square footage is for our property.

Yes - 4319 Glenbrook Drive, Hailey, ID

Yes - 336 Overland Drive, Burley, ID

Completed projects will be paid with 10 business days.

Standard Plumbing Supply
P.O. Box 708490
Sandy, Ut 84070

Miles Romney miles.romney@standardplumbing.com 801-233-2197 will assist in coordinating with the stores.

Thank you very much for your quotes and best wishes in successfully completing the projects.

Kind Regards,

Richard N. Reese
President
Standard Plumbing Supply Company.

Sent from my iPad



From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Wednesday, August 24, 2016 5:57 PM
To: 'Miles Romney'
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Drawing.pdf

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Thursday, August 11, 2016 9:53 AM
To: richard.reese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

Thank you,

Kerrie

-----Original Message-----

From: Richard Reese <richard.reese@standardplumbing.com>
To: 'Kerrie Kuhn' <gemstateroofing@aol.com>
Sent: Wed, Aug 10, 2016 9:29 am
Subject: RE: Estimate 2973 from United Components Incorporated

Can you send me a diagram of where the repair would be?

Richard

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Wednesday, August 10, 2016 9:25 AM
To: rreese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

I corrected the estimate and resent to you. installed at 2-1/2" and compacted

Thank you,

Kerrie

-----Original Message-----

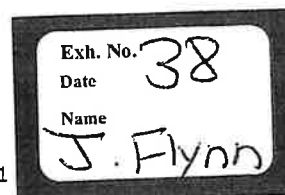
From: Richard Reese <rreese@standardplumbing.com>
To: GEMSTATEROOFING <GEMSTATEROOFING@AOL.COM>
Sent: Tue, Aug 9, 2016 5:45 pm
Subject: Re: Estimate 2973 from United Components Incorporated

What thickness on the remove and repave?

Sent from my iPhone

Richard Reese

801-209-2800 mobile
801-233-4090 office direct



000431

From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Thursday, August 25, 2016 10:32 AM
To: 'Miles Romney'; 'TF Store'
Cc: gemstateroofing@gmail.com
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Est_2973_from_United_Components_Incorporated_4456.pdf

Please proceed at the lower bid price. Work with the store with as little disruption as possible and advise when completed.

Thanks
Richard

From: United Components Incorporated [mailto:replyTo@intuit.com]
Sent: Thursday, August 25, 2016 8:29 AM
To: rreese@standardplumbing.com
Subject: Estimate 2973 from United Components Incorporated

Dear Customer :

Please review the attached estimate. Feel free to contact us if you have any questions.

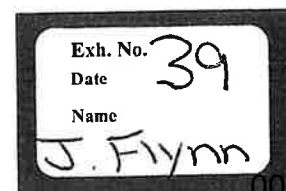
We look forward to working with you.

Sincerely,

United Components Incorporated
208-338-9318

To view your estimate

Open the attached PDF file. You must have [Acrobat® Reader®](#) installed to view the attachment.



McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS, INC. dba GEM)
STATE ROOFING,)
Defendant.)

Case No. CV01-18-13437

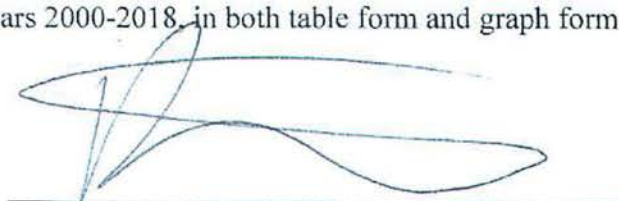
AFFIDAVIT OF RICK SILVIA IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SANCTIONS UNDER IDAHO
RULE OF CIVIL PROCEDURE 37(b)

Rick Silvia, being first duly sworn upon oath, deposes and says:

1. Your affiant is the President and owner of the Plaintiff corporation Gem State Roofing, Incorporated ("Gem State-Blaine") in the above-captioned action. I make this affidavit based upon my own personal knowledge and can testify as to the truth of the matters contained herein if called upon as a witness at trial.

2. Attached hereto as Exhibit A is a true and correct table showing Gem State-Blaine's gross revenue and profits for the years 2000-2018, in both table form and graph form.

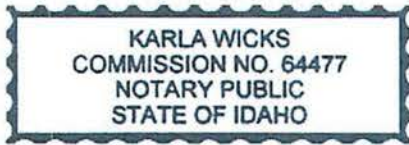
Further your affiant sayeth naught.


Rick/Silvia

STATE OF IDAHO)
) ss
County of Ada)

I, Karla Wicks, a Notary Public, do hereby certify that on this 29th day of May 2019, personally appeared before me Rick Silvia, who, being by me first duly sworn, declared that he is the President and owner of Plaintiff corporation in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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



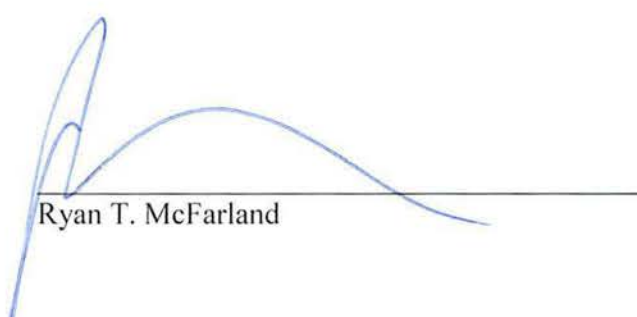
Karla Wicks
Notary Public for Idaho
Residing at: Blaine County
My commission expires: 10-27-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RICK SILVIA IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

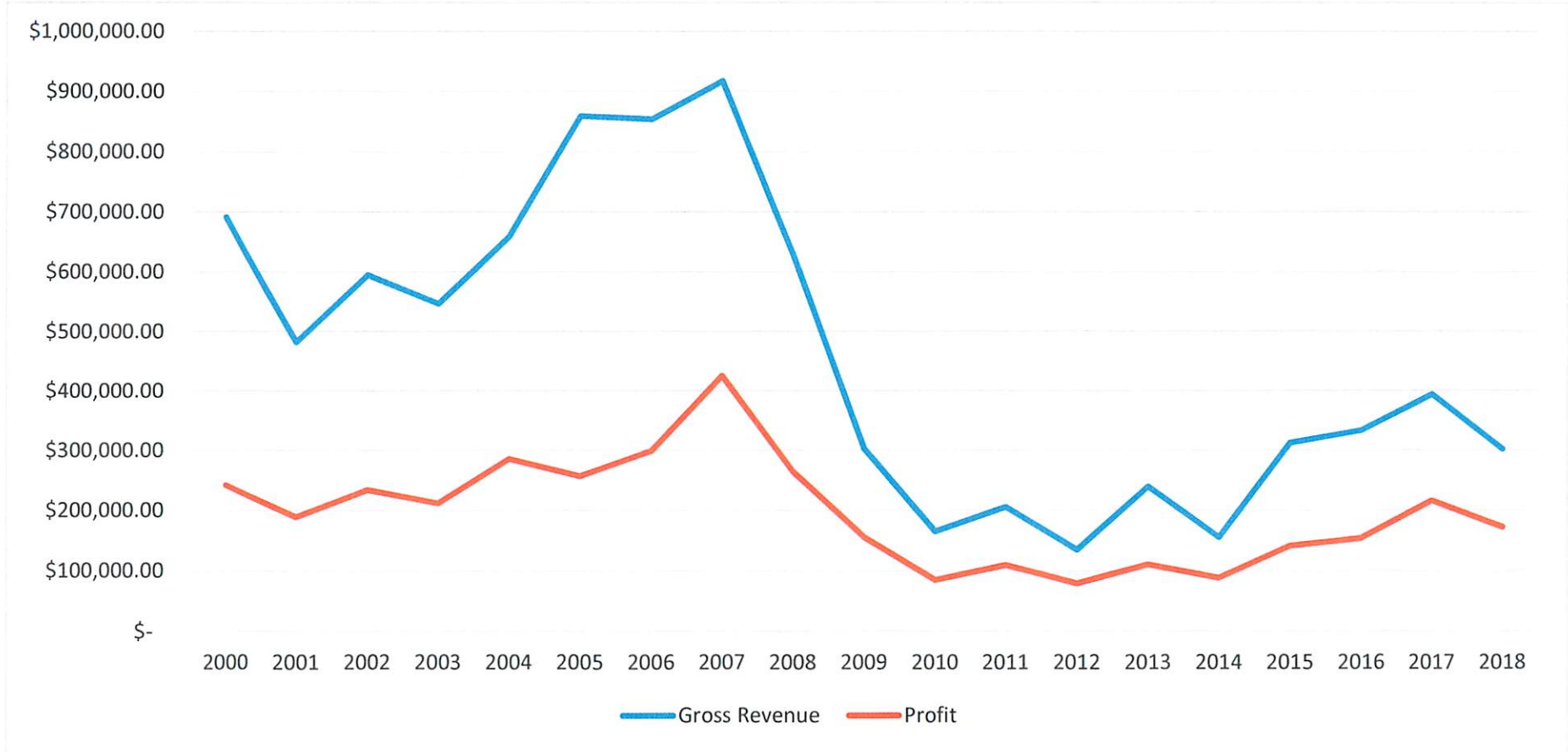
iCourt electronic filing



Ryan T. McFarland

EXHIBIT A

Year	Gross Revenue	Profit	Margin
2000	\$ 691,091.84	\$ 242,198.41	35.05%
2001	\$ 481,587.21	\$ 188,255.42	39.09%
2002	\$ 594,441.84	\$ 233,662.21	39.31%
2003	\$ 546,293.49	\$ 211,653.48	38.74%
2004	\$ 659,238.10	\$ 285,721.87	43.34%
2005	\$ 859,188.61	\$ 256,454.73	29.85%
2006	\$ 853,699.79	\$ 298,526.68	34.97%
2007	\$ 917,559.70	\$ 425,276.13	46.35%
2008	\$ 628,122.69	\$ 264,161.93	42.06%
2009	\$ 301,667.73	\$ 154,608.98	51.25%
2010	\$ 164,701.24	\$ 84,391.99	51.24%
2011	\$ 205,607.67	\$ 109,424.06	53.22%
2012	\$ 134,284.01	\$ 78,577.07	58.52%
2013	\$ 239,279.58	\$ 110,245.83	46.07%
2014	\$ 154,811.43	\$ 87,781.34	56.70%
2015	\$ 312,175.98	\$ 140,733.36	45.08%
2016	\$ 333,160.75	\$ 153,517.63	46.08%
2017	\$ 393,802.43	\$ 215,910.69	54.83%
2018	\$ 302,073.54	\$ 171,813.47	56.88%



Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT’S OBJECTION TO
MOTION FOR SANCTIONS UNDER
IDAHO RULE OF CIVIL
PROCEDURE RULE 37(b)**

Defendant United Components, Incorporated, dba Gem State Roofing (“UCI”) by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., submits this Objection to Plaintiff’s Motion for Sanctions dated May 20, 2019. This Objection is supported by the Declaration of Terri Pickens Manweiler, filed concurrently herewith.

I. INTRODUCTION

Plaintiff Gem State Roofing Incorporated filed its Motion for Sanctions under Idaho Rule of Civil Procedure 37(b) (“Motion for Sanctions”) alleging UCI failed to comply with this Court’s Amended Order Granting Plaintiff’s Motion to Compel dated April 3, 2019 (“Court’s Order”). Plaintiff is attempting to re-litigate the Motion to Compel which was already argued and decided.

Simply put, Plaintiff's Motion for Sanctions is a waste of judicial resources and time for the following reasons, each of which is more thoroughly argued in Section II:

1. UCI complied with the Court's Order and as stated numerous times in its briefing and oral argument, it does not have additional documents or discoverable items in its possession;
2. The Affidavit of Ryan McFarland in Support of Motion for Sanctions contains statements that are entirely untrue and made in bad faith;
3. The relief and form of sanctions that Plaintiff seeks is non-sensical and moot, largely in part because (a) Plaintiff misconstrues the burden of proof regarding damages, and (b) Plaintiff seems to think this matter will be decided by a jury; and
4. Attorney fees should not be awarded because UCI has fully and completely complied with this Court's Order.

II. LEGAL ARGUMENT

1. UCI Complied with the Court's Order.

UCI has fully complied with the Court's Order because it has produced everything it has in its possession. There are no documents being withheld from Plaintiff in an attempt to use them as a surprise at the trial in this matter. UCI's counsel is well aware of the requirement that documents intended for use at trial must have been produced to opposing counsel before the date of trial. Perhaps counsel was too busy with his power point presentation to hear this Court state that UCI cannot produce documents it does not have knowledge of or possession of. UCI has stated over and over that it has gone through all of its files, hard copy and electronic, and it has produced everything to Plaintiff. Thus, it has fully complied with the Court's Order and the Motion for Sanctions should be denied.

2. The McFarland Affidavit Contains False Statements.

Plaintiff's counsel filed an Affidavit containing statements that are either a lie or at a minimum were made without proper due diligence. Paragraph 2 of the Affidavit of Ryan McFarland in Support of Motion for Sanctions states

Attached hereto as Exhibit A are true and correct copies of estimates and invoices produced in response to third party subpoenas, which documents were not produced by UCI.

The first two documents attached as Exhibit A are invoices from Gem State Roofing, Inc. to Snow Mountain Apartments. These are Plaintiff's **own** invoices and have nothing to do with UCI – there is no reason UCI should have or would have produced Plaintiff's invoices.

The third, fourth, and fifth documents attached as Exhibit A have in fact been produced by UCI. UCI bates stamped these documents as DEFENDANT00098-100 and produced them to Plaintiff on November 19, 2018 in its Answers and Responses to Plaintiff's Second Interrogatories and Requests for Production (*Declaration of Terri Pickens Manweiler*, ¶ 3, Exhibit A).

Mr. McFarland states in his sworn affidavit that UCI has not produced these documents when in fact UCI produced these documents seven months ago and the documents it did not produce were Plaintiff's invoices. Paragraph 2 and Exhibit A of McFarland's Affidavit should not be considered for purposes of the Motion for Sanctions.

3. The Relief Requested Is Inappropriate and Non-Sensical.

Plaintiff would like this Court to sanction UCI by:

[r]efusing to allow it to produce evidence on the issue of damages, and ordering that the jury should take as established the following fact: that, had UCI (or its predecessor Gem State-Boise) not violated the Trademark Settlement Agreement by working in Blaine County, Gem State-Blaine would have obtained the Blaine County jobs that UCI obtained.

Memorandum in Support of Motion for Sanctions, p. 2.

First, regarding the issue of damages, UCI does not have the burden to produce evidence of damages, this is Plaintiff's case and Plaintiff has the burden to show it has been damaged and the amount of such damages.

Second, this is not a case being heard by a jury. Plaintiff did not request a jury trial in its Complaint and the parties stipulated to a court trial in the Stipulation for Scheduling dated October 4, 2018. Additionally, Plaintiff is asking the Court to make a pretty wild presumption that Plaintiff would have gotten all Blaine County jobs if UCI had not breached the Agreement. There is no causal connection between those two items, and it is inappropriate for Plaintiff to request the Court to make this determination prior to the trial taking place.

Third, UCI agrees with Plaintiff's statement that it should "simply allow Gem State-Blaine to produce such invoices as it has possession of" and that UCI should be prohibited from producing additional evidence relative to damages or work done in Blaine County that it has not already produced (*Memorandum in Support of Motion for Sanctions*, p. 9-10, Section ii). UCI could not agree more! This is after all, what the Idaho Rules of Civil Procedure require. Plaintiff could have actually avoided the entire Motion for Sanctions because the relief it wants is already written into the rules of law and procedure that the parties and Court are bound by. The rules also provide for something called a Motion in Limine that could be filed to again achieve the exact same result.

There is no basis for the sanctions and relief requested by Plaintiff, thus, the Motion for Sanctions should be denied.

4. There is no Basis for Attorney Fees.

UCI is at a loss as to how to convince Plaintiff that it is not hiding documents or refusing to produce documents – it simply does not have additional documents and has produced EVERYTHING it has to Plaintiff. No amount of incessant motions for sanctions will change this. Because of this, attorney fees should not be awarded to Plaintiff. The Idaho Rules of Civil Procedure require a disobedient party to pay reasonable expenses including attorney fees, unless the failure was substantially justified, or other expenses make the award unjust. IRCP 37(b)(C).

UCI did not disobey the Court's Order – UCI was ordered to provide full and complete responses to Plaintiff on or before April 18, 2019, which it did, and those responses contain the absolute truth that there are no additional documents to produce nor information to be provided.

III. CONCLUSION

UCI has fully complied with the Court's Amended Order Granting Plaintiff's Motion to Compel; thus, no sanctions should be issued against UCI nor should UCI be ordered to pay any attorney fees as requested by Plaintiff. For the forgoing reasons, Plaintiff's Motion for Sanctions should be denied.

DATED: June 11, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 11, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff,))	
vs. )	)	REPLY IN SUPPORT OF PLAINTIFF’S
UNITED COMPONENTS, )	)	MOTION FOR SANCTIONS UNDER
INCORPORATED, dba GEM STATE )	)	IDAHO RULE OF CIVIL PROCEDURE
ROOFING, )	)	37(b)
Defendant.))	

Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”), by and through its attorneys of record, McFarland Ritter PLLC, files this Reply in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b).

I. INTRODUCTION

At the outset, Plaintiff’s attorney acknowledges the inadvertent error he made in the previously filed Affidavit of Ryan T. McFarland in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b) (the “Affidavit”). Paragraph 2 of the Affidavit – and the corresponding documents attached as Exhibit A – mistakenly included two of Gem State-Blaine’s invoices; also, UCI’s Estimate #2982 (three pages total) were produced both in response

to a third party subpoena and by Defendant United Components, Incorporated (“UCI”). Gem State-Blaine submits the concurrently-filed Corrected Affidavit of Ryan T. McFarland in Support of Motion for Sanctions in an effort to correct the record. It appears that UCI has produced all of the invoices and estimates that were produced by third parties in response to subpoenas.

This error, however, does not nullify Gem State-Blaine’s Motion for Sanctions. Gem State-Blaine only received documents from six (6) of the third parties who received subpoenas. Gem State-Blaine does not know what other customers, or prospective customers UCI had contact with – principally, because UCI has produced no email communications, except as concerning the Animal Shelter project. UCI did not comply with this Court’s order to provide “full and complete responses” to Gem State-Blaine’s written discovery on or before April 18, 2019 (the “Order”). UCI’s claim that it cannot perform a basic search of its email accounts for emails related to prospective or actual work in Blaine County violates the Order, and poses a major hindrance in determining the amount of damages Gem State-Blaine suffered by UCI’s breach of the Trademark Settlement Agreement (“Settlement Agreement”). It is also unacceptable in the current era of e-discovery. Sanctions are therefore appropriate, including an order prohibiting UCI from introducing any additional evidence on the issue of damages, finding that Gem State-Blaine would have obtained UCI’s Blaine County jobs but for Gem State-Boise and UCI’s violation of the Settlement Agreement, and awarding Gem State-Blaine its costs and attorneys’ fees.

II. ARGUMENT

A. UCI Did Not Comply with the Court's Order Granting Motion to Compel.

UCI's latest discovery responses failed to include a single new document; instead, they include the implausible assertion that UCI does not have an electronic record keeping system in place to store emails. McFarland Aff., ¶ 3, Exh. B. Except for the McAlvain Construction/Animal Shelter Project for which it belatedly produced over 1,000 pages of documents on the eve of Gem State-Blaine's Motion to Compel hearing, UCI has only produced 117 documents in response to Gem State-Blaine's multiple requests for all documents, writings and emails regarding UCI's (and its predecessor Gem State-Boise) Blaine County jobs (actual or potential) during a thirteen year period of time. And none of those documents included any emails sent or received by UCI.

In the last quarter century, email has become one of the most common forms of communication for businesses both large and small. And maintaining an "electronic record keeping system" to store emails is neither complicated nor costly: all email accounts have "sent" folders built in. Other Courts have found that the failure to preserve email evidence warrants precisely the sanctions Gem State-Blaine has asked for: preclusion, an adverse inference instruction, and attorneys' fees:

Hummer deleted emails which it had a duty to preserve and produce to plaintiffs. These emails related to the merits of the action, and plaintiffs have been prejudiced by their destruction. . . . However, Hummer has shown that they took steps to preserve [L]esser sanctions will adequately remedy Hummer's failure to preserve and produce. . . .

B. Evidentiary Sanctions

Plaintiffs have requested two forms of evidentiary sanctions. First, plaintiffs request that Hummer be precluded from contesting all or

some of a number of issues related to the parties' claims and defenses. Second, plaintiffs request that the jury be given an adverse inference instruction.

1. Preclusion

The court's inherent authority to impose sanctions for the wrongful destruction of evidence includes the power to exclude evidence that, given the spoliation, would "unfairly prejudice an opposing party." The propriety of preclusion sanctions, therefore, depends on the extent to which plaintiffs were prejudiced by Hummer's deletion of its Napster-related emails. This analysis must be made in light of the requirement to impose the "least onerous sanction" given the extent of the offending party's fault and the prejudice to the opposing party.

As discussed above, the full extent of prejudice is unclear based on the record before the court for the purposes of this motion. However, plaintiffs have shown sufficient prejudice to warrant some degree of preclusion sanctions. . . .

2. Adverse Inference Instruction

. . . . As discussed above, Hummer deleted Napster-related communications which it had a duty to preserve, knowing that such a duty existed. Hummer's conduct amounts to gross negligence, if not willfulness, which is sufficient culpability to justify an adverse inference. In addition, the deleted emails were relevant to the action as discussed above. Therefore, plaintiffs are entitled to an adverse inference instruction. The precise wording of the instruction will be determined at trial.

C. Monetary Sanctions

Monetary sanctions may be imposed where one party has wrongfully destroyed evidence. Plaintiffs claim that they are entitled to their attorneys' fees associated with bringing this motion, and with the meet and confer process involved in determining the availability of Hummer's Napster-related emails. The court finds that monetary sanctions are warranted here. Hummer could have forestalled a great deal of time and effort by simply acknowledging early on that it was not preserving its internally generated Napster-related communications.

In re Napster, Inc. Copyright Litigation, 462 F.Supp.2d 1060, 1077-78 (N.D. Cal. 2006) (internal citations omitted). While we do not know whether UCI destroyed emails, the refusal to produce them has the same effect.

It is simply not credible for UCI to claim that it has no responsive emails. At a minimum, one of UCI's customers, Standard Plumbing Supply, produced emails with UCI to Gem State-Blaine in response to a third party subpoena. Also, it seems improbable in the extreme that UCI would have email records on one, but only one, Blaine County project (the McAlvain/Animal Shelter project). As is evident from the emails between UCI and Standard Plumbing, attached as Exhibit D to the Corrected Affidavit of Ryan T. McFarland filed concurrently herewith, UCI has at least two email addresses: gemstateroofing@gmail.com and gemstateroofing@aol.com. UCI clearly uses email. The failure to produce emails in this case only benefits UCI – it has every incentive to not produce emails. Without knowing who UCI has contacted in Blaine County via email (or any other writing) as an actual or prospective customer between October 2005 and November 2018, or what UCI (or its predecessor communicated) Gem State-Blaine is unfairly prejudiced in presenting its case on damages.

B. Sanctions are Appropriate and Necessary.

This Court can and should impose a variety of sanctions because of UCI's continued evasion of its discovery obligations, and to ensure that Gem State-Blaine's recovery of damages is not adversely affected by UCI's noncompliance. In particular, and as outlined in Gem State-Blaine's Memorandum in Support of Motion for Sanctions, Gem State-Blaine requests that such sanctions include prohibiting UCI from introducing any more materials into evidence to oppose Gem State-Blaine's claim for damages. *See* I.R.C.P 37(b)(2)(A)(ii).

UCI seems to agree that it will not produce evidence in opposition to damages, beyond the invoices UCI has already produced. The parties are thus agreed.

Gem State-Blaine has also requested a jury instruction that it be established that Gem State-Blaine would have obtained the Blaine County jobs that UCI (and its predecessor Gem State-Boise) obtained. That instruction is fair because, where email communication has been wrongfully withheld, it is impossible for Gem State-Blaine to know what UCI (or its predecessor) might have communicated to customers and potential customers, particularly here where the names of the parties were virtually identical. And though the Court, not a jury, will be the finder of fact here (as UCI correctly pointed out in its Objection to Motion for Sanctions), the sanction – more accurately termed an inference than a jury instruction – remains appropriate. When an action is tried before the court without a jury, “resolution of the possible conflict between ... inferences is within the responsibilities of the trial court as fact finder.” *Chapin v. Linden*, 162 P.3d 772, 775 (Idaho 2007). Indeed, “[t]he trial judge is not constrained to draw inferences in favor of the non-moving party, but rather the judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts, despite the possibility of conflicting inferences. *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009) (citing *Chapin*, 162 P.3d at 775); see also *Capstar Radio Operating Co. v. Lawrence*, 375 P.3d 282, 294 (Idaho 2016) (it is within the province of the trial court to determine the inferences to be drawn from the evidence); *Thomas v. Arkoosh Produce, Inc.*, 48 P.3d 1241, 1246 (Idaho 2002) (it is the trial court's responsibility to determine credibility of witnesses and inferences to be drawn from evidence) (citation omitted).

Gem State-Blaine has already provided the Court with the data setting forth its lost profits for the relevant time period. Thus, when it comes time for the Court to ascertain Gem State-Blaine's total damages as a result of UCI's breach of the Settlement Agreement, the Court can and should conclude that the inference linking UCI's conduct to Gem State-Blaine's damages is more probable than the inference connecting Gem State-Blaine's loss to other factors. *See Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 334 P.3d 780, 790 (Idaho 2014). It is well within the Court's province of imposing sanctions and acting as the finder of fact to: 1) prohibit UCI from producing any further evidence on the issue of damages; and 2) infer that but for UCI's (and its predecessor Gem State Boise) violation of the Settlement Agreement, at a minimum Gem State-Blaine would have obtained the Blaine County jobs that UCI and Gem State-Boise obtained. *See* I.R.C.P. 37(b)(2)(A)(i) and (ii).

Alternatively, the Court could permit Gem State-Blaine to search UCI's email accounts for documents relevant to its discovery requests; Gem State-Blaine has not asked for this particular remedy because it is more expensive and more oppressive than the options Gem State-Blaine has asked for, but it is a viable alternative to the remedies Gem State-Blaine has requested.

III. CONCLUSION

For the foregoing reasons, Gem State-Blaine requests that this Court sanction UCI pursuant to Rule 37(b).

DATED THIS 17th day of June 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June 2019, I caused to be served a true copy of the foregoing REPLY IN SUPPORT OF MOTION FOR SANCTIONS UNDER RULE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. CV01-18-13437
Plaintiff,))	
vs. )	)	CORRECTED AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, INC. dba GEM )	)	MCFARLAND IN SUPPORT OF
STATE ROOFING, )	)	MOTION FOR SANCTIONS UNDER
Defendant. )	)	IDAHO RULE OF CIVIL PROCEDURE
_____ )	)	37(b)

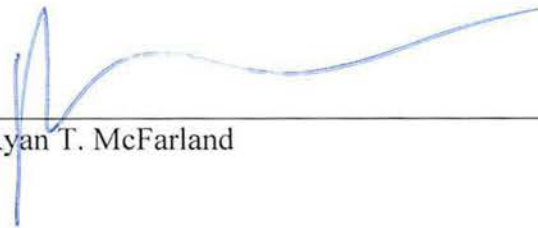
Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”) in the above referenced matter. I make this Affidavit based upon my own personal knowledge.
2. *Intentionally omitted.*
3. Attached hereto as Exhibit B is a true and correct copy of Defendant’s Fourth Supplemental Answers to Plaintiff Gem State Roofing Incorporated’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, served on me on April 17, 2019.

4. Attached hereto as Exhibit C is a true and correct copy of Defendant's First Supplemental Answers and Responses to Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and Requests for Production of Documents, served on me on April 17, 2019.

5. Attached hereto as Exhibit D are true and correct copies of Exhibits from the Deposition of Jeffery Flynn taken in this case in December 2018.

Further your affiant sayeth naught.

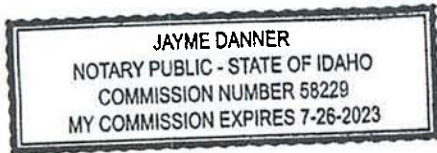


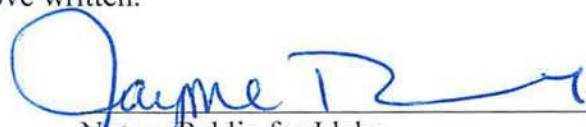
Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 17th day of May 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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





Notary Public for Idaho
Residing at: Nampa, Idaho
My commission expires: 7/26/23

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June 2019, I caused to be served a true copy of the foregoing CORRECTED AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF MOTION FOR SANCTIONS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(b) by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

EXHIBIT B

Terri Pickens Manweiler, ISB No. 5828
Shannon N. Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S FOURTH
SUPPLEMENTAL ANSWERS TO
PLAINTIFF GEM STATE ROOFING
INCORPORATED'S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

DEFENDANT'S FOURTH SUPPLEMENTAL ANSWERS TO PLAINTIFF GEM STATE ROOFING
INCORPORATED'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR ADMISSION, Page 1

000456

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the "Discovery Requests"), to the extent that they are inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 3: Please identify any and all documents, diaries, calendars, notes, journals, reports, records, statements, writings or any other such items created by You or at Your direction, which were made prior to, contemporaneously with, or after the alleged events which are the subject of the Complaint and Your Answer.

ANSWER TO INTERROGATORY NO. 3: These items do not exist. Defendant reserves the right to supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI did not keep diaries, calendars, notes, journals, reports or other writings regarding work it did in Blaine County, Idaho. UCI kept invoices and statements, which have been provided previously as DEFENDANT00003-9.

SECOND SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3: UCI does not have an electronic record keeping system in place to maintain electronic communications (emails) with vendors, suppliers, customers, and clients. UCI conducted a diligent search for any electronic records that may have existed related to Blaine County projects, but no additional documents exist that have not already been produced or obtained through subpoena. UCI did not maintain or keep many of the records that were provided through subpoena, and UCI does not have a method of recovery for deleted electronic files. All documents that could be recovered have now been produced as DEFENDANT000114-01148.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 6: Please produce All correspondence or other documents or tangible things exchanged between You and any customer You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: No documents exist.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 6:
Please see the documents bates stamped as DEFENDANT000114-01148.

REQUEST FOR PRODUCTION NO. 7: Please produce all correspondence or other documents or tangible things exchanged between You and any potential customer – including any person or entity You have submitted a roofing bid or roofing services solicitation to – You have ever had in Blaine County, Idaho, including any and all customer feedback, complaints or opinions regarding any work You performed for them.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: No documents exist.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 7:
Please see the documents bates stamped as DEFENDANT000114-01148.

DATED: April 17, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT C

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S FIRST
SUPPLEMENTAL ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED'S SECOND SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozacos, P.A., supplements its answers and responses to *Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and Requests for Production of Documents*, dated September 17, 2018, pursuant to Rules 26, 33 and 34 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents (hereafter, the "Discovery Requests"), to the extent that they are

inconsistent with or purport to require obligations different from or in addition to those imposed by the Idaho Rules of Civil Procedure.

2. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek premature discovery of any information in contravention of the Scheduling Order in this case.

3. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek information in the possession, custody, or control of Plaintiff.

4. Defendant objects to the Discovery Requests (and each of them) to the extent that they seek or call for the disclosure or production of information that is privileged or protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other cognizable privilege or protection.

5. Defendant's responses are provided prior to the completion of preparation for trial of this matter. Defendant, therefore, reserves the right to rely on any facts, documents, or other evidence which may hereafter develop or come to Defendant's attention. These answers and responses are based upon information presently known to Defendant and its attorneys. Defendant reserves the right to supplement or amend both the answers and objections at any time prior to the trial of this action.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 20: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County between October 2005 and the date of these Discovery Requests by stating:

- a. The address of the roofing project;
- b. The customer(s) of each roofing project;

- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project; and
- e. All revenue You generated from such project.

ANSWER TO INTERROGATORY NO. 20: Please see the Invoices, Estimates, and Work Orders from September 2010 to September 2018 provided herewith bates stamped as DEFENDANT000086 – 00113.

FIRST SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 20: UCI was not in the business of providing roofing services in 2005. UCI did not solicit business in Blaine County from the date of its formation, October 25, 2011, to present. UCI has already identified the projects it provided estimates for or completed in Blaine County, none of the projects were subject to the Trademark Settlement Agreement as alleged by Gem State Roofing Hailey. The work was either warranty work or existing customers of UCI seeking additional services from UCI. None of the work was solicited by UCI and none of the work violated the Trademark Settlement Agreement.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 24: Please produce any and all documents that support or relate in any manner to Your Response to Interrogatory No. 20.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: Please see the documents produced herewith bates stamped as DEFENDANT000086-00113.

FIRST SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 24:
Please see the documents produced herewith bates stamped as DEFENDANT000114-01148.

DATED: April 17, 2019.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680.

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT D

From: Richard Reese <rreese@standardplumbing.com>
Sent: Saturday, June 04, 2016 11:09 PM
To: Romney Miles; bo.manager@standardplumbing.com; tf@standardplumbing.com; sv@standardplumbing.com; bu@standardplumbing.com; Gem State Roofing
Subject: Asphalt Projects to Begin per bid

Gem State Roofing/Asphalt Maintenance and Paving:

Please begin on the following jobs per estimates 2817 at Standard Plumbing Supply Locations:

Yes - 145 North Curtis. Boise, ID 69020 Square feet.

Note: Please advise if this includes the fenced tenant area in the 69,020 square feet

Yes - 167 Eastland Drive. Twin Falls, ID. 32,250 Square Feet

Note: Please confirm with Miles Romney that the square footage is for our property.

Yes - 4319 Glenbrook Drive, Hailey, ID

Yes - 336 Overland Drive, Burley, ID

Completed projects will be paid with 10 business days.

Standard Plumbing Supply
P.O. Box 708490
Sandy, Ut 84070

Miles Romney miles.romney@standardplumbing.com 801-233-2197 will assist in coordinating with the stores.

Thank you very much for your quotes and best wishes in successfully completing the projects.

Kind Regards,

Richard N. Reese
President
Standard Plumbing Supply Company.

Sent from my iPad



From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Wednesday, August 24, 2016 5:57 PM
To: 'Miles Romney'
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Drawing.pdf

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Thursday, August 11, 2016 9:53 AM
To: richard.reese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

Thank you,

Kerrie

-----Original Message-----

From: Richard Reese <richard.reese@standardplumbing.com>
To: 'Kerrie Kuhn' <gemstateroofing@aol.com>
Sent: Wed, Aug 10, 2016 9:29 am
Subject: RE: Estimate 2973 from United Components Incorporated

Can you send me a diagram of where the repair would be?

Richard

From: Kerrie Kuhn [mailto:gemstateroofing@aol.com]
Sent: Wednesday, August 10, 2016 9:25 AM
To: rreese@standardplumbing.com
Subject: Re: Estimate 2973 from United Components Incorporated

I corrected the estimate and resent to you. installed at 2-1/2" and compacted

Thank you,

Kerrie

-----Original Message-----

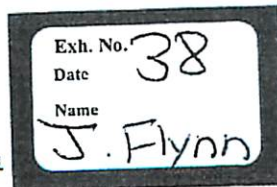
From: Richard Reese <rreese@standardplumbing.com>
To: GEMSTATEROOFING <GEMSTATEROOFING@AOL.COM>
Sent: Tue, Aug 9, 2016 5:45 pm
Subject: Re: Estimate 2973 from United Components Incorporated

What thickness on the remove and repave?

Sent from my iPhone

Richard Reese

801-209-2800 mobile
801-233-4090 office direct



From: Richard Reese <richard.reese@standardplumbing.com>
Sent: Thursday, August 25, 2016 10:32 AM
To: 'Miles Romney'; 'TF Store'
Cc: gemstateroofing@gmail.com
Subject: FW: Estimate 2973 from United Components Incorporated
Attachments: Est_2973_from_United_Components_Incorporated_4456.pdf

Please proceed at the lower bid price. Work with the store with as little disruption as possible and advise when completed.

Thanks
Richard

From: United Components Incorporated [mailto:replyTo@intuit.com]
Sent: Thursday, August 25, 2016 8:29 AM
To: rreese@standardplumbing.com
Subject: Estimate 2973 from United Components Incorporated

Dear Customer :

Please review the attached estimate. Feel free to contact us if you have any questions.

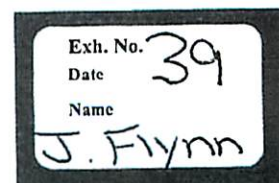
We look forward to working with you.

Sincerely,

United Components Incorporated
208-338-9318

To view your estimate

Open the attached PDF file. You must have [Acrobat® Reader®](#) installed to view the attachment.



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

GEM STATE ROOFING, INCORPORATED,

Plaintiff,

vs.

UNITED COMPONENTS, INCORPORATED,
dba GEM STATE ROOFING

Defendant.

Case No. CV01-18-13437

ORDER GRANTING PLAINTIFF'S
MOTION FOR SANCTIONS

Following oral argument and a review of the matters on file herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Sanctions is GRANTED in part as follows:

1. Defendant is prohibited from introducing any evidence, including but not limited to any written or electronic communications, other than such evidence as Defendant has produced to the Plaintiff prior to the date of this Order.

2. Within thirty (30) days of the entry of this Order, Defendant must produce or make available to Plaintiff, or authorized representatives, for the purpose of allowing Plaintiff to inspect, copy or make mirror image copies of, any and all communication data stored or accesses by any of defendant's personal or business-related electronic devices capable of creating or receiving electronic mail or text messages, including but not limited to computers (desktop, laptops and/or tablets), mobile or handheld devices such as cell phones, smartphones, personal digital assistants (PDA), smartwatches, or electronic notebooks that Defendant or any of its employees use or have used ("Electronic Devices"), any and all hard drives used in connection

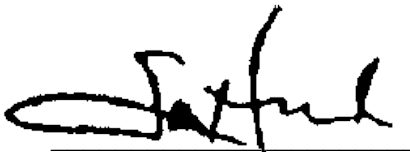
with the Electronic Devices, and all login and password information necessary for Plaintiff to access Defendant's email accounts and text messaging applications. Defendant shall provide Plaintiff or its authorized representative(s) immediate access, during Defendant's normal business hours, to any and all such Electronic Devices and hard drives, as well as the necessary information to successfully login to Defendant's email accounts and its employees' text messaging applications.

3. Plaintiff may issue third party subpoenas to relevant Email Service Providers (ESP), or Internet Service Providers (ISP) as needed.

4. Plaintiff and/or its authorized representatives shall hold all information obtained in its review of Defendant's Electronic Devices and hard drives in strictest confidence, and Plaintiff may only use materials or communications that are relevant to the issue of Plaintiff's damages in this matter. Any and all mirror images of Defendant's hard drives shall be returned to Defendant at the conclusion of this matter.

5. The Court reserves its ruling on additional sanctions, including fees, costs and the requested inference that Plaintiff would have obtained the Blaine County jobs that Defendant (and its predecessor entity) obtained, until further proceedings or trial.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 6/24/2019 09:08 AM

Date

CERTIFICATE OF SERVICE

Signed: 6/24/2019 09:12 AM

I HEREBY CERTIFY that on this ___ day of June 2019, I caused to be served a true copy of the foregoing ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS by the method indicated below, and addressed to each of the following:

MCFARLAND RITTER PLLC
Ryan McFarland
PO Box 1335
Meridian, Idaho 83680

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: ryan@mcfarlandritter.com
paralegal@mcfarlandritter.com
- iCourt
- Telecopy

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: terri@pickenslawboise.com
shannon@pickenslawboise.com
- iCourt
- Telecopy

PHIL MCGRANE
Clerk of the District Court



Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S MOTION FOR
RECONSIDERATION AND MOTION
FOR PROTECTIVE ORDER**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby moves this Court under I.R.C.P. 11.2(b) and 26(c) for reconsideration of its June 24, 2019 Order Granting Plaintiff's Motion for Sanctions.

This Motion is supported by the *Memorandum in Support of Defendant's Motion for Reconsideration and Motion for Protective Order, Declaration of Terri Pickens Manweiler in Support of Defendant's Motion for Reconsideration and Motion for Protective Order*, and the *Declaration of Kerrie Kuhn in Support of Defendant's Motion for Reconsideration and Motion for Protective Order*, each concurrently filed herewith.

Oral argument is requested.

DATED: June 24, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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McFarland Ritter PLLC
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- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING, INCORPORATED,	
	Plaintiff,
vs.	
UNITED COMPONENTS, INCORPORATED, dba GEM STATE ROOFING,	
	Defendant.

Case No. CV01-18-13437

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
RECONSIDERATION AND MOTION
FOR PROTECTIVE ORDER**

Defendant United Components Incorporated, dba Gem State Roofing (“UCI”) by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby submits its memorandum in support of Defendant’s Motion for Reconsideration and Motion for Protective Order. This Memorandum is supported by the *Declaration of Terri Pickens Manweiler in Support of Defendant’s Motion for Reconsideration and Motion for Protective Order* (“*Manweiler Dec.*”) and the *Declaration of Kerrie Kuhn in Support of Defendant’s Motion for Reconsideration and Motion for Protective Order* (“*Kuhn Dec.*”).

I. INTRODUCTION

Plaintiff Gem State Roofing, Inc. (“Plaintiff”) filed its Motion for Sanctions on May 30, 2019, oral argument was heard on June 19, 2019, Plaintiff issued its Proposed Order Granting Motion for Sanctions and UCI submitted its redlined version of the Proposed Order Granting Motion for Sanctions (*Manweiler Dec.*, ¶ 3, Exhibit A). On June 24, 2019, this Court signed Plaintiff’s proposed order. UCI seeks reconsideration of the Order Granting Plaintiff’s Motion for Sanctions (“Order”) and additionally seeks the issuance of a protective order as argued below.

II. LEGAL AUTHORITY AND ARGUMENT

1. MOTIONS FOR RECONSIDERATION.

A party may make motion for reconsideration of any interlocutory orders of the trial court at any time before the entry of final judgment. The Idaho Rule of Civil Procedure states:

In General. A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment. A motion to reconsider an order entered after the entry of final judgment must be made within 14 days after entry of the order.

I.R.C.P. 11.2(b)(1). Such reconsideration “usually involves new or additional facts, and a more comprehensive presentation of both law and fact.” *Coeur d’Alene Mining Co. v. First Nat’l Bank*, 118 Idaho 812, 822, 800 P.2d 1026, 1036 (1990). However, “[a] motion for reconsideration need not be supported by any new evidence or authority.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012); *see also Johnson v. N. Idaho College*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012)(noting, Rule 11(a)(2)(B) [now 11.2(b)(1)] does not contain a new evidence requirement). 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.” *Id.*

The Order requires UCI to submit “all login and password information necessary for Plaintiff to access UCI’s email accounts and text messaging applications” (Order, ¶ 2) and to “provide Plaintiff or its authorized representatives immediate access...to any and all such Electronic Devices and hard drives as well as the necessary information to successfully login to UCI’s email accounts and its employees’ text messaging applications” (Order, ¶ 2). The Order violates Idaho Rules of Civil Procedure 26(b)(1)(A), 34(b)(E), 37(e), Idaho Rules of Evidence 502, and Idaho Rule of Professional Conduct 1.6, as follows.

A. The Order Violates the Idaho Rules of Civil Procedure.

This Court’s Order violates Idaho Rules of Civil Procedure 26(b)(1)(A), 34(b)(E), and 37(e) and should be reconsidered to comply with the Idaho Rules of Civil Procedure.

i. IRCP 26(b)(1)(A).

The Order violates Idaho Rule of Civil Procedure 26(b)(1)(A) which provides for parties to obtain discovery regarding any “**nonprivileged matter** that is relevant to any party’s claim or defense” (emphasis added). The information Plaintiff will have access to is UCI’s attorney client communications because UCI communicates with its attorneys via e-mail. (*Kuhn Dec.*, ¶ 9, *Manweiler Dec.*, ¶ 6) Such communications are privileged under the Idaho Rules of Evidence 502 and Idaho Rules of Professional Conduct 1.6 and Plaintiff is not privy to review of such information without proper protection of the communications.

ii. IRCP 34(b)(E).

The Order also violates Idaho Rules of Civil Procedure 34(b)(E) which provides that “A party need not produce the same electronically stored information in more than one form”. The Order provides Plaintiff access to at least eight devices of UCI and UCI’s employees, such devices will have duplicative information and need not be subject to this Order.

iii. IRCP 37(e).

The Order violates Idaho Rule of Civil Procedure 37(e) which provides:

Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.

(Emphasis added.)

As was stated numerous times in briefing and on the record in court, UCI does not keep email records once a project is complete. It is UCI's routine operation to delete emails once a project has been completed and the reason so many emails regarding McAlvain were provided is because this is an ongoing project for UCI. *Kuhn Dec.*, ¶¶ 3-4. Further, Plaintiff's initial demand letter dated June 22, 2018 did not provide that electronic communications needed to be preserved. *Kuhn Dec.*, ¶¶ 7,8, Exhibit A. It has also been stated on the record numerous times that UCI is not hiding emails or refusing to produce such emails, UCI simply does not have the emails Plaintiff is looking for. *Kuhn Dec.*, ¶¶ 5-6.

Thus, sanctions should not be entered against UCI for its failure to keep electronic communications. Additionally, until a mirror imaging search has been completed, there is no evidence that UCI was intentionally withholding emails from Plaintiff, so such sanctions are premature.

B. The Order Violates Idaho Rules of Evidence

Idaho Rule of Evidence 502 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but

not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

IRE 502(c) goes on to also provide that this privilege may be claimed by the client or for the client through the client's lawyer. IRE 502 provides certain exceptions to the attorney client privilege, however none of the exceptions are applicable to this situation.

Allowing Plaintiff unsupervised and unfettered access to UCI's email accounts, computers, hard-drives, cell phones, text messages, and so on is a complete violation of UCI's attorney client privilege since the email communications with UCI's attorney are contained in those accounts *Kuhn Dec.*, ¶ 9, *Manweiler Dec.*, ¶ 6.

C. The Order Violates the Idaho Rules of Professional Conduct.

The Idaho Rules of Professional Conduct provide that a lawyer shall make reasonable efforts to prevent the inadvertent disclosure or unauthorized disclosure of, or unauthorized access to, information relating to the representations of a client. IRPC 1.6(c). It is the undersigned's duty to prevent unauthorized access by Plaintiff into UCI's emails which contain attorney client privilege. This Court's Order attempts to circumvent the attorney-client privilege and should be reconsidered and redrafted to protect such information.

2. MOTION FOR PROTECTIVE ORDER.

Idaho Rule of Civil Procedure 26(c) governs the granting of protective orders. The rule states in relevant part:

- (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. **The court may, for good cause, issue an order to protect a party or person from annoyance,**

embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) **specifying terms, including time and place, for the disclosure or discovery;**
- (C) **prescribing a discovery method other than the one selected by the party seeking discovery;**
- (D) **forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;**
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

I.R.C.P. 26(c) (emphasis added).

Good cause exists for this Court to issue a protective order because UCI's attorney client privilege will be destroyed if Plaintiff is allowed unfettered access to UCI's electronic communications without proper steps being taken to protect the privileged information.

UCI will comply with the electronic search ordered by this Court, but because good cause exists, UCI seeks a protective order which requires (i) 24 hour advanced written notice to counsel for UCI before the mirror imaging will take place to allow UCI's counsel to be present for any mirror-imaging or access by Plaintiff to UCI's electronic communications and (ii) the ability of UCI's counsel to ensure that all attorney-client communications remain privileged and exempt from view of Plaintiff. *Manweiler Dec.*, ¶ 8. Alternatively, UCI requests a special master to be

appointed to review any communications on UCI's electronic devices for attorney client privilege information and remove each such communication from the disclosure of information provided to Plaintiff. *Manweiler Dec.*, ¶ 9.

III. CONCLUSION

Based on the foregoing, UCI respectfully request this Court reconsider its Order on Plaintiff's Motion for Sanctions and issue a Protective Order to ensure all attorney client communications will remain privilege and exempt from view of Plaintiff.

DATED: June 24, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
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- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
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Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DECLARATION OF TERRI PICKENS
MANWEILER IN SUPPORT OF
DEFENDANT'S MOTION FOR
RECONSIDERATION AND MOTION
FOR PROTECTIVE ORDER**

I, TERRI PICKENS MANWEILER make the following declaration pursuant to Idaho Code § 9-1406:

1. I am the attorney of record for Defendant, and as such, I have personal knowledge of the facts herein.
2. On June 20, 2019, I received a copy of Mr. McFarland's proposed Order Granting Plaintiff's Motion for Sanctions.
3. Upon receipt, I redlined the proposed Order and the redlined proposed order was submitted via iCourts and email to Janet Hoskins. A true and accurate copy of the redlined proposed order is attached hereto as **Exhibit A**.

4. This Court entered Mr. McFarland's order as drafted on June 24, 2019.
5. The Order allows for Plaintiff or Plaintiff's agents to obtain login and password information for all of UCI's email accounts, text messages, phones, hard drives, etc.
6. I frequently email Kerrie Kuhn, office manager for UCI, at UCI's email address.
7. Thus, the order allows for Plaintiff to access such accounts that contain attorney client information.
8. UCI will comply with the mirror image search but require the undersigned to be present for any mirror imaging and require attorney client information to be exempt from review by Plaintiff.
9. Alternatively, UCI requests a special master to be appointed to review all information prior to Plaintiff reviewing the information and to remove attorney client privileged documentation from the documentation provided to Plaintiff.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: June 24, 2019.

/s/ Terri Pickens Manweiler

TERRI PICKENS MANWEILER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

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- Facsimile – 208.895.1270
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- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT A

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff,))	
vs. )	)	ORDER GRANTING PLAINTIFF'S
UNITED COMPONENTS, )	)	MOTION FOR SANCTIONS
INCORPORATED, dba GEM STATE))	
ROOFING))	
Defendant.))	

Following oral argument and a review of the matters on file herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Sanctions is GRANTED in part as follows:

1. Defendant is prohibited from introducing any evidence, including but not limited to any written or electronic communications, other than such evidence as Defendant has produced to the Plaintiff prior to the date of this Order, on the issue of damages at trial in this matter.

2. Within thirty (30) days of the entry of this Order, Defendant must produce or make available to Plaintiff, for the purpose of allowing Plaintiff to make mirror image copies of,

any and all electronic devices capable of creating or receiving electronic mail or text messages, including but not limited to computers (desktop, laptops and/or tablets), mobile or handheld devices such as cell phones, smartphones, personal digital assistants (PDA), smartwatches, or electronic notebooks that Defendant or any of its employees use or have used (“Electronic Devices”), any and all hard drives used in connection with the Electronic Devices, ~~and all login and password information necessary for Plaintiff to access Defendant’s email accounts and text messaging applications.~~ During Defendant’s normal business hours, and upon twenty-four (24) hour notice to counsel for Defendant, Defendant shall provide Plaintiff or its authorized representative(s) ~~immediate~~ access to any and all such Electronic Devices and hard drives, ~~as well as the necessary information to successfully login to Defendant’s email accounts and its employees’ text messaging applications.~~ Counsel for Defendant shall be present during the review to provide proper login and access to the Electronic Devices, and further in order to protect all attorney/client privileged information, as well as other privileged information as protected by law.

3. Plaintiff may issue third party subpoenas to relevant Email Service Providers (ESP).

4. Plaintiff and/or its authorized representatives shall hold all information obtained in its review of Defendant’s Electronic Devices and hard drives in strict confidence. Plaintiffs may not reproduce, copy, or use any information without first identifying which documents, emails, etc. it believes falls within the Order to Compel, and after notifying counsel for Defendants if its intent to do so. If any attorney/client privileged communications are obtained during the review, counsel for Plaintiff shall immediately notify counsel for Defendant, then protect that information in accordance with Idaho Rules and statute. Additionally, Plaintiff may

only use materials or communications that are relevant to the issue of Plaintiff's damages in this matter. Any and all mirror images of Defendant's hard drives shall be returned to counsel for Defendant at the conclusion of this matter.

5. The Court reserves its ruling on additional sanctions, including the requested inference that Plaintiff would have obtained the Blaine County jobs that Defendant (and its predecessor entity) obtained, until Plaintiff completes its review of Defendant's Electronic Devices, hard drives, and email accounts.

6. The Court further reserves its ruling on Plaintiff's request for attorneys' fees and costs until the conclusion of the matter.

DATED THIS _____ day of June 2019.

By _____
The Honorable Samuel A. Hoagland
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of June 2019, I caused to be served a true copy of the foregoing ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS by the method indicated below, and addressed to each of the following:

MCFARLAND RITTER PLLC
Ryan McFarland
PO Box 1335
Meridian, Idaho 83680

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Terri Pickens Manweiler
Shannon Pearson
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shannon@pickenslawboise.com
- iCourt
- Telecopy

PHIL MCGRANE
Clerk of the District Court

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

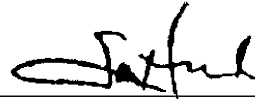
GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED,
Defendant.

Case No. CV01-18-13437
ORDER RESETTING HEARING

Due to the Court's schedule and for good cause shown, it is hereby ORDERED that Defendant's Motion for Reconsideration and Motion for Protective Order hearing in this case is hereby rescheduled to **Tuesday, July 9, 2019 at 4:00 pm.**



Signed: 7/1/2019 01:54 PM

SAMUEL A. HOAGLAND
District Judge

Date

CERTIFICATE OF MAILING

Signed: 7/1/2019 02:45 PM

I hereby certify that on _____ I served a true and correct copy of the within instrument to:

Ryan McFarland
ryan@mcfarlandritter.com

Terri Pickens Manweiler
terri@pickenslawboise.com

PHIL MCGRANE
Clerk of the District Court

By: 
Deputy Court Clerk



McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)	
	)	Case No. <u>CV01-18-13437</u>
Plaintiff,)	
	)	PLAINTIFF'S MEMORANDUM IN
vs.	)	OPPOSITION TO DEFENDANT'S
	)	MOTION FOR RECONSIDERATION
UNITED COMPONENTS, INCORPORATED,	)	AND MOTION FOR PROTECTIVE
dba GEM STATE ROOFING,	)	ORDER
)	
Defendant.)	
)	

Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”), by and through its attorneys of record, McFarland Ritter PLLC, files this Memorandum in Opposition to Defendant’s Motion for Reconsideration and Motion for Protective Order.

I. INTRODUCTION

On the very same day this Court entered its Order Granting Plaintiff’s Motion for Sanctions (“Order”), Defendant United Components, Incorporated (“UCI”) filed its Motion for Reconsideration and Motion for Protective Order (“Motion to Reconsider”) to re-argue the same facts this Court has already considered and ruled on. This Court should not grant UCI’s Motion to Reconsider because UCI has provided this Court with no new factual or legal basis to

reconsider its Order. The Motion to Reconsider is yet another effort by UCI to prevent Gem State-Blaine from completing discovery and preparing for trial.

II. ARGUMENT

A. UCI Has Provided No Valid Basis For its Motion to Reconsider.

“A motion for reconsideration is a motion which allows the court – when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof – to reconsider the correctness of an interlocutory order.” *Johnson v. N. Idaho College*, 278 P.3d 928, 932 (Idaho 2012). Here, UCI has presented no new facts and no new law for this Court to consider. Rather, UCI has only regurgitated the arguments it raised (and the Court rejected) in opposing Gem State-Blaine’s Motion to Compel and Motion for Sanctions. “A rehash of arguments previously presented affords no basis for a revision of the court’s order.” *Sims v. Ellis*, 972 F. Supp.2d 1211, 1213 (D. Idaho 2013); *see also In re Negrete*, 183 B.R. 195, 197 (B.A.P. 9th Cir. 1995) (“Motions for reconsideration which merely revisit the same issues already ruled upon by the trial court, or which advance supporting facts that were otherwise available when the issues were originally briefed, will generally not be granted.”) UCI’s disagreement with this Court’s Orders to compel discovery and then impose sanctions does not provide a valid basis for reconsideration. Accordingly, this Court should deny the Motion to Reconsider.

B. The Motion to Reconsider is Both Excessive and an Unnecessary Distraction to the Remaining Issues in This Case.

UCI maintains that it has no documents. It is curious that UCI would work so hard to prevent the Court and Gem State-Blaine from verifying this claim: if there are no documents,

then there is nothing to hide. This Court's Order requires UCI to provide Gem State-Blaine with full access to UCI's electronic devices and email accounts so as to verify UCI's full and complete responses to Gem State-Blaine's discovery requests. Rather than promptly complying with the Order so that discovery can finally be completed and both parties can prepare for trial in less than five weeks, UCI has chosen to file a new motion. This new attempt to obstruct is a continuation of a pattern:

- (i) Gem State-Blaine served its first set of discovery requests in September 2018;
- (ii) When UCI refused to produce all responsive documents, Gem State-Blaine filed a Motion to Compel;
- (iii) Only a few days before the hearing on the Motion to Compel, UCI produced an additional 1,000+ pages of discovery (having produced only about 100 pages before then);
- (iv) This Court granted Gem State-Blaine's Motion to Compel on April 3, 2019.
- (v) In response to the Motion to Compel, UCI produced responses that were non-responsive, stating that it "does not have an electronic record keeping system in place to maintain . . . emails. . . . [N]o additional documents exist . . .";
- (vi) Gem State-Blaine filed its Motion for Sanctions, which was heard by the Court, and granted from the bench, on June 19, 2019;
- (vii) Thereafter, Gem State-Blaine and UCI submitted proposed orders to the Court. The Court rejected UCI's proposed order, and granted substantially all of Gem State-Blaine's proposed Order; and
- (viii) Rather than comply with the entered Order, UCI has filed this Motion for Reconsideration.

C. The Order Does Not Violate any Idaho Rules of Procedure, Evidence or Professional Conduct.

UCI claims that the Court Order violates the Idaho Rules of Civil Procedure, Evidence and Professional Conduct. None of these rules, however, are violated:

1. Idaho Rule of Civil Procedure 26(b)(1)(A) – This Rule permits discovery of any “nonprivileged matter that is relevant to any party’s claim or defense . . .” None of Gem State-Blaine’s discovery requests seek discovery of privileged communications. The Order merely

provides a way for Gem State-Blaine to review emails and text messages that UCI has continuously refused to produce – emails and text messages regarding UCI’s work in Blaine County.

On June 25, 2019, counsel for both parties attended the Pretrial Status Conference. The Court asked counsel to work together to provide Gem State-Blaine access to the electronic devices and all emails and text messages thereon, while protecting UCI’s attorney-client privilege. Counsel for Gem State-Blaine immediately contacted a third party digital imaging company to conduct the search of the electronic devices and perform a “privilege wash” to protect UCI’s attorney-client communications. UCI’s counsel appears to have agreed to this protocol in principal, but as of the filing of this Opposition, no documents have been produced. Affidavit of Ryan T. McFarland, at ¶¶ 2-3, Exh. A.

2. Idaho Rule of Civil Procedure 34(b)(2)(E)(iii) – UCI claims the Order violates subsection (iii) of this Rule which provides that “a party need not produce the same electronically stored information in more than one form.” This subsection is one of four procedures that apply to producing electronically stored information; however, these procedures are all contingent on the following introductory clause: “Unless otherwise stipulated or ordered by the Court....” I.R.C.P. 34(b)(2)(E) (emphasis added). The Order supersedes the rule, as the rule allows.

3. Idaho Rule of Civil Procedure 37(e) – This Rule states that a court may not impose sanctions for failing to provide electronically stored information “lost as a result of the routine, good faith operation of any electronic information system.” No real sanctions have been entered here – at this point, Gem State-Blaine has been granted access to UCI’s emails to verify whether

emails have been withheld, intentionally, deleted, or lost in the good faith operation of UCI's business. UCI suggests that it had no duty to preserve electronic communications because Gem State-Blaine did not specifically make such a request in its initial demand letter dated June 22, 2018. That argument is contrary to law. A duty to preserve electronically stored information arises once one "knew or should have known that they were in possession of evidence relevant to pending litigation." *McCabe v. Gonzales*, No. 1:13-CV-00435-CWD, 2015 WL 5679735, at *12 (D. Idaho Sept. 25, 2015) (citing *Leon v. IDX Systems Corp.*, 464 F.3d 951, 956 (9th Cir. 2006)); see also *Harmon v. United States by & through Bureau of Indian Affairs*, No. 4:15-CV-00173-BLW, 2017 WL 1115158, at *2 (D. Idaho 2017) (the obligation to preserve attaches when a party knows or should reasonably know that the evidence is potentially relevant to litigation).

And as further explained in *Voom HD Holdings LLC v. EchoStar Satellite LLC*:

In *Zubulake*, the court stated that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." As has been stated, "[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process." (*Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175–76 (S.D.N.Y.2004)). Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.

Voom HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 41, 939 N.Y.S.2d 321, 328 (N.Y. App Div. 2012) (internal citations omitted). UCI had a duty to preserve electronically stored information and put in place a litigation hold as soon as it reasonably anticipated litigation, which occurred when it received Gem State-Blaine's demand letter.

4. Idaho Rule of Evidence 502 – UCI next claims that the Order violates the protections afforded attorney-client communications. Gem State-Blaine is not seeking the disclosure of privileged communications. Not only did UCI make this same argument in its proposed redlined version of the Order which the Court previously rejected – but as stated above, the parties have now agreed to a third-party imaging company performing a privilege wash to protect any attorney-client communications from being inadvertently disclosed to Gem State-Blaine. Accordingly, this objection is moot, and UCI’s Motion to Reconsider should be denied.

5. Idaho Rules of Professional Conduct 1.6(c) – UCI’s fifth and final claim of a rules violation is Idaho Rules of Professional Conduct 1.6(c) which provides that a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to information relating to its representation of a client. I.R.P.C. 1.6(c). UCI claims the Order circumvents the attorney-client privilege and should be reconsidered and redrafted. Neither the Order, nor Gem State-Blaine, are seeking the production and review of attorney-client communications. Furthermore, as previously stated the parties’ agreement to have the third party imaging company perform a privilege wash ensures that there will be no inadvertent or unauthorized disclosure of such privileged communications.

III. CONCLUSION

For the foregoing reasons, Gem State-Blaine requests that this Court deny UCI’s Motion to Reconsider.

DATED THIS 2nd day of July 2019.

By /s/ Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July 2019, I caused to be served a true copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION AND MOTION FOR PROTECTIVE ORDER by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

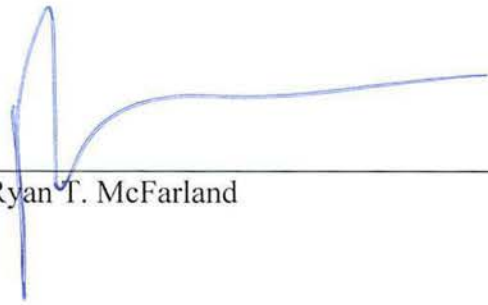
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GEM STATE ROOFING, INCORPORATED, )	)	Case No. CV01-18-13437
Plaintiff,))	
vs. )	)	AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, INC. dba GEM )	)	MCFARLAND IN SUPPORT OF GEM
STATE ROOFING, )	)	STATE ROOFING, INCORPORATED'S
Defendant. )	)	OPPOSITION TO DEFENDANT'S
_____ )	)	MOTION TO RECONSIDER

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated ("Gem State-Blaine") in the above referenced matter. I make this Affidavit based upon my own personal knowledge.
2. Attached hereto as Exhibit A is a true and correct copy of an email exchange between me and counsel for Defendant, dated June 27, 2019, regarding a proposed protocol for copying Defendant's email accounts.
3. As of the signing of this Affidavit, I have not received any emails.

Further your affiant sayeth naught.

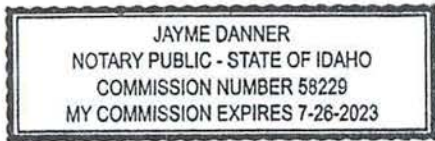


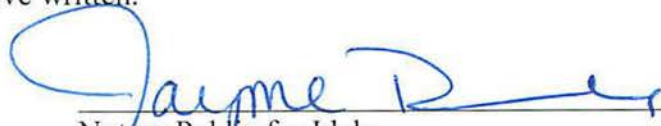
Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 2nd day of ~~May~~ ^{July} 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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





Notary Public for Idaho
Residing at: Nampa Idaho
My commission expires: 7/26/23

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF GEM STATE ROOFING, INCORPORATED'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

EXHIBIT A

Ryan McFarland

From: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Sent: Thursday, June 27, 2019 11:50 AM
To: Ryan McFarland; Shannon Pearson
Cc: 'Lori Hickman'; 'Shane Sawyer'
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Ryan and Shane,

If I can work directly with Shane, I will accommodate the email review.

Shannon and I just met with our clients. Here is the information you have requested.

1. There are three computers at UCI main office, only one of which is used for company business. It is a 2018 Windows 10 PC used by Kerrie Kuhn, the Office Administrator/Minority owner. The other two are previous computers she used from 2011 and sometime after 2013, but are no longer being used for the business since she got the new computer in 2018.
2. There are four telephones that are used for UCI as follows:
 - a. Kerrie, 208-941-4579, iPhone 8s
 - b. Jeff, 208-941-7456, Android Samsung S10
 - c. Bob, 208-941-8317, iPhone 6s
 - d. Andrew Hayden (employee), 208-901-0039, Android Duraforce PRO
3. The business has a Facebook page: Gem State Roofing, @GemStateRoofingUS
4. The company has zero laptops, tablets, iPads, smart watches, or any other electronic devices capable of sending/receiving text messages or emails.
5. The company has four email accounts:
 - a. gemstateroofing@aol.com
 - b. gemstateroofing@gmail.com
 - c. asphaltmaintenancepaving@gmail.com
 - d. unitedcomponentsinc@gmail.com

For physical inspection of the phones and computers, we propose either July 1, 2, 8 or 9. If the email search with Shane is sufficient, please advise and Shane and I can start that process immediately.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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From: Ryan McFarland <ryan@mcfarlandritter.com>
Sent: Tuesday, June 25, 2019 5:11 PM
To: Terri Pickens Manweiler <Terri@pickenslawboise.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>; 'Shane Sawyer' <Ssawyer@Streamlineimaging.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Terri,

I'm not sure we are in a position to do that yet because you have not yet told me how many computers/phones/other devices, or what kind they are. That matters in terms of costs and in terms of equipment/personnel my guy will need to bring. Here's what I propose:

- We have retained Streamline Imaging (<http://www.streamlineimaging.com/>) to assist us in getting the mirror image copies. Streamline is a highly regarded imaging company and I believe will serve effectively and ethically as a neutral here.
- If you will provide all of the email addresses and passwords, Shane from Streamline (cc'd here) can go in and take mirror images of the email accounts. If you will further provide Shane a list of email addresses (presumably just from your firm) that would denote attorney-client privileged communications, Shane can redact all such emails from the eventual production before they ever get to me. Shane can ultimately produce a redacted set of emails, and can also create a privilege log. Shane will produce copies of the emails (redacted), and the privilege log to both of us. I will also agree to the claw back provisions of 26(b)(5)(B), in case something is missed. Under this arrangement, I would not receive any attorney-client privileged communications.
- If you agree to this approach, we may be able to get most of the discovery completed without additional cost or time to either of us. There may not be a need to image computers - or, if there is, we can agree on that in due course after the emails are reviewed.
- The big outstanding thing I will certainly still need is copies of text messages. For that, I need to know how many phones, and what make/models they are. I can get that information to Shane and we can schedule with you time to make those images.

Please confirm whether you will agree to an initially providing email account log in info to Shane.

Thanks,
Ryan

Ryan McFarland
Legal Counsel
P.O. Box 1335
Meridian, ID 83642
p. 208.895.1291
c. [208.789.1643](tel:208.789.1643)
f. [208.895.1270](tel:208.895.1270)
mcfarlandritter.com



McFARLAND  **RITTER**

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contents is strictly prohibited. Please notify me immediately if you have received this message in error, and delete the message.

From: Terri Pickens Manweiler [<mailto:Terri@pickenslawboise.com>]
Sent: Tuesday, June 25, 2019 4:42 PM
To: Ryan McFarland <ryan@mcfarlandritter.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Dear Ryan,

Per your request, I am responding to your correspondence regarding the electronic discovery search. Is there a day next week that your third party computer analyst can meet me at the UCI office for the inspection/copying? I would provide passwords and logins at that time to him or her only. I would be there to safeguard any information that I deem to be privileged. You are obviously welcome to be present as well, but I will not give you access to the electronic information without a third party providing a layer of protection for privileged information. Given the Court's comments this afternoon, this is a very reasonable solution. If you feel like I have not given you enough access to the electronic information, you can take it up with the Judge at the hearing scheduled for July 10.

Tell me what day works for your analyst and I will get you a list of all devices.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S MOTION FOR
PROTECTIVE ORDER REGARDING
THIRD PARTY SUBPOENAS**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its counsel of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby move this Court pursuant to IRCP 26 for the entry of a protective order regarding the three subpoenas issued to Defendant by Plaintiff.

This Motion is supported by the *Memorandum in Support of Defendant's Motion for Protective Order Regarding Third Party Subpoenas* and the *Declaration of Terri Pickens Manweiler in Support of Defendant's Motion for Protective Order Regarding Third Party Subpoenas*, each concurrently filed herewith.

Oral argument is requested.

DATED: July 3, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER REGARDING
THIRD PARTY SUBPOENAS**

Defendant United Components Incorporated, dba Gem State Roofing (“UCI”) by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby submits its memorandum in support of Defendant’s Motion for Protective Order Regarding Third Party Subpoenas. This Memorandum is supported by the *Declaration of Terri Pickens Manweiler in Support of Defendant’s Motion for Protective Order Regarding Third Party Subpoenas* (“*Manweiler Dec.*”).

I. INTRODUCTION

Plaintiff Gem State Roofing, Inc. (“Plaintiff”) submitted to UCI a copy of three subpoenas which will be served within seven days of today’s date. *Manweiler Dec.*, ¶ 2, Exhibit A. Plaintiff is attempting to subpoena Google, LLC and Oath, Inc. (AOL) to provide all emails deleted from

UCI's email accounts between October 1, 2005 and June 30, 2019. Plaintiff also is attempting to subpoena Verizon for all text messages sent or received between UCI employees from October 1, 2005 through June 30, 2019.

Each subpoena seeks the discovery of attorney client privileged information, information which Plaintiff is not entitled. UCI has already complied with this Court's order regarding a mirror image search and Plaintiff is in possession of all non-privilege emails and communications it was seeking by way of the Order for Sanctions. Manweiler Dec., ¶¶ 4-5, Exhibits B & C. These three subpoenas should be quashed, or in the alternative, a protective order be entered to once again, protect against any attorney client information which may be uncovered and given to Plaintiff as a result of these subpoenas.

II. LEGAL AUTHORITY AND ARGUMENT

Idaho Rule of Civil Procedure 26(c) governs the granting of protective orders. The rule states in relevant part:

- (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. **The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:**
 - (A) forbidding the disclosure or discovery;
 - (B) **specifying terms, including time and place, for the disclosure or discovery;**
 - (C) **prescribing a discovery method other than the one selected by the party seeking discovery;**
 - (D) **forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;**

- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

I.R.C.P. 26(c) (emphasis added).

Good cause exists for this Court to issue a protective order because UCI's attorney client privilege will be destroyed if Plaintiff is allowed to serve the Subpoenas upon Google, AOL, and Verizon if the proper steps are not taken to protect the privileged information.

A. The Subpoenas Violate the Idaho Rules of Civil Procedure.

The three subpoenas violate Idaho Rules of Civil Procedure 26(b)(1)(A), 34(b)(E), and 37(e) and should be reconsidered to comply with the Idaho Rules of Civil Procedure.

i. **IRCP 26(b)(1)(A)**. The Subpoenas violate Idaho Rule of Civil Procedure 26(b)(1)(A) which provides for parties to obtain discovery regarding any “**nonprivileged matter** that is relevant to any party's claim or defense” (emphasis added). The information Plaintiff will have access to is UCI's attorney client communications because UCI communicates with its attorneys via e-mail. Such communications are privileged under the Idaho Rules of Evidence 502 and Idaho Rules of Professional Conduct 1.6 and Plaintiff is not privy to review of such information without proper protection of the communications.

ii. **IRCP 34(b)(E)**. The Subpoenas also violate Idaho Rules of Civil Procedure 34(b)(E) which provides that “A party need not produce the same electronically stored information in more than one form”. Plaintiff already has the non-privileged emails and communications which

were ordered to be turned over. The Subpoenas are duplicative and will provide Plaintiff access to attorney client privileged information.

B. The Subpoenas Violate Idaho Rules of Evidence

Idaho Rule of Evidence 502 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

IRE 502(c) goes on to also provide that this privilege may be claimed by the client or for the client through the client's lawyer. IRE 502 provides certain exceptions to the attorney client privilege, however none of the exceptions are applicable to this situation.

Allowing Plaintiff to obtain access to the information sought in the Subpoenas will allow Plaintiff access attorney client privilege information which is a complete violation of UCI's attorney client privilege since the email communications with UCI's attorney are contained in those accounts.

C. The Subpoenas Violate the Idaho Rules of Professional Conduct.

The Idaho Rules of Professional Conduct provide that a lawyer shall make reasonable efforts to prevent the inadvertent disclosure or unauthorized disclosure of, or unauthorized access to, information relating to the representations of a client. IRPC 1.6(c). It is the undersigned's duty to prevent unauthorized access by Plaintiff into UCI's emails which contain attorney client privilege. Plaintiff's Subpoenas attempt to circumvent the attorney-client privilege and should not

be allowed to be served. There is simply no other explanation for Plaintiff's vigilant attempts to get email communications beyond what has now already been provided voluntarily. The third party specialist is holding back all attorney/client privileged communications, thus counsel for Plaintiffs are seeking to obtain those emails via subpoena. If that is not the case, then the request is duplicative and the subpoenas are now moot. Either way, this Court must intervene and determine what its true intent was when it signed the Order for Sanctions, because if it was to get the unprivileged emails, that has already been accomplished. Otherwise, all of the rules and privileges cited hereinabove apply and this Court is ordering Defendants to do more than is allowed by law.

III. CONCLUSION

Plaintiff is abusing its subpoena power and circumventing the rules of civil procedure and evidence by attempting to recover emails and communications which contain attorney client privilege information. Plaintiff already has the information it sought in its Motion to Compel and Motion for Sanctions because UCI has fully complied with the Court's Order for Sanctions. In spite of this, Plaintiff is yet again trying to get access to UCI's privileged communications. Thus, UCI respectfully request this Court enter a protective order with regard to the three subpoenas and quash the subpoenas in their entirety.

DATED: July 3, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DECLARATION OF TERRI PICKENS
MANWEILER IN SUPPORT OF
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER REGARDING
THIRD PARTY SUBPOENAS**

I, TERRI PICKENS MANWEILER make the following declaration pursuant to Idaho Code § 9-1406:

1. I am the attorney of record for Defendant, and as such, I have personal knowledge of the facts herein.
2. On July 3, 2019 I received a copy of three subpoenas Plaintiff intends to serve within seven days of today's date. True and accurate copies of the three subpoenas are attached hereto as **Exhibit A**.
3. Plaintiff has already been given access to Defendant's emails, text messages, and communications, as ordered in this Court's Order Granting Motion for Sanctions.

4. Plaintiff's agent has conducted the mirror image search and Plaintiff is in the receipt of those search results. True and accurate copies of the emails to Plaintiff's agent regarding the mirror image search are attached hereto as **Exhibit B**.

5. As of today's date, Plaintiff's agent has successfully downloaded all of the emails as set forth in this Court's initial Order. See **Exhibit C**.

6. Plaintiff is in custody of all non-privileged communications, yet it seeks the recovery of emails containing attorney client privilege information by way of the three subpoenas.

7. This request can only be interpreted as a blatant disregard for the attorney/client privilege and Plaintiff's attempt to circumvent the already approved and successfully completed email download because the privileged emails were being protected.

8. The undersigned does not believe that this Court's Order contemplated the issues now arising with protected and privileged communications, thus this Court should reconsider its Order and grant the protection orders accordingly.

9. These three subpoenas should be quashed, or a protective order should be entered to protect Defendant's attorney client privilege information.

CERTIFICATION

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED: July 3, 2019.

/s/ Terri Pickens Manweiler

TERRI PICKENS MANWEILER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler

Terri Pickens Manweiler

EXHIBIT A

000516



McFARLAND RITTER

3 July 2019

VIA ICOURT

Terri Pickens Manweiler
Shannon N. Pearson
Pickens Cozacos, P.A.
398 S. 9th Street, Ste. 240
Boise, ID 83701

Re: *Gem State Roofing, Incorporated v. United Components, Incorporated,
dba Gem State Roofing - CV01-18-13437*

Ms. Manweiler and Ms. Pearson,

Pursuant to Idaho Rule of Civil Procedure 45(c)(2)(A), please see the enclosed subpoenas, which will be served seven (7) days from today.

Sincerely,

A handwritten signature in blue ink, which appears to read 'Jayme Danner', is written over the typed name.

Jayme Danner
Paralegal

Enclosures

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendant.)

Case No. CV01-18-13437
SUBPOENA

The State of Idaho to: Google LLC

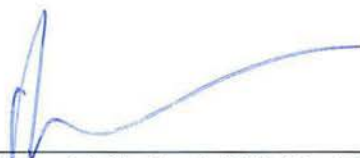
YOU ARE COMMANDED to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below: all emails deleted from the following Gmail accounts between October 1, 2005 and June 30, 2019, and the date(s) such emails were deleted: 1) gemstateroofing@gmail.com; 2) asphaltmaintenancepaving@gmail.com; 3) unitedcomponentsinc@gmail.com.

PLACE, DATE, TIME: On or before the later of July 31, 2019, or 15 days after service hereof, produce electronic or hard copies of the above-requested information to Plaintiff's counsel at the email or mailing address set forth above.

You are further notified that if you fail to produce or permit copying or inspection as specified above, you may be held in contempt of court and the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 3rd day of July, 2019.

By Order of the Court.

By: 

Ryan McFarland, ISB No. 7347
Attorneys for Plaintiff

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)

Plaintiff,)

vs.)

UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)

Defendant.)

Case No. CV01-18-13437

SUBPOENA

The State of Idaho to: Oath Inc.


YOU ARE COMMANDED to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below: all emails deleted from the following AOL email account between October 1, 2005 and June 30, 2019, and the date(s) such emails were deleted: gemstateroofing@aol.com.

PLACE, DATE, TIME: On or before July 31, 2019, produce electronic or hard copies of the above-requested information to Plaintiff's counsel at the email or mailing address set forth above.

You are further notified that if you fail to produce or permit copying or inspection as specified above, you may be held in contempt of court and the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 3rd day of July, 2019.

By Order of the Court.

By:  _____
Ryan McFarland, ISB No. 7347
Attorneys for Plaintiff

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)

Plaintiff,)

vs.)

UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)

Defendant.)

Case No. CV01-18-13437

SUBPOENA

The State of Idaho to: Verizon

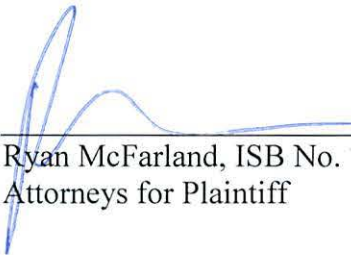
YOU ARE COMMANDED to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below: all text messages sent or received from the following persons' mobile telephone numbers between October 1, 2005 and June 30, 2019: Kerrie Kuhn: 208-941-4579; Jeffery Flynn 208-941-7456; Robert Hayden 208-941-8317; Andrew Hayden 208-901-0039.

PLACE, DATE, TIME: On or before July 31, 2019, produce electronic or hard copies of the above-requested information to Plaintiff's counsel at the email or mailing address set forth above.

You are further notified that if you fail to produce or permit copying or inspection as specified above, you may be held in contempt of court and the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 3^d day of July, 2019.

By Order of the Court.

By: 

Ryan McFarland, ISB No. 7347
Attorneys for Plaintiff

EXHIBIT B

000524

Terri Pickens Manweiler

From: Terri Pickens Manweiler
Sent: Monday, July 1, 2019 3:41 PM
To: Shane Sawyer
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Shane,

Thank you.

The other two accounts are:

gemstateroofing@aol.com (username gemstateroofing), Kerrie Kuhn is the account owner, 208-941-4579, pw:
[REDACTED]

gemstateroofing@gmail.com Kerrie Kuhn is the account owner, 208-941-4579 [REDACTED]

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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From: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Sent: Monday, July 1, 2019 3:38 PM
To: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Hi Terri,

To confirm, no one outside of myself and Paul Wiley or Cameron Lee in our Portland office will have access to this data set.

I will forward the passwords below to Paul to begin the collection process.

Thanks,
Shane

From: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Sent: Monday, July 1, 2019 3:18 PM
To: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Hi Shane,

Please confirm that this information will not be conveyed to Mr. McFarland or anyone outside your company.

I am still working on getting a couple of passwords, but you can start on these:

asphaltmaintenancepaving@gmail.com Kerrie Kuhn owns account, 208-941-4579 [REDACTED]

unitedcomponentsinc@gmail.com Kerrie Kuhn owns account, 208-941-4579 [REDACTED]

I will let her know you may be calling her.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
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From: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Sent: Monday, July 1, 2019 9:52 AM
To: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Good morning Terri,

We are set to move forward with collection. If you could send me the info listed below for each account that we are collecting, I would greatly appreciate it. As I mentioned in my previous email, our forensic specialist Paul Wiley, may need to reach out to your clients so it may be worth giving them a heads up that a call from a (503) number may be coming their way to complete the collection process.

1. Name of account holder
2. Email address
3. Email password
4. Mobile phone number for account holder

Please don't hesitate to give me a call or email if you have any questions or concerns.

Many thanks,

Shane

Shane Sawyer
Streamline Imaging LLC
223 N. 6th St. Suite 45
Boise, ID 83702
208-424-3355 Main Office
208-850-4400 Direct
866-893-3335 Fax
www.streamlineimaging.com



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From: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Sent: Monday, July 1, 2019 8:56 AM
To: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Shane,

When you are ready to start, and you have everything you need from Mr. McFarland, please let me know and I will work with you to get accounts and passwords.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
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From: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Sent: Friday, June 28, 2019 3:28 PM
To: Ryan McFarland <ryan@mcfarlandritter.com>; Terri Pickens Manweiler <Terri@pickenslawboise.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Hello All,

Please see my response to item #4 below:

There are two means of text message collection from modern mobile devices. The primary difference is which tool is used to collect the data and the process surrounding the collection. For ease, I'll refer to these as a Forensic or Non-Forensic collection.

Forensic Collection: Typically this collection is the more robust and the data is collected using a product like Cellebrite, FTK or EnCase. Additionally this collection is performed by a qualified and certified forensic examiner. This is also the more expensive option and lines up the prior quotation I provided of potentially \$3000 and \$4000 depending on the size of phones. The S10 and 8S are of particular note given that they may be of a large size and take a substantial period of time to collect. According to my forensic examiners a phone with 75 GB's of data can take up to 7 hours to collect in the Cellebrite application. This collection certainly provides a more extensive ability to analyze the contents and logs of the device.

Non-Forensic Collection: For the iPhone's this is typically acquired via the creation of an iTunes backup and the subsequent use of a tool called iExplorer. iExplorer then allows for PDF exports of all or specific conversations from that backup. The output is quite conducive to bates style production in standard litigation. This is the most common phone collection service I personally provide (given that I am not personally a forensic examiner). For Android phones; there can be some additional challenges which the variable nature of the Android OS. However, the same process basically applies. If I needed to collect the phones on-site you'd be looking at \$300 per phone, if I can do the collection at my office I could get the job done for \$200 per phone. \$1,200 for on-site collections and \$800 to collect them at my office.

Let me know your thoughts and instructions.

Thanks,
Shane

From: Ryan McFarland <ryan@mcfarlandritter.com>
Sent: Friday, June 28, 2019 2:33 PM
To: Shane Sawyer <Ssawyer@Streamlineimaging.com>; 'Terri Pickens Manweiler' <Terri@pickenslawboise.com>; 'Shannon Pearson' <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Thanks all. Here are my thoughts:

1. Terri, I have no problem with you communicating to Shane directly (without copying me) the email account login/password info. All other communications should copy me so everyone is aware of what is happening. For example (and not by way of limitation), if you ask Shane to do work outside the scope of what I ask for, my client should not be billed for that extra work. Also, I wish to know what email addresses or other privilege filters you are asking Shane to insert prior to production.
2. Shane, the date range we are concerned with is October 2005-current.
3. The judge has ordered that my client has the right to a mirror image of the email accounts; so, Shane, can you do an initial review of the email accounts and then give us an estimate of costs? If my client then decides, we can then insert some search terms.
4. Shane, what is the cost and mechanism to copy just text messages from the phones?
5. Terri, let's get through the email accounts and texts, then we'll decide whether to also do the full phones and computers.

Thanks,
Ryan
Ryan McFarland
Legal Counsel
P.O. Box 1335

Meridian, ID 83642
p. 208.895.1291
c. 208.789.1643
f. 208.895.1270
mcfarlandritter.com



McFARLAND RITTER

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From: Shane Sawyer [<mailto:Ssawyer@Streamlineimaging.com>]
Sent: Thursday, June 27, 2019 12:39 PM
To: Terri Pickens Manweiler <Terri@pickenslawboise.com>; Ryan McFarland <ryan@mcfarlandritter.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Hi Terri, Ryan and Shannon,

I would be happy to work directly with Terri to collect email data and perform the "privilege wash" prior to production of data to all parties.

Collection of four email boxes in their entirety can result in a large quantity of digital information, much of which is usually unrelated to the matter in question. Typically in order to limit the amount of reviewable information we will use an high volume indexing software, called Nuix, to essentially date cull and keyword search the total data set prior to load to our Relativity platform for direct review of the potential production or privileged documents.

Would there be key terms or a date range that would be applicable in this case? I would expect that all parties would need to agree to these terms and date ranges for us to use this strategy.

Alternatively, we can load the entirety of the collected emails to Relativity for review and exclusion of privileged terms. The remainder could then be imaged, bates numbered and produced to all counsel. My concern with this strategy would be with the cost involved to produce what I would guess could be a very substantial amount of information. For example, we recently collected a single business yahoo account recently that equated to 24 compressed GB's containing over 150,000 emails and attachments. If we were to load that data set directly into Relativity for searching and bates numbered production, we would likely be looking at production costs of nearly \$5,000. However, by applying terms and date ranges via our Nuix tool, we were able to cut that down to only approximately 2,500 emails and attachments for direct review and potential production within our Relativity platform. Not including final production, that process was billed at approximately \$1400 in accordance with our standard pricing.

For everyone's information I have included a general price sheet for the processes I refer to above, as well as a Statement of Work document.

I would greatly appreciate an email from both counsel's confirming how we are to proceed with these collections and how billing is to be handled. I am also available for a conference call or meeting if that would work best for all involved.

Many thanks,
Shane

Shane Sawyer
Streamline Imaging LLC
223 N. 6th St. Suite 45
Boise, ID 83702
208-424-3355 Main Office
208-850-4400 Direct
866-893-3335 Fax
www.streamlineimaging.com



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From: Terri Pickens Manweiler <Terri@pickenslawboise.com>
Sent: Thursday, June 27, 2019 11:50 AM
To: Ryan McFarland <ryan@mcfarlandritter.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>; Shane Sawyer <Ssawyer@Streamlineimaging.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Ryan and Shane,

If I can work directly with Shane, I will accommodate the email review.

Shannon and I just met with our clients. Here is the information you have requested.

1. There are three computers at UCI main office, only one of which is used for company business. It is a 2018 Windows 10 PC used by Kerrie Kuhn, the Office Administrator/Minority owner. The other two are previous computers she used from 2011 and sometime after 2013, but are no longer being used for the business since she got the new computer in 2018.
2. There are four telephones that are used for UCI as follows:
 - a. Kerrie, 208-941-4579, iPhone 8s
 - b. Jeff, 208-941-7456, Android Samsung S10
 - c. Bob, 208-941-8317, iPhone 6s
 - d. Andrew Hayden (employee), 208-901-0039, Android Duraforce PRO
3. The business has a Facebook page: Gem State Roofing, @GemStateRoofingUS
4. The company has zero laptops, tablets, iPads, smart watches, or any other electronic devices capable of sending/receiving text messages or emails.
5. The company has four email accounts:
 - a. gemstateroofing@aol.com
 - b. gemstateroofing@gmail.com
 - c. asphaltmaintenancepaving@gmail.com

d. unitedcomponentsinc@gmail.com

For physical inspection of the phones and computers, we propose either July 1, 2, 8 or 9. If the email search with Shane is sufficient, please advise and Shane and I can start that process immediately.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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From: Ryan McFarland <ryan@mcfarlandritter.com>
Sent: Tuesday, June 25, 2019 5:11 PM
To: Terri Pickens Manweiler <Terri@pickenslawboise.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>; 'Shane Sawyer' <Ssawyer@Streamlineimaging.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Terri,

I'm not sure we are in a position to do that yet because you have not yet told me how many computers/phones/other devices, or what kind they are. That matters in terms of costs and in terms of equipment/personnel my guy will need to bring. Here's what I propose:

- We have retained Streamline Imaging (<http://www.streamlineimaging.com/>) to assist us in getting the mirror image copies. Streamline is a highly regarded imaging company and I believe will serve effectively and ethically as a neutral here.
- If you will provide all of the email addresses and passwords, Shane from Streamline (cc'd here) can go in and take mirror images of the email accounts. If you will further provide Shane a list of email addresses (presumably just from your firm) that would denote attorney-client privileged communications, Shane can redact all such emails from the eventual production before they ever get to me. Shane can ultimately produce a redacted set of emails, and can also create a privilege log. Shane will produce copies of the emails (redacted), and the privilege log to both of us. I will also agree to the claw back provisions of 26(b)(5)(B), in case something is missed. Under this arrangement, I would not receive any attorney-client privileged communications.
- If you agree to this approach, we may be able to get most of the discovery completed without additional cost or time to either of us. There may not be a need to image computers - or, if there is, we can agree on that in due course after the emails are reviewed.
- The big outstanding thing I will certainly still need is copies of text messages. For that, I need to know how many phones, and what make/models they are. I can get that information to Shane and we can schedule with you time to make those images.

Please confirm whether you will agree to an initially providing email account log in info to Shane.

Thanks,
Ryan

Ryan McFarland

Legal Counsel
P.O. Box 1335
Meridian, ID 83642
p. 208.895.1291
c. 208.789.1643
f. 208.895.1270
mcfarlandritter.com



McFARLAND RITTER

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From: Terri Pickens Manweiler [<mailto:Terri@pickenslawboise.com>]
Sent: Tuesday, June 25, 2019 4:42 PM
To: Ryan McFarland <ryan@mcfarlandritter.com>; Shannon Pearson <shannon@pickenslawboise.com>
Cc: 'Lori Hickman' <lori@mcfarlandritter.com>
Subject: RE: Gem State Roofing v. UCI CV01 18 13437

Dear Ryan,

Per your request, I am responding to your correspondence regarding the electronic discovery search. Is there a day next week that your third party computer analyst can meet me at the UCI office for the inspection/copying? I would provide passwords and logins at that time to him or her only. I would be there to safeguard any information that I deem to be privileged. You are obviously welcome to be present as well, but I will not give you access to the electronic information without a third party providing a layer of protection for privileged information. Given the Court's comments this afternoon, this is a very reasonable solution. If you feel like I have not given you enough access to the electronic information, you can take it up with the Judge at the hearing scheduled for July 10.

Tell me what day works for your analyst and I will get you a list of all devices.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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EXHIBIT C

000533

Terri Pickens Manweiler

From: Shane Sawyer <Ssawyer@Streamlineimaging.com>
Sent: Wednesday, July 3, 2019 2:30 PM
To: Terri Pickens Manweiler
Cc: Ryan McFarland
Subject: Re: UCI Email downloads

Hi Terri,

You are correct; all emails have been collected successfully. We'll move forward with secondary processing through Nuix once we've confirmed with Mr. McFarland.

Thanks,
Shane

Shane Sawyer
Streamline Imaging
208-424-3355

On Jul 3, 2019, at 12:11 PM, Terri Pickens Manweiler <Terri@pickenslawboise.com> wrote:

Hi Shane,

Is it correct that you have completed the initial download of my client's email accounts? If so, please make sure that every email to and from my domain @pickenslawboise.com is redacted and privileged.

Thank you,
Terri

Terri Pickens Manweiler, Esq.
Pickens Law, P.A.
398 S. 9th Street, Ste. 240
Boise, Idaho 83702
(208) 954-5090 (office)
(208) 954-5099 (fax)
www.pickenslawboise.com

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McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com
Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,) Plaintiff,)	Case No. <u>CV01-18-13437</u>
vs.)	PLAINTIFF’S MEMORANDUM IN
UNITED COMPONENTS,)	OPPOSITION TO DEFENDANT’S
INCORPORATED, dba GEM STATE)	MOTION FOR PROTECTIVE ORDER
ROOFING,)	REGARDING THIRD PARTY
Defendant.)	SUBPOENAS

Plaintiff Gem State Roofing, Incorporated (“Gem State-Blaine”), by and through its attorneys of record, McFarland Ritter PLLC, files this Memorandum in Opposition to Defendant’s Motion for Protective Order Regarding Third Party Subpoenas.

I. INTRODUCTION

In filing this Motion for Protective Order, Defendant United Components, Incorporated, dba Gem State Roofing (“UCI”) has taken its obstructionist, time-and-money-wasting litigation “strategy” to an absurdity.

First: in the months after Gem State-Blaine served its discovery requests, UCI produced only a token number of documents – and no emails.

Second: in the days just prior to the hearing on Gem State-Blaine’s Motion to Compel, UCI produced 1,000+ pages of documents related to the Animal Shelter project. No emails

regarding any other project were produced. This Court granted Gem State-Blaine's Motion to Compel.

Third: in "response" to the Motion to Compel, UCI asserted it had no other documents, and no emails, to produce.

Fourth: at the hearing on Gem State-Blaine's Motion for Sanctions, this Court orally ruled against UCI, ordering it to make "mirror-image" copies of its email accounts and computer hardware available to Gem State-Blaine.

Fifth: rather than comply with the Court's oral ruling, UCI attempted, via email, to change the Court's oral ruling. The Court rejected this effort and entered the Order Granting Plaintiff's Motion for Sanctions, reiterating the mandate that UCI make the "mirror-image" copies available to Plaintiff. The Court's Order also expressly allows Gem State-Blaine to "issue third party subpoenas to relevant Email Service Providers."

Sixth: rather than comply with the Court's written ruling, UCI filed a Motion to Reconsider that Ruling.

Seventh: in response to Gem State-Blaine's compliance with this Court's order by providing notice of the issuance of third-party subpoenas, UCI has now filed this Motion for Protective Order.

UCI's conduct is outrageous. It has already lost the question of liability (on summary judgment). It has refused to produce emails. It has refused to comply with this Court's Order to Compel. It initially refused to comply with this Court's Order Granting Plaintiff's Motion for Sanctions. It is continuing to delay, obfuscate, and needlessly increase the cost of this litigation.

UCI's Motion for Protective Order should be rejected out of hand, and UCI should be made to bear the full cost of its conduct.

II. ARGUMENT

A. UCI Has Not Met and Conferred On This Issue in Good Faith.

Idaho Rule of Civil Procedure 26(c)(1) requires that the parties meet and confer in good faith before a Motion for Protective Order may be granted:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. . . . The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

UCI's counsel has made no effort to meet and confer regarding the third party subpoenas.

Affidavit of Ryan T. McFarland in Support of Gem State Roofing, Incorporated's Opposition to Defendant's Motion for Protective Order Regarding Third Party Subpoenas filed concurrently herewith ("McFarland Aff."), ¶ 2. Had Counsel attempted to meet and confer, it is likely that a resolution could have been achieved: such a resolution has been worked out regarding email production. UCI's violation of this Rule, alone, justifies denying the Motion for Protective Order.

B. The Court's Order Granting Plaintiff's Motion for Sanctions Specifically Allows the Third Party Subpoenas.

On June 24, 2019, this Court entered the Order Granting Plaintiff's Motion for Sanctions. That Order specifically allows Gem State-Blaine to "issue third party subpoenas to relevant Email Service Providers (ESP) or Internet Service Providers (ISP) as needed." That is what the third party subpoenas that UCI is complaining of are. A "mirror-image" copy of email accounts may not reflect emails that have been permanently deleted, thus potentially allowing UCI to hide

intentional, bad faith destruction of evidence. That potential is heightened in this environment in which UCI, from September through June, refused to produce any emails (with the exception of emails related to the Animal Shelter project), claiming that none exist.

C. The Subpoenas Do Not Seek Attorney-Client Privileged Emails, and are Not Likely To Result in the Production of Any Such Emails.

The subpoenas at issue are not intended to get duplicative emails, or to get attorney-client privileged emails – they are intended to unearth whether any emails were deleted, and when. In fact, the third-party subpoenas **cannot** unearth attorney-client privileged communications, unless those communications were previously deleted. All the subpoenas request are **deleted** emails, and there is no evidence that attorney-client privileged emails have been deleted from UCI's accounts.

D. UCI's Actions are An Unjustifiable Waste of Time, Money and Attention.

This Court's Order Granting Plaintiff's Motion for Sanctions requires UCI to provide Gem State-Blaine with full access to UCI's electronic devices and email accounts so as to verify UCI's full and complete responses to Gem State-Blaine's discovery requests. Rather than promptly complying with the Order so that discovery can finally be completed and both parties can prepare for trial in less than five weeks, UCI has chosen to file a second Motion for Protective Order. UCI is acting like it has something to hide: its refusal to simply produce documents in the first instance, and subsequent refusal to simply comply with the Court's Orders on discovery (the Order Granting Motion to Compel and Order Granting Plaintiff's Motion for Sanctions), and instead file Motions to Reconsider and Motion for Protective Order are a waste of time and resources, for UCI, for Gem State-Blaine, and for this Court – and all of this on the eve of trial.

UCI has already lost on liability. All that is left to determine is the question of damages. Perhaps UCI is betting its chances for success on that issue on delay and obfuscation, but this Court should see through those tactics and reject them; otherwise, the tactics may work, to the unfair prejudice of Gem State-Blaine:

- Contrary to the Declaration of Terri Pickens Manweiler in Support of Defendant's Motion for Protective Order Regarding Third Party Subpoenas ("Manweiler Dec."), neither Gem State-Blaine nor its counsel has received any e-mails (as of the filing of this Opposition) as ordered by the Court in its Order Granting Plaintiff's Motion for Sanctions. The emails have been gathered by a third party, but are still being processed and screened for privilege and have not been turned over to the Plaintiff. McFarland Aff., ¶ 3.

- Contrary to the Manweiler Dec., neither Gem State-Blaine nor its counsel have received any copies of any text messages. McFarland Aff., ¶ 4.

- Contrary to the Manweiler Dec., no "mirror image search" has been performed on any of Defendants' electronic devices. All that has happened is that UCI, after some delay, has provided email login and password information to a third party who is copying email accounts and screening them for privilege. McFarland Aff., ¶ 5.

The Court's order was entered on June 24, 2019. By UCI's counsel's own declaration, she waited until late in the day on Monday, July 1, to turn over the email account information to a third party. That happened on Monday afternoon before the 4th of July holiday. It takes time for the third party to access and download four entire email accounts, review them for privilege, and produce the documents. UCI's delay is inexcusable and unfairly prejudicial, coming as it did just

one month before trial. This Motion is yet another in a series of delays that is unfairly prejudicial and should not be countenanced by this Court.

III. CONCLUSION

For the foregoing reasons, Gem State-Blaine requests that this Court deny UCI's Motion for Protective Order.

DATED THIS 8th day of July 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July 2019, I caused to be served a true copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING THIRD PARTY SUBPOENAS by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

iCourt electronic filing

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. CV01-18-13437
Plaintiff,))	
vs. )	)	AFFIDAVIT OF RYAN T.
UNITED COMPONENTS, INC. dba GEM )	)	MCFARLAND IN SUPPORT OF GEM
STATE ROOFING, )	)	STATE ROOFING, INCORPORATED'S
Defendant. )	)	OPPOSITION TO DEFENDANT'S
_____ )	)	MOTION FOR PROTECTIVE ORDER
	)	REGARDING THIRD PARTY
	)	SUBPOENAS

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of McFarland Ritter PLLC, counsel of record for Plaintiff Gem State Roofing, Incorporated ("Gem State-Blaine") in the above referenced matter. I make this Affidavit based upon my own personal knowledge.

2. Counsel for United Components, Inc. dba Gem State Roofing has never contacted me about the proposed third party subpoenas, and has never talked to me about screening any potentially responsive documents for privilege.

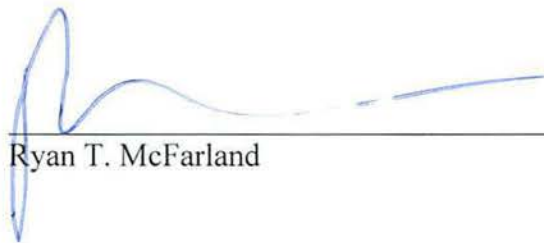
3. As of the signing of this Affidavit, I have not received any emails following the Court's issuance of the Order to Compel or the Order Granting Plaintiff's Motion for Sanctions.

On information and belief, a third party service provider has obtained a copy of emails from UCI's accounts and is processing those for privilege and production, but I have not received them.

4. Neither Gem State-Blaine nor its attorneys have obtained copies of any text messages. To my knowledge, no copies of any text message have been obtained by the third-party service provider.

5. To my knowledge, no "mirror image" copy has been made of any of Defendants computers, phones, or other devices.

Further your affiant sayeth naught.

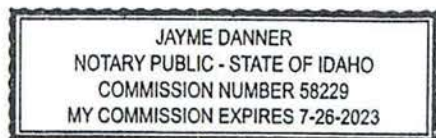


Ryan T. McFarland

STATE OF IDAHO)
) ss
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 8th day of July 2019, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document, and that the statements therein contained are true.

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



Notary Public for Idaho
Residing at: Nampa, Canyon
My commission expires: July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 07 day of July 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF GEM STATE ROOFING, INCORPORATED'S OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING THIRD PARTY SUBPOENAS by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

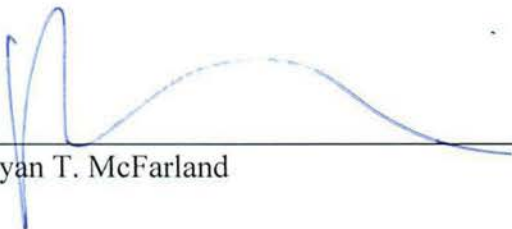
398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing



Ryan T. McFarland

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

PROTECTIVE ORDER

THIS MATTER, having come before the Court on Defendant's Motion for Protective Order, a hearing being held on the matter on July 9, 2019, and the Court having good cause therefore,

IT IS HEREBY ORDERED that Defendant's Motion for Protective Order is GRANTED. The Plaintiff is hereby directed to amend its subpoenas to Google and AOL to clearly identify that only deleted emails are being sought, and all documents sought under the subpoenas shall be delivered to the Court, not Plaintiff or Plaintiff's Counsel. Once amended, Plaintiff may issue said subpoenas immediately.

DATED: Signed: 7/11/2019 03:58 PM

By 
HONORABLE SAMUEL A. HOAGLAND
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Signed: 7/11/2019 04:12 PM _____ I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

Terri Pickens Manweiler
Shannon N. Pearson
Pickens Law, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, ID 83701

- First Class Mail
- Facsimile
- Hand Delivery
- iCourts – terri@pickenslawboise.com;
shannon@pickenslawboise.com



CLERK OF THE COURT

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant.

Case No. CV01-18-13437

ORDER

THIS MATTER, having come before the Court on Defendant's Motion for Reconsideration of this Court's Order for Sanctions, a hearing being held on the matter on July 9, 2019, and the Court having good cause therefore,

IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration is GRANTED. The Order shall specifically exclude all attorney/client privileged communications. Defendant shall provide to the Court a copy of the Privilege Log prepared by Streamline Imaging, and the emails identified in the Privilege Log shall not be produced to Plaintiff under the Order Granting Plaintiff's Motion for Sanctions, unless so ordered by the Court following a motion and hearing.

DATED: Signed: 7/11/2019 04:00 PM

By  _____
HONORABLE SAMUEL A. HOAGLAND
District Judge

CLERK'S CERTIFICATE OF SERVICE

Signed: 7/11/2019 04:13 PM

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P.O. Box 1335
Meridian, ID 83680

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- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

Terri Pickens Manweiler
Shannon N. Pearson
Pickens Law, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, ID 83701

- First Class Mail
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- iCourts – terri@pickenslawboise.com;
shannon@pickenslawboise.com



CLERK OF THE COURT

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED dba GEM STATE)
ROOFING,)
Defendant.)

Case No. CV01-18-13437

PLAINTIFF’S TRIAL BRIEF

Plaintiff Gem State Roofing, Incorporated (“Gem State”), by and through its attorneys of record, McFarland Ritter PLLC, respectfully files its Trial Brief.

I. INTRODUCTION

Gem State commenced this action on July 20, 2018, seeking injunctive and monetary relief as a result of Defendant United Component Inc.’s (“UCI”) breach of the terms of the Trademark Settlement Agreement (the “TSA”) that Gem State and UCI’s predecessor - Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State-Boise”) - entered into in 2005. Both parties filed motions for summary judgment, and following the March 19, 2019 hearing, this

Court issued its Memorandum Decision and Order (“Order”) finding UCI liable for breach of the TSA. Accordingly, the only remaining issues for trial are:

1. What is the proper relief for UCI’s breach of the TSA?
2. Has UCI infringed Gem State’s trademark rights?
3. What additional remedies should be granted to Gem State for UCI’s infringement of Gem State’s trademark rights?

II. FACTS

A. Uncontested Facts

1. In or about August 1997, Rick Silvia filed a Certificate of Assumed Business Name with the Idaho Secretary of State declaring that he was operating Gem State under the name “Gem State Roofing.”¹

2. Gem State has continuously operated its roofing business in Blaine County, Idaho, since 1997.²

3. In or about July 1999, Gem State-Boise filed a Certificate of Assumed Business Name with the Idaho Secretary of State, declaring that it was operating its roofing and asphalt business under the name “Gem State Roofing.”³

4. On April 8, 2002, Gem State file a corrected Application for Registration of its “Gem State Roofing” trademark with the Idaho Secretary of State. The corresponding Certificate of Registration for this trademark was issued May 2, 2002.

¹ Bates No. DEF000029; Pl. Prop. Trial Exh. No. 2; Affidavit of Rick Silvia in Support of Gem State Roofing, Incorporated’s Motion for Partial Summary Judgment filed February 6, 2019 (hereinafter the “Silvia Summary Judg. Aff.”), ¶ 2, Exh. A.

² Silvia Summary Judg. Aff. ¶ 3.

³ Bates No. DEF000030; Pl. Prop. Trial Exh. No. 3; Affidavit of Ryan T. McFarland in Support of Gem State Roofing, Incorporated’s Motion for Partial Summary Judgment filed February 6, 2019 (hereinafter the “McFarland Summary Judg. Aff.”), ¶ 5, Exh. D (J. Flynn Dep. Exh. 10).

5. Since 1997, Gem State has continuously used the “Gem State Roofing” trade name and trademark for its roofing business in Blaine County.

6. UCI (and its predecessor Gem State-Boise) operates its roofing and asphalt business primarily in the Treasure Valley and Magic Valley areas in Idaho.⁴

7. Gem State-Boise obtained a Certificate of Registration for its “Gem State Roofing” trademark on December 29, 2004.

8. In or about October 2005, Gem State and Gem State-Boise formally acknowledged that because their business names were similar, and because they provided similar services, there was a likelihood of confusion in the marketplace. As a result, Gem State and Gem State-Boise entered into the TSA on or about October 19, 2005,⁵ which requires, among other things, the following:

1. Commencing immediately upon execution of this Agreement, Gem State Roofing & Asphalt Maintenance, Inc., agrees that it will not advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County. Radio or television advertising on a Boise or Twin Falls station that happens to reach Blaine County is permissible so long as it does not state or imply that Gem State Roofing & Asphalt Maintenance, Inc., performs services in Blaine County. Gem State Roofing & Asphalt Maintenance, Inc., may advertise in Twin Falls telephone directories which may be distributed in Blaine County so long as it is not listed under any cities in Blaine County, and does not state or imply that it performs services in Blaine County.
3. Gem State Roofing & Asphalt Maintenance, Inc., shall not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is

⁴ Pl. Prop. Trial Exh. No. 57 (M. Flynn Dep. 33:1-6) ; McFarland Summary Judg. Aff. ¶ 6, Exh. E.

⁵ Pl. Prop. Trial Exh. Nos. 1, 57 (for Sett Agmt & M. Flynn Depo); J. Flynn Dep. Exh. 13; Silvia Summary Judg. Aff. ¶ 4, Exh. B; McFarland Summary Judg. Aff. ¶ 6, Exh. E (M. Flynn Dep. 34:13-24).

put out for bid among qualified contractors. When doing work falling under these exceptions, Gem State Roofing & Asphalt Maintenance, Inc., shall not display signs or otherwise display the name, “Gem State Roofing,” or any phrase that is confusingly similar, except that it may use a vehicle displaying the name, “Gem State Roofing,” so long as the print is not larger, brighter, or in any way more prominent than that shown in the photographs of the service vehicles attached hereto as Exhibit C and incorporated herein by this reference.

5. If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.

9. In or about 2011, Jeff Flynn dissolved Gem State-Boise and formed its successor corporation, UCI. On or about October 25, 2011, UCI’s Articles of Incorporation were filed with the Idaho Secretary of State.⁶

10. On October 26, 2011, UCI filed an Amendment of Certificate of Assumed Business Name for the “Gem State Roofing” business name. The Amendment removed Gem State-Boise and added UCI as the entity doing business under the “Gem State Roofing” name.⁷

11. In December 2014, Gem State-Boise filed with the Idaho Secretary of State an Application for Registration of Assignment of Trademark assigning its “Gem State Roofing” logo to UCI.⁸

12. Beginning in or about 2010, UCI’s predecessor – Gem State-Boise – violated the terms of the TSA by soliciting and performing roofing and asphalt jobs in Blaine County.⁹

13. In or about June 2016, Mr. Silvia saw some UCI employees working at a job site in Hailey with their trucks parked nearby that displayed the “Gem State Roofing” logo. Mr.

⁶ Bates No. DEF000042-000044; Pl. Prop. Trial Exh. No. 15; McFarland Summary Judg. Aff. ¶¶ 4- 5, Exhs. D, E (J. Flynn Dep. 36:10-20, 37:16-38:5, J. Flynn Dep. Exh. 20)

⁷ Bates No. DEF000031, DEF000084; Pl. Prop. Trial Exh. No. 16; J. Flynn Dep. Exh. 24; McFarland Summary Judg. Aff. ¶ 4, Exh. C (J. Flynn Dep. 99:11-21).

⁸ Bates No. DEF0017, DEF000075; Pl. Prop. Trial Exh. No. 17; J. Flynn Dep. Exh. 30; McFarland Summary Judg. Aff. ¶ 4, Exh. C (J. Flynn Dep. 43:18-22; 107:17-20).

⁹ Bates Nos. DEF00086-00091; Pl. Prop. Trial Exh. Nos. 9-13; McFarland Summary Judg. Aff. ¶ 4, Exh. C (J. Flynn Dep. 84:17-87:10; 87:25-89:3; 89:5-90:13).

Silvia took photographs of these UCI trucks and employees, and informed them they were violating the terms of the TSA by performing roofing work under the “Gem State Roofing” trademark in Blaine County.¹⁰

14. Since 2016, UCI has continued to violate the terms of the TSA by bidding on and performing roofing jobs in Blaine County, including accepting a \$256,784.00 roofing project in 2018 for the Wood River Valley Animal Shelter.¹¹

15. As this Court has already found, at no time did UCI (or its predecessor, Gem State-Boise) ever refer any Blaine County work to Gem State.¹²

16. The top result of a Google search performed in July, 2019 for “United Components Inc. Idaho” identifies “United Components Inc.” as a “roofing contractor in Hailey, Idaho.”¹³

B. Contested Facts

1. Gem State-Boise and UCI’s solicitation and performance of roofing jobs in Blaine County caused Gem State to lose profits.¹⁴

2. Gem State’s trademark rights in “Gem State Roofing” are prior in right to UCI’s in Blaine County, Idaho.

3. Documents produced pursuant to a third party subpoena from McAlvain Construction, the contractor for the Wood River Valley Animal Shelter, show that UCI’s

¹⁰ Pl. Prop. Trial Exh. No. 7; Silvia Summ. Judg. Aff. ¶ 5.

¹¹ Bates Nos. DEF00006-00008, DEF00132, DEF00588, DEF00660, DEF01039; Pl. Prop. Trial Exh. Nos. 32, 33, 34, 36, 37, 39, 40, 41, 42, 42 and 44; J. Flynn Dep. Exhs. 49, 51, 53, 55, 56, 57 and 61; Mem. Decision and Order filed Apr. 26, 2019, p. 18; McFarland Summ. Judg. Aff. ¶4, Exh. C (J. Flynn Dep. 107:22-108:17; 112:25-113:17; 114:9-115:15; 115:17-116:4; 116:6-18; 116:23-117:14; 125:6-22; 127:9-24; 129:23-130:25; 134:4-18; 135:19-136:4; 137:1-14; 139:2-13; 139:15-24; 140:6-17; 141:1-20; 142:11-23; 145:6-16)

¹² See Memorandum Decision and Order entered in this matter on 4/26/2019, at 18.

¹³ Pl. Prop. Trial Exh. No. 55

¹⁴ Pl. Prop. Trial Exh. No. 50; Affid. of Rick Silvia in Support of Pls. Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), ¶ 1, Exh. A.

operations in Blaine County under the “Gem State Roofing” name created confusion as to Gem State’s source or sponsorship of the project.¹⁵

III. ARGUMENT

A. Remedies for UCI’s Breach of the TSA.

1. Gem State is Entitled to Injunctive Relief.

Gem State is entitled to permanent injunctive relief as a result of UCI’s breach of the TSA. “The granting or refusal of an injunction is a matter resting largely in the trial court’s discretion. . . . An injunction will not issue unless the party against whom relief is sought is violating, or threatens to violate, some right of the party seeking the remedy.” *Conley v. Whittlesey*, 985 P.2d 1127, 1135 (Idaho 1999) (internal citation omitted). This Court should exercise its broad discretion and enter a permanent injunction because Gem State has prevailed on the merits, and because equity requires it. “For a permanent injunction to issue, the plaintiff must prevail on the merits of his or her claim and establish that equitable relief is appropriate in all other respects.” 42 Am. Jur. 2d Injunctions § 11. Here, Gem State has prevailed on the merits of its claim: as this Court found on summary judgment, the TSA is binding on UCI, and UCI has breached it.

Principles of equity support entry of injunctive relief: “although injunctions are generally seen as discretionary, there is authority for the view that a complainant is entitled to injunctive relief as a matter of right on a clear showing that the acts complained of cause a material, substantial, and irreparable injury to the complainant for which there is no adequate remedy at law.” 42 Am. Jur. 2d Injunctions § 14. As the Idaho Supreme Court has explained: “injunctions should issue only where irreparable injury is actually threatened.” *O’Boskey v. First Fed. Sav. &*

¹⁵ Pl. Prop. Trial Exh. No. 38; J. Flynn Dep. Exh. No. 66.

Loan Ass'n of Boise, 739 P.2d 301, 306 (Idaho 1987). Generally, when assessing the need for injunctive relief, courts apply a four-part inquiry, under which injunctive relief may be ordered where (1) the plaintiff has prevailed on the merits, (2) the plaintiff would suffer irreparable injury in the absence of injunctive relief, (3) the harm to the plaintiff would outweigh the harm to the defendants from an injunction, and (4) the injunction would not adversely affect the public interest. *Joyce v. Town of Dennis*, 720 F.3d 12 (1st Cir. 2013). This general principal is similar to the preliminary injunction standard in Idaho Rules of Civil Procedure 65(e), which provides for the entering of injunctive relief upon any of the following cases:

- (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually;
- (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;
- (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual[.]

Each of these requirements are satisfied here:

1. Gem State has prevailed on the liability issue, thus, “it appears . . . that the plaintiff is entitled to the relief demanded, and that relief . . . consist of restraining the commission or continuance of the acts complained of,” e.g., working in Blaine County in violation of the TSA.

2. “[T]he . . . continuance of [UCI’s continued violation of the TSA by working in Blaine County] would produce . . . great . . . injury to the plaintiff.” Gem State will present evidence that UCI’s shoddy workmanship – done under Gem State’s “Gem State Roofing” trademark – has likely harmed Gem State’s reputation. Reputational damages are difficult to

calculate, permanent or very long-lasting, and may not be detected immediately. Reputational damages, almost by definition, constitute irreparable and are properly the subject of injunctive relief:

Reed has established a likelihood of irreparable harm. Continued use of the mark in a confusingly similar manner will likely damage Reed's reputation. . . .Reed likely will lose goodwill among consumers if [his trademark] continues to be diluted by groups . . . whose name is confusingly similar. . . .

Herb Reed Enterprises, Inc. v. Monroe Powell's Platters, LLC, 842 F. Supp. 2d 1282, 1291 (D. Nev. 2012). The very act of losing business, even in the absence of reputational damages, may not be immediately apparent, but its effects may be long lasting and even fatal to a business. Finally, UCI's future breach of the TSA may also result in lost profits, which, as set forth below, are difficult to calculate.

3. “[T]he defendant is doing . . . some act in violation of the plaintiff’s rights [e.g., working in Blaine County in violation of the TSA] . . . and the action may make the requested judgment ineffectual.”

Should UCI protest that a permanent injunction is moot because it has exited Blaine County and does not intend to return, this Court should look to the Idaho Supreme Court’s decision in *O’Boskey*:

The Supreme Court warned: It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

O’Boskey v. First Fed. Sav. & Loan Ass’n of Boise, 739 P.2d 301, 306 (Idaho 1987). Given UCI’s flagrant and long-term violation of the TSA, this Court should enter a permanent injunction requiring that UCI not conduct business in Blaine County.

2. Gem State is Entitled to Money Damages.

Under Idaho law, damages from the violation of a non-competition agreement (which the TSA fundamentally is) is arrived at by showing two things: (i) the plaintiff's lost profits, and (ii) the defendant's corresponding gains:

The measure of damages for loss of profits is rarely susceptible of accurate proof. Therefore, **the law does not require accurate proof with any degree of mathematical certainty. Any claim of damages for prospective loss contains an element of uncertainty, but that fact is not fatal to recovery.** The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. **The party seeking to recover lost profits is not required to obtain the testimony of the customers allegedly lost as a result of the wrongdoer's conduct.** There only need be sufficient evidence in the record to allow the jury to conclude that the **inference linking the wrongdoer's conduct to the claimant's damages is more probable than the inference connecting such loss to other factors.** Factors that the jury may consider include the claimant's profits for a reasonable period prior to the breach of the covenant not to compete, leaving it for the other party to show that, by depression in trade or other causes, they would have been less, the relationship between the increase in profits by the party breaching the covenant and the losses sustained by the claimant during the period of the breach, and all of the surrounding facts and circumstances.

Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 334 P.3d 780, 790 (Idaho 2014)

(emphasis added; internal citation and quotations omitted). The fact that Gem State may not be able to prove its amount of damages with mathematical certainty does not mean that Gem State is not entitled to damages; the fact that there is uncertainty is a cost to be borne – literally – by the wrongdoing defendant. So, for example, Gem State need not submit a customer's testimony. All that this Court must determine that it is more probable than not that Gem State lost some profit due to UCI's breach of the TSA.

At trial, Gem State will show that it lost profit at the same time UCI was earning profit from its work in Blaine County. *See Dunn v. Ward*, 670 P.2d 59, 61–62 (Ct. App. 1983) (the profits which a defendant realized in violation of an agreement may be considered, in evidence, if shown to correspond, in whole or in part, with the loss of plaintiff). Although this evidence will not establish an exact amount of damages, Idaho law does not require such precision to validate an award of damages. “The mere fact that it is difficult to arrive at an exact amount of damages ... does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount.” *Timberline Drilling, Inc. v. Am. Drilling Corp., LLC*, No. CV 09-18-N-EJL-MHW, 2010 WL 11531293, at *7 (D. Idaho Mar. 17, 2010) (internal citations omitted). Indeed, “[w]hen damages are sought for lost business profits, the amount of the loss must be proven with reasonable certainty. ‘Reasonable certainty’ does not require that damages be proved with mathematical exactitude, but the evidence must be sufficient to take the damages out of the realm of speculation. Damages also must be shown to be the proximate consequence of the defendant’s actionable conduct.” *Magic Valley Truck Brokers, Inc. v. Meyer*, 982 P.2d 945, 951 (Idaho Ct. App. 1999) (internal citations omitted).

Perhaps most importantly, Gem State will produce evidence – as this Court already found on summary judgment – that UCI never referred any work to Gem State, even though the TSA required UCI to refer Blaine County work. While UCI will likely argue that some of the roofing jobs it acquired in Blaine County were due to relationships with contractors, the fact that UCI did not refer such work to Gem State constitutes very strong evidence that had UCI complied with its referral obligations, Gem State could have obtained at least some of the jobs UCI wrongfully performed in Blaine County.

B. UCI Violated Gem State's Trademark Rights.

Trademark rights in the United States are acquired by use, not by registration. *Hydro-Dynamics, Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1473 (Fed. Cir. 1987) (citing *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 334, 59 S.Ct. 191, 200, 83 L.Ed. 195 (1938); *United States v. Steffens*, 100 U.S. (10 Otto) 82, 92, 25 L.Ed. 550 (1879)). “It is axiomatic in trademark law that the standard test of ownership is priority of use. **To acquire ownership of a trademark it is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services.**” *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1047 (9th Cir.1999) (emphasis added).

To establish common law trademark rights in a geographical area, the owner of the mark has to be the first to use the mark in a particular area and must continue to so use the mark in that area. *Optimal Pets, Inc. v. Nutri-Vet, LLC*, 877 F. Supp. 2d 953, 958–59 (C.D. Cal. 2012). See also *Halicki Films, LLC v. Sanderson Sales & Marketing*, 547 F.3d 1213, 1226 (9th Cir.2008) (citing *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir.1996)); *Idaho Golf Partners, Inc. v. TimberStone Mgmt., LLC.*, No. 1:14-CV-00233-BLW, 2018 WL 1526004, at *5 (D. Idaho Mar. 27, 2018) (common law trademark rights extend only to the area where a mark is known and recognized). The first to use a mark in an area is deemed the “senior” user and it has the right to enjoin “junior” users from using confusingly similar marks in the same industry and market within that area. *Brookfield Commc'ns*, 174 F.3d at 1047. The common law trademark owner must also establish continuing use of the mark, which “must be maintained without interruption.” *Optimal Pets*, 877 F. Supp. 2d at 959 (citing *Casual Corner Assocs., Inc. v. Casual Stores of Nevada, Inc.*, 493 F.2d 709, 712 (9th Cir.1974); *Hanginout, Inc.*

v. Google, Inc., 54 F. Supp. 3d 1109, 1121 (S.D. Cal. 2014) (trademark owner must establish sufficient market penetration in a specified geographic area).

At trial Gem State will establish through testimony and exhibits that it began using the “Gem State Roofing” business name and trademark in Blaine County, Idaho in 1997, and that it has continuously used the mark since then. Based on applicable trademark law, the fact that Gem State’s state trademark registration for the “Gem State Roofing” mark expired in 2012 does not extinguish or otherwise cancel its longstanding common law trademark rights in the “Gem State Roofing” mark in Blaine County – the area where Gem State has operated continuously since 1997. Any rights UCI claims to have in its “Gem State Roofing” trademark are limited to the geographical area where UCI, and its predecessor Gem State-Boise, continuously used the mark – in the Treasure and Magic Valleys.

It is possible that UCI will attempt to assert that it had prior rights to the “Gem State Roofing” mark in Blaine County; indeed, there is one “proposal” for Blaine County work that UCI has produced, dated 6/18/97, a few months before Gem State began using the trademark. Should UCI make that argument, the Court should find that it does not trump Gem State’s trademark rights, for the following reasons:

1. Though the property at issue was in Blaine, County, that proposal does not evidence that UCI’s predecessor used the “Gem State Roofing” mark in Blaine County – only that a proposal was sent to a prospective customer in Torrance, California, not Blaine County, Idaho.

2. UCI cannot submit evidence that it actually did – or if it did, when it did – the work in the proposal. At deposition, Jeffrey Flynn testified as follows:

Q. (BY MR. MCFARLAND) Sir, you have been handed what has been marked as Exhibit 7 to this deposition. Do you see that?

A. [BY JEFFREY FLYNN] I do.

Q. And what is it?

A. That is a contract.

Q. Who is the contract between?

A. It looks like it was Conrad Thomas. And the work was done at Venzon Jewelry in Hailey.

Q. And was the work done by Flynn, Inc.?

A. That is what the contract says, yes, on top of it.

Q. Do you remember this particular job?

A. I remember something about it. Because I knew Dan Venzon. He owned Venzon Jewelry there. And I do believe it was -- I think it was a referral, if I remember. I don't recall honestly. I know Dan Venzon.

Q. Do you have any memory of working on this job yourself?

A. I don't.

Q. You have called this a contract. Just below --

A. Actually, it is a bid. It not a contract until it is signed. It is a proposal.

.....

Q. Do you know whether this is your first job that you did in Blaine County under Gem State Roofing?

A. I don't recall.

Q. You can't recall any that were before this; can you?

A. No.¹⁶

3. The doctrine of “tacking” prohibits allowing this proposal to trump Gem State’s trademark rights. The Ninth Circuit explained this doctrine in *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1047–49 (9th Cir. 1999):

[O]ur sister circuits have explicitly recognized the ability of a trademark owner to claim priority in a mark based on the first use date of a similar, but technically distinct, mark—but only in the exceptionally narrow instance where the previously used mark is ‘the legal equivalent of the mark in question or indistinguishable therefrom’ such that consumers ‘consider both as the same mark.’ This constructive use theory is known as “tacking,” as the trademark holder essentially seeks to “tack” his first use date in the earlier mark onto the subsequent mark.... The standard for “tacking,” however, is exceedingly strict:

¹⁶ Pl. Prop. Trial Exh. No. 56; J. Flynn Dep., at 67:5-68:24.

‘The marks must create the *same, continuing commercial impression*, and the later mark should not materially differ from or alter the character of the mark attempted to be tacked.’

The Federal Circuit, for example, concluded that priority in “CLOTHES THAT WORK. FOR THE WORK YOU DO” could not be tacked onto “CLOTHES THAT WORK” [because] the shorter phrase was *not* the legal equivalent of the longer mark. The Sixth Circuit held that “DCI” and “dci” were too dissimilar to support tacking. And the Trademark Board has rejected tacking in a case involving “American Mobilphone” with a star and stripe design and “American Mobilphone Paging” with the identical design, as well as in a case involving “PRO-CUTS” and “PRO-KUT.

In contrast to [these] cases ... which were close questions, the present case is clear cut: “The Movie Buff’s Movie Store” and “moviebuff.com” are very different, in that the latter contains three fewer words, drops the possessive, omits a space, and adds “.com” to the end. Because West Coast failed to make the slightest showing that consumers view these terms as identical, we must conclude that West Coast cannot tack its priority in “The Movie Buff’s Movie Store” onto “moviebuff.com.”

Id. at 1047-49. *See also Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 759 (9th Cir.2006)

(district court erred in tacking “QUIKSILVER ROXY” onto “ROXY” because a reasonable jury could easily conclude that “QUIKSILVER ROXY” and “ROXY” did not create the ‘same, continuing commercial impression’ at the time the ‘ROXY’ brand was introduced). Here, Flynn Inc.’s logo is quite distinguishable from UCI’s Gem State Roofing mark because of the additional words “Flynn Inc., dba” and “& Asphalt,” and the different font and placement of the words next to the logo. Because of these significant differences in the two marks, the Gem State Roofing logo does not create the same, continuing commercial impression to the earlier mark. Tacking, therefore, should not be allowed.

The federal statute that governs trademarks – also known as the Lanham Act – sets forth the elements for a trademark infringement claim as follows:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof ... which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(A). Courts consider eight factors to determine if there is a likelihood of confusion: (1) strength of the mark, (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) type of goods and the degree of care likely to be exercised by the purchaser, (7) defendant's intent in selecting the mark, and (8) likelihood of expansion of the product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir.1979). However, a court “need not address all eight factors, nor must the plaintiff establish that each weighs in its favor to establish a likelihood of confusion.” *Hanginout, Inc. v. Google, Inc.*, 54 F. Supp. 3d 1109, 1125 (S.D. Cal. 2014); *see also Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011) (“The Sleekcraft factors are intended as an adaptable proxy for consumer confusion, not a rote checklist.”); *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir.1998) (“The factors should not be rigidly weighed; we do not count beans.”); *Eclipse Assoc. Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1118 (9th Cir.1990) (“These tests were not meant to be requirements or hoops that a district court need jump through to make the determination.”). “A determination may rest on only those factors that are most pertinent to the particular case before the court, and other variables besides the enumerated factors should also be taken into account based on the

particular circumstances.” *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012) (internal citations omitted).

At trial Gem State will establish through testimony and exhibits that UCI’s (and its predecessor Gem State-Boise) use of the “Gem State Roofing” trademark and trade name in connection with its soliciting and performing roofing jobs in Blaine County is likely to confuse customers as to the affiliation with Gem State and/or Gem State’s sponsorship or approval of UCI providing roofing services in Blaine County. The parties to the TSA – Gem State-Boise and Gem State – previously acknowledged and agreed that their similar names and roofing services would lead to “a likelihood of confusion as to source, origin, and sponsorship of the services” if they advertised or operated in the same primary market. Indeed, both marks contain the same words: “Gem State Roofing.” Mr. Silvia will testify as to the confusion caused by UCI soliciting and performing roofing work in Blaine County using the trademark and business name “Gem State Roofing” as well as the damage to his business’ reputation as a result of UCI’s substandard roofing work in Blaine County. Finally, emails produced by McAlvain Construction pursuant to a third party subpoena will show that other personnel working on the Wood River Valley Animal Shelter were actually confused as to which Gem State Roofing entity was doing the roofing job on the Shelter.

C. Remedies for UCI’s Violation of Gem State’s Trademark Rights.

1. Gem State is Entitled to Injunctive Relief.

Injunctive relief is also an appropriate remedy for UCI’s infringement of Gem State’s trademark. The Ninth Circuit has held that when the infringing use is for similar or practically identical services, a broad injunction is especially appropriate. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1211 (9th Cir. 2000); *see also Internet Specialties W., Inc., v. Milon-*

DiGiorgio Enterprises, Inc., 559 F.3d 985, 993 (9th Cir. 2009) (“The essence of trademark infringement is the likelihood of confusion and an injunction should be fashioned to prevent just that.”).

2. Gem State is Entitled to Money Damages.

Gem State is entitled to recover the following damages for UCI’s infringement of Gem State’s trademark:

(1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant’s sales only; defendant must prove all elements of cost or deduction claimed.

15 U.S.C. §1117(a). “Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement. Because proof of actual damage is often difficult, a court may [also] award damages based on defendant’s profits on the theory of unjust enrichment.”

Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993), *abrogated on other grounds by SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).

Gem State will establish its lost profits as well as UCI’s sales from its work in Blaine County as set forth above; however, given the potential difficulty of correlating actual damages between these two figures, the Court may opt to award damages based on UCI’s profits, as 15 U.S.C. 1117 allows.

D. Following Judgment, the Court Should Award Costs and Fees in Favor of Gem State.

Gem State is entitled to recover its costs and reasonable attorneys’ fees incurred for the prosecution of this action based on the following:

- **Section 11 of the TSA.** “If any litigation or proceeding is commenced between or among the parties or their representatives arising out of this Agreement ... the prevailing party shall be entitled ... to have and recover from the other party reasonable attorneys’ fees and all costs of such action.”

- **15 U.S.C. §1117(a).** “When ... a violation under section 1125(a) of this title ... shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled ... to recover ... the costs of the action.”

- **Idaho Code §12-121.** “In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.”

- **Idaho Rule of Civil Procedure 54(d)(1)(A).** “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 Rule of Civil Procedure 37(a)(5)(A).** “If the motion is granted, or if the requested discovery is provided after the motion was filed, the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.

- **Idaho Rule of Civil Procedure 37(b)(2)(C).** “Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure [to comply with an order compelling discovery], unless the failure was substantially justified or other circumstances make an award of expenses unjust.”

Gem State will renew its request for an award of costs and attorneys' fees following trial, as provided for by the Idaho Rules of Civil Procedure.

IV. CONCLUSION

Based on the foregoing, Gem State requests a judgment in its favor granting injunctive relief and damages in the amount of Gem State's losses, or UCI's profits, whichever is greater.

DATED THIS 16th day of July 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July 2019, I caused to be served a true copy of the foregoing PLAINTIFF'S TRIAL BRIEF by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

DEFENDANT'S TRIAL BRIEF

Defendant United Components Incorporated, dba Gem State Roofing and Asphalt Maintenance ("UCI") by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby submits this Trial Brief in accordance with the Court's Scheduling Order, dated October 12, 2018.

I. INTRODUCTION

Plaintiff Gem State Roofing Incorporated ("Plaintiff") filed this current case against UCI on July 20, 2018 listing six causes of action 1) Breach of Contract, 2) Breach of Covenant of Good Faith and Fair Dealing, 3) Trademark Infringement, 4) Unjust Enrichment, 5) Preliminary Injunction, and 6) Permanent Injunction. Both parties filed for summary judgment and this Court

entered its Memorandum Decision and Order on April 26, 2019. In its Order, this Court dismissed Plaintiff's Cause of Action for Unjust Enrichment and determined that UCI breached the Trademark Settlement Agreement and violated the covenant of good faith and fair dealing. This Court did not rule on the cause of action for Trademark Infringement but stated an unregistered trademark does not render it invalid. Lastly, this Court did not make a ruling on Plaintiff's causes of action for preliminary and permanent injunction stating such ruling would be premature.

II. DEFENSES OF DEFENDANT'S CASE

1. Plaintiff Does Not Have a Valid and Enforceable Trademark.

As argued below in Section VII, Plaintiff does not have a valid and enforceable trademark because UCI was the first party to use the trademark. A trademark is just that, a mark. Not a name. For example, there are 387 active listings with the Idaho Secretary of State's office using "Gem State" in their name.¹ A trademark is defined as:

Generally speaking, a distinctive mark of authenticity, through which the products of particular manufacturers of the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, **it follows that no sign or form of words can be appropriated as a valid trademark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.**

Black's Law Dictionary, Sixth Ed., 1990 (emphasis added). Currently 387 companies or entities use "Gem State" in their name, likely because Idaho is well known as the Gem State.² Thus, simply using "Gem State" in your business title is not a trademark. In order to protect a trademark, it must be registered through the U.S. Patent & Trademark Office³, or through the Idaho Secretary

¹ See Exhibit A, Request for Judicial Notice

² <https://statesymbolsusa.org/symbol-official-item/idaho/state-nickname/gem-state>

³ <https://www.uspto.gov/trademarks-getting-started/trademark-basics>

of State's Office.⁴ In this case, Plaintiff did neither. Thus, UCI will provide, as a defense at trial, that Plaintiff has no trademark to enforce, thus no cause of action against UCI for violation of the same.

2. Plaintiff Cannot Prove Trademark Infringement.

As argued below in Section VII, Plaintiff cannot meet the elements required to prove trademark infringement. In order to prevail on a claim for trademark infringement, Plaintiff must establish that: (1) it is the owner of a valid and protectable trademark; (2) UCI used the mark in commerce; (3) UCI's use of the mark is likely to cause confusion; and (4) Plaintiff has suffered damages. 15 U.S.C. § 1125(a). UCI will provide evidence that Plaintiff failed to meet all four of these elements necessary to prevail on its trademark infringement claim.

3. The Trademark Settlement Agreement does not apply to Asphalt Jobs.

Plaintiff seeks recovery for work done by UCI that relates to asphalt and sealcoating. However, nowhere in the Trademark Settlement Agreement is there language requiring UCI to not accept seal coat jobs in Blaine County. Plaintiff does not do sealcoating or any asphalt work, thus it is nonsensical to not allow UCI to do asphalt and sealcoating jobs in Blaine County.

4. Injunction is Not Appropriate.

Plaintiff's request for permanent injunction is not appropriate because as argued herein, Plaintiff has not been damaged by UCI's actions, thus, there is no basis for the entry of a permanent injunction.

⁴ <https://legislature.idaho.gov/statutesrules/idstat/title48/t48ch5/>

III. STATEMENT OF UNCONTESTED, AGREED TO, OR STIPULATED FACTS

There are no uncontested, agreed to, or stipulated facts at this time. Prior to the Pretrial Conference, Plaintiff and UCI will submit a joint statement of uncontested facts for the convenience of this Court.

IV. STATEMENT OF CONTESTED FACTS

1. Plaintiff alleges it would have gotten any jobs UCI worked on in Blaine County if UCI had not performed the work.

2. Plaintiff, through motion practice and discovery responses, has alleged UCI breached the Trademark Settlement Agreement by submitting estimates, and/or doing work for certain companies in Blaine County. The following chart contains a list of the customers for which Plaintiff is alleging constitute a breach by UCI of the Trademark Settlement Agreement along with UCI's response as to why such actions do not constitute a breach.

- Standard Plumbing Supply: UCI provided seal coat services to Standard Plumbing Supply, did not do any roofing services.
- Pioneer West Property Management: Pioneer West Property Management took over for Advanced Maintenance Services who is named in the Trademark Settlement Agreement as an existing client of UCI.
- Bruce Bothwell & Larry Isham: UCI did not provide any services to Mr. Bothwell or Mr. Isham, only provided estimates.
- Kerry Armstrong: UCI did not solicit work from Kerry Armstrong in violation of the Trademark Settlement Agreement.
- ESI Construction: UCI does work for ESI throughout the entire state of Idaho, did not do any work in Blaine County, only provided an estimate.
- Shay Construction: UCI did not solicit work for Shay Construction in violation of the Trademark Settlement Agreement.

- Snow Mountain Apartments: UCI did not do any work for Snow Mountain, only provided an estimate. Plaintiff also provided an estimate for the same job.
- Brashears & Sons: UCI did not provide any work to Brashears & Sons, only provided an estimate.
- McAlvain Construction: UCI does work throughout the state for McAlvain, did not solicit services, McAlvain reached out to UCI because of UCI's work in Valley County.

V. CONTESTED ISSUES OF LAW

The following issues of law are contested and discussed in Section VII below: 1) Plaintiff does not have a valid and enforceable trademark, 2) UCI did not infringe upon Plaintiff's trademark, 3) Plaintiff has not suffered damages, 4) There is no basis for a permanent injunction.

VI. EVIDENTIARY ISSUES

There are no evidentiary issues at this point. Plaintiff and UCI will submit to the Court a list of all exhibits that will be stipulated to for admission and which ones will need further foundation, relevance, etc.

VII. POINTS AND AUTHORITIES ON ISSUES OF LAW

1. Plaintiff does not have a Valid and Enforceable Trademark.

Per the Idaho Secretary of State, UCI's first use of its trademark was in 1985, whereas Plaintiff's first use of its trademark was in November 1997. UCI was the first in which gives UCI priority in use of the trademark. Plaintiff should have been on notice that the name "Gem State Roofing" was already in existence at the time it registered its trademark. Because UCI was first in time to use the name and trademark, Plaintiff does not have an enforceable trademark against UCI.

2. UCI did not Infringe upon Plaintiff's Trademark.

The Lanham Act defines a trademark as including “any word, name, symbol, or device, or any combination thereof” used by a person “to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127. The United States Supreme Court described the principle of trademark law and set forth the boundaries of common law trademark rights in *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916). In *Hanover*, the United States Supreme Court illustrated that the purpose of trademark law is to protect the good will of a trade or business by identifying “the origin or ownership of the article to which it is fixed.” *Id.* at 412. The rights afforded to an entity through its trademarks grow out of use of the trademark and through the good will that becomes associated with the trademark. *Id.* at 413. Trademarks are treated as merely a protection for the good will associated with the mark, and not the subject of property except for the limited extent the marks are used in connection with an existing business. *Id.* at 414. The United States Supreme Court in *Hanover* summarized the geographical limitation of a trademark when it stated “the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.” *Id.* at 416.

In order to prevail on a claim for trademark infringement, the plaintiff must establish that: (1) it is the owner of a valid and protectable trademark; (2) the defendant used the mark in commerce; (3) the defendant’s use of the mark is likely to cause confusion; and (4) the plaintiff has suffered damages. 15 U.S.C. § 1125(a); *Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, LLC*, 331 F.Supp.3d 1131, (2018) (citing *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015); *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010)). The core element of trademark infringement is

“[p]rotecting against a likelihood of confusion,” which helps to “ensur[e] that owners of trademarks can benefit from the goodwill associated with their marks” and “that consumers can distinguish among competing producers.” *Nelson-Ricks Cheese Company, Inc.*, 331 F.Supp.3d 1131, (2018).

In this case, Plaintiff cannot prove trademark infringement because element # 3 (the likelihood of confusion) and element # 4 (Plaintiff suffered damages) are not satisfied, as further argued herein.

A. No Likelihood of Confusion

To establish a likelihood of confusion, courts commonly use the eight-factor test set out in *AMF Inc., v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). In applying the *Sleekcraft* factors, a court is to consider: (1) the similarity of the marks; (2) the relatedness of the two companies’ services; (3) the marketing channel used; (4) the strength of plaintiff’s mark; (5) the defendant’s intent in selecting its mark; (6) evidence of actual confusion; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers. *Id.*

i. Similarity of the Marks.

“[T]he similarity of the marks . . . has always been considered a critical question in the likelihood-of-confusion analysis.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). Three general principles help determine whether marks are similar. First, “[s]imilarity is best adjudged by appearance, sound, and meaning.” *Entrepreneur Media v. Smith*, 279 F.3d 1135, 1144 (9th Cir. 2001). Second, the “marks must be considered in their entirety and as they appear in the marketplace.” *GoTo.com*, 202 F.3d at 1206. Third, “similarities are weighed more heavily than differences.” *Id.*

Plaintiff and UCI's logos are not similar, as seen below, Plaintiff's is circular with the state of Idaho being the central focus whereas UCI's is a triangle with a diamond inside of it.



Because the two logos are so different, this factor likely supports a finding that confusion is not likely. Furthermore, UCI does not use the Gem State Roofing symbol for its asphalt work. It uses a wholly separate trademark for asphalt jobs. The Certificate of Assignment Registration of Trademark for the roofing side of UCI confirms the trademark is:

DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "GEM STATE ROOFING" TO THE SIDE.⁵

To the contrary, the asphalt side of UCI's trademark is as follows:

DIAMOND SHAPE WITH RAYS OF LIGHT COMING OFF THE DIAMOND WITH AN UPSIDE DOWN V WITH THE WORDS "ASPHALT MAINTENANCE" TO THE SIDE "ASPHALT MAINTENANCE".⁶

The collective of the company trademarks is as follows:

A TRIANGLE HAVING ONE SIDE FLAT DOWN AND THE OTHER TWO SIDES SLOPING UPWARD TO A TOP PEAK; A FACETED GEMSTONE CONTAINED WITHIN THE TRIANGLE HAVING A DOWNWARD CONICAL POINT AND A FLAT SURFACE ON TOP AND INDICATIONS OF LIGHT RADIATING FROM THE FLAT GEM SURFACE; AND EXTERIOR LINES JUXTAPOSED ABOUT THE UPWARD SIDES OF THE TRIANGLE IN THE MANNER OF A ROOF.⁷

The trademarks are not just the words "Gem State" as alleged by Plaintiff. A trademark is the entirety of the mark, setting itself apart from other marks. In this case, the marks between Plaintiff

⁵ DEFENDANT000074

⁶ DEFENDANT000076

⁷ DEFENDANT000071

and UCI are completely different and cannot be confused for one another, nor can Plaintiff claim to have exclusive rights to use “Gem State”.

ii. Relatedness of UCI and Plaintiff’s Services.

The services of UCI and Plaintiff are similar in that both companies provide roofing services. UCI, however, also provides asphalt services in addition to its roofing services and used to be referred to as Gem State Roofing and Asphalt Maintenance which differentiates the two companies. Presently, UCI is the parent company doing business as two separate entities through assumed business names, particularly Gem State Roofing, and Asphalt Maintenance.

iii. Marketing Channels Used.

Plaintiff and UCI both market through the telephone book in different counties and they also have an online presence. Because the marketing channels are similar, this factor does not carry much weight in determining the likelihood of confusion.

iv. Strength of Plaintiff’s Mark.

As a general matter, “[t]he more likely a mark is to be remembered and associated in the public mind with the mark’s owner, the greater protection the mark is accorded by trademark laws.” *GoTo.com*, 202 F.3d at 1207. The Lanham Act sets out the test for generic marks: “The primary significance of the ... mark to the relevant public ... shall be the test for determining whether the ... mark has become the generic name of goods or services on or in connection with which it has been used.” 15 U.S.C. § 1064(3). The Federal Circuit has interpreted this statement as codifying “the time-honored test for genericness articulated by Judge Learned Hand ... ‘What do the buyers understand by the word for whose use the parties are contending?’” *Committee for Idaho’s High Desert, Inc. v. Yost*, 39 U.S.P.Q.2d 1705, 92 F.3d 814, (Cir. 1996).

In this case, neither mark has become the generic name of goods or services for which it has been used. Further, the ‘Gem State’ component of UCI and Plaintiff’s marks constitutes a generic term which is not protected under trademark law. The ‘roofing’ component of UCI and Plaintiff’s marks also constitutes a generic term which is not protected under trademark law. Neither mark nor company name is has become the generic name of goods or services in the state of Idaho, thus, this factor does not carry much weight in determining the likelihood of confusion.

v. **UCI’s Intent in Selecting its Mark.**

UCI did not have any intent in deceiving or misleading the public nor did it have the intent to take advantage of Plaintiff’s profit. “The Ninth Circuit has stated that “willfulness” should require some proof of the infringer’s intent to profit from the reputation of the trademark holder and that to qualify as “willful” the infringement must be willfully calculated to exploit the advantage of an established mark.” *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400 (9th Cir. 1993). In other words, mere knowledge of a competing trademark claim will not suffice to establish willful infringement. *Id.*

The Ninth Circuit Court has stated that “when the alleged infringer intended to deceive customers, we infer that its conscious attempt to confuse did in fact result in confusion.” *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004). “Recognizing the difficulty of collecting evidence of a party’s motive, we have held that choosing a designation with knowledge that it is another’s trademark permits a presumption of intent to deceive.” *Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1096 (9th Cir. 2013).

UCI (then Gem State) began using the mark and its name Gem State Roofing & Asphalt Maintenance before Plaintiff began using its mark and name. Thus, there was no intent and no willfulness on the part of UCI to deceive or exploit Plaintiff’s mark.

vi. Evidence of Actual Confusion.

Plaintiff must show that confusion is probable, not merely possible, under the circumstances. *HMH Pub. Co. v. Brincat*, 504 F.2d 713, 717 (9th Cir. 1974). There is no evidence of actual confusion occurring, thus, this factor weighs heavily in the determination of likelihood of confusion.

vii. Likelihood of Expansion Into Other Markets.

This factor is not relevant to the likelihood of confusion analysis because neither party has presented evidence expressing interest in expanding into other markets.

viii. Degree of Care Likely to be Exercised by Purchasers.

This factor looks at purchasers' sophistication in the particular industry, because a professional or wholesaler purchaser would usually not be as confused as a layperson when buying products. *Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, LLC*, 331 F.Supp.3d 1131, (2018). In this case, the customers of the parties are either construction companies or individuals. The level of sophistication varies between the two and depends on the circumstances and services that Plaintiff or UCI is hired to complete, thus this factor does not provide much weight into the likelihood of confusion analysis.

Based on these eight factors, there is not a likelihood of confusion between the two parties.

B. Plaintiff has not Suffered Damages.

As cited above, to prevail on a trademark infringement action, Plaintiff must be able to prove it has been damaged, i.e., sales that would have occurred had it not been for the infringing conduct. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993). The Lanham Act provides a number of remedies that a Court may award plaintiffs in cases of trademark infringement or unfair competition. These remedies include various types of monetary damages

and the issuance of a permanent injunction. See 15 U.S.C. § § 1116-17. With respect to damages, the Lanham Act provides that

[w]hen a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled ... to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

Id. § 1117(a). Thus, Congress has authorized the recovery of three different types of monetary damages for the Lanham Act violations at issue here: UCI's profits, Plaintiffs' actual damages, and Plaintiffs' costs of litigating the Lanham Act claim. The Lanham Act allows a prevailing plaintiff to disgorge profits that are earned by the defendant and attributable to the infringement. 15 U.S.C. § 1117(a). Awarding profits "is proper only where the defendant is attempting to gain the value of an established name of another." *Id.* at 1406.

When seeking damages, "a plaintiff must prove both that it actually incurred damages and the amount of those damages." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 620-21 (9th Cir. 1993). Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement. *Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, LLC*, 331 F.Supp.3d 1131, (2018). In a trademark case, "[t]he district court assesses 'any damages sustained by the plaintiff' in the same manner as in tort damages: the reasonably foreseeable harms caused by the wrong." *Skydive Arizona, Inc. v. Quattrocchi*, 102 U.S.P.Q.2d 1046, 673 F.3d 1105,1112 (Cir. 2012).

It is well established that, when making an award of monetary damages under the Lanham Act, a trial judge "should state whether the award is based on [the] defendant's profits, plaintiff's actual damages or both, since each measure depends on different factors." *Yah Kai World Wide Enterprises, Inc. v. Napper*, 292 F.Supp.3d 337, 355-56 (D.C. 2018). The need for making this

distinction arises from the fact that, under the Lanham Act, “courts have generally required proof that certain factors are present before approving a monetary award and the se factors vary according to the measure of relief used.” *Id.*, 292 F.Supp.3d at 356. The court explained:

For example, before a court may award a plaintiff the defendant’s profits, the plaintiff must demonstrate that the defendant acted in “bad faith” or with “willful” disregard of the plaintiff’s trademark rights. *Id.* ; see also *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 965 (D.C. Cir. 1990) (citing *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 662 (2d Cir. 1970)). This standard is not easy to satisfy, for “**courts have insisted on a relatively egregious display of bad faith,**” *Foxtrap, Inc.*, 671 F.2d at 641, or a showing that the infringement was done knowingly and callously, see *id.* at 641-42 (citing *Stuart v. Collins*, 489 F.Supp. 827, 831 (S.D.N.Y.1980)). Indeed, “[w]illfulness or bad faith requires some element of targeted wrongdoing and intentionally deceptive conduct before the defendant’s profits are recoverable.” *Riggs Inv. Mgmt. Corp. v. Columbia Partners, LLC*, 966 F.Supp. 1250, 1270 (D.D.C. 1997) [hereinafter *Riggs I*] (internal quotation marks and citation omitted); see also *ALPO Petfoods, Inc.*, 913 F.2d at 966 (“[I]n the trademark infringement context, ‘willfulness’ and ‘bad faith’ require a connection between a defendant’s awareness of its competitors and its actions at those competitors’ expense.”).

If a plaintiff establishes that the defendant acted willfully or in bad faith, the court must assess the profits that the defendant earned through the unlawful use of his mark. See *Riggs Inv. Mgmt. Corp. v. Columbia Inv. Partners, LLC*, 975 F.Supp. 14, 15 (D.D.C. 1997) [hereinafter *Riggs II*] (“[A] plaintiff is not entitled to profits demonstrably not attributable to the unlawful use of his mark.”). To do so, the court applies the burden-shifting framework that section 1117(a) establishes, which initially requires the plaintiff “to prove defendant’s sales only[.]” 15 U.S.C. § 1117(a). The burden of production then shifts to the defendant, who “must prove all elements of cost or deduction claimed” from those gross sales, as needed for the court to reach the final figure representing the defendant’s profits. *Id.* Should the defendant fail to prove these costs and deductions, the defendant’s gross sales shall serve as the profits for purposes of section 1117(a). See *Riggs II*, 975 F.Supp. at 15-16, 17. The court also retains the discretion to alter the resulting sum if it concludes that “recovery based on profits is either inadequate or excessive ... according to the circumstances of the case.” 15 U.S.C. § 1117(a).

Yah Kai World Wide Enterprises, Inc., 292 F.Supp.3d at 357 (emphasis added).

In this case, Plaintiff has not shown it suffered any damages as a result of UCI’s actions, nor can Plaintiff show egregious bad faith, thus, Plaintiff cannot prevail on its claim for trademark infringement.

3. Plaintiff has not Suffered Any Damages from the Trademark Settlement Agreement.

Plaintiff has not suffered any damages from UCI's alleged trademark infringement, it also has not suffered any damages from the Breach of Trademark Settlement Agreement and Breach of Covenant of Good Faith and Fair Dealing. Plaintiff has yet to put forth any evidence of damages suffered, and each cause of action requires the element of damages to be proven before Plaintiff can prevail.

4. Permanent Injunction is Not Appropriate.

Plaintiff's request for permanent injunction is not appropriate. The Lanham Act also authorizes district courts to "grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title." 15 U.S.C. § 1116(a). Thus, the statute authorizes a district court to grant a permanent injunction against defendants who engage in trademark infringement or who engage in unfair competition. However, court have held:

The decision to issue such a permanent injunction rests, as section 1116(a) acknowledges, on the principles of equity that underlie most forms of injunctive relief: '(1) success on the merits, (2) whether the plaintiffs will suffer irreparable injury absent an injunction, (3) whether, balancing the hardships, there is harm to defendants or other interested parties, and (4) whether the public interest favors granting the injunction.' *Hanley-Wood LLC v. Hanley Wood LLC*, 783 F.Supp.2d 147, 151 (D.D.C. 2011) (quoting *Am. Civil Liberties Union v. Mineta*, 319 F.Supp.2d 69, 87 (D.D.C. 2004)).

Yah Kai World Wide Enterprises, Inc., 292 F.Supp.3d at 355-56.

In this case, Plaintiff cannot show that it suffered any damages (success on the merits), nor can Plaintiff suffer irreparable injury. Any future violations would simply result in monetary damages, not irreparable injury. Finally, when balancing the hardships between Plaintiff and UCI,

this Court may conclude that more damage is done to UCI than Plaintiff under the Trademark Settlement Agreement, thereby declining to impose a permanent injunction.

VIII. CONCLUSION

Based on the forgoing, Plaintiff cannot prevail on its claim for trademark infringement and permanent injunction, and additionally, it cannot prove the requisite damages for breach of contract and breach of covenant of good faith and fair dealing.

DATED: July 16, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

REQUEST FOR JUDICIAL NOTICE

Defendant United Components Incorporated, dba Gem State Roofing and Asphalt Maintenance (“UCI”) by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby asks this Court to take judicial notice of the current, active listings with the Idaho Secretary of State’s Office for businesses including the terms “Gem State” at <https://sosbiz.idaho.gov/search/business>. The records kept by the Idaho Secretary of State’s office are public records. A true and accurate printout of the 387 current, active listings using “Gem State” is attached hereto as Exhibit “A.”

DATED: July 16, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT A

Home

Search

Forms

Lists

Help

Business Search

Gem State



Advanced ▼

Results: 387

Form Info	Status	Filing Date	Agent
A GEM STATE FURNACE & DUCT CLEANING CO. (243679) <i>Assumed Business Name</i>	Active-Current	06/30/2004	NO AGENT
GEM STATE ACCOUNTABLE CARE ORGANIZATION (563196) <i>Assumed Business Name</i>	Active-Current	05/06/2016	NO AGENT
GEM STATE ACOUSTICAL & DRYWALL SUPPLY (375224) <i>Assumed Business Name</i>	Active-Current	06/03/2008	NO AGENT
GEM STATE ADVENTIST ACADEMY (71096) <i>Assumed Business Name</i>	Active-Current	10/16/1998	NO AGENT
GEM STATE ADVENTURES, LLC (573681) <i>Limited Liability Company (D)</i>	Active-Existing	10/13/2017	BRANDON L RICE
GEM STATE ALLOYS, INC. (191767) <i>General Business Corporation (D)</i>	Active-Good Standing	01/11/1979	DAVID H ORGAN
GEM STATE ANALYTICS, LLC (471661) <i>Limited Liability Company (D)</i>	Active-Existing	08/21/2015	REGISTERED AGENTS INC
GEM STATE ANGEL FUND SYNDICATE 1 LLC (524352) <i>Limited Liability Company</i>	Active-Existing	10/11/2016	LOON CREEK CAPITAL GROUP LLC

Home	GEM STATE ANGUS RANCH (445131) <i>Assumed Business Name</i>	>	Active-Current	03/22/2011	NO AGENT
Search	GEM STATE APPAREL & PROMOTIONS (426556) <i>Assumed Business Name</i>	>	Active-Current	06/04/2010	NO AGENT
Forms	GEM STATE APPLIANCE (243482) <i>Assumed Business Name</i>	>	Active-Current	06/29/2004	NO AGENT
Lists	GEM STATE APPRAISERS INC. (346959) <i>General Business Corporation (D)</i>	>	Active-Good Standing	11/17/1995	DOMENIC J BARONE
Help	GEM STATE ARMORY (456101) <i>Assumed Business Name</i>	>	Active-Current	09/06/2011	NO AGENT
	GEM STATE ARMS (348090) <i>Assumed Business Name</i>	>	Active-Current	07/09/2007	NO AGENT
	GEM STATE ARMS COLLECTORS, INC. (634114) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	01/30/2018	DAVID V NIELSEN
	GEM STATE AUCTIONS (574073) <i>Assumed Business Name</i>	>	Active-Current	10/31/2016	NO AGENT
	GEM STATE AUTO (501166) <i>Assumed Business Name</i>	>	Active-Current	08/19/2013	NO AGENT
	GEM STATE AUTO LLC (392879) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/19/2013	DAVID ELDREDGE JR
	GEM STATE AUTO SALES (255450) <i>Assumed Business Name</i>	>	Active-Current	11/12/2004	NO AGENT
	GEM STATE AUTO SALES (412990) <i>Assumed Business Name</i>	>	Active-Current	11/30/2009	NO AGENT

Home	GEM STATE AVIATION (103213) <i>Assumed Business Name</i>	>	Active-Current	10/18/1999	NO AGENT
Search	GEM STATE AWARDS (336711) <i>Assumed Business Name</i>	>	Active-Current	03/14/2007	NO AGENT
Forms	GEM STATE BAIL, LLC (425537) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/27/2014	RYAN PATRICK HENSON
Lists	GEM STATE BELTED GALLOWAYS (585467) <i>Assumed Business Name</i>	>	Active-Current	04/26/2017	NO AGENT
Help	GEM STATE BILLING (177504) <i>Assumed Business Name</i>	>	Active-Current	05/30/2002	NO AGENT
	GEM STATE BOOKKEEPING SERVICE (373634) <i>Assumed Business Name</i>	>	Active-Current	05/13/2008	NO AGENT
	Gem State Books (3379823) <i>Assumed Business Name</i>	>	Active-Current	12/20/2018	NO AGENT
	GEM STATE BOTANICALS LLC (621528) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/02/2018	DUSTIN COYLE
	GEM STATE BRANCH 382 INC., FLEET RESERVE ASSOCIATION (226757) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	02/16/1983	THOMAS W FLANIK
	GEM STATE BRANDS LLC. (448554) <i>Limited Liability Company (D)</i>	>	Active-Existing	02/04/2015	JASON W EWART
	GEM STATE BREWING LLC (623993) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/28/2018	CHRISTOPHER R MCGINNIS
	GEM STATE BROKERS LLC (602867) <i>Limited Liability Company</i>	>	Active-Existing	04/05/2018	VADIM LOZOVSKYY

Home	Gem State Builders LLC (3388431) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/04/2019	JOHN T EVERETT JR
Search	GEM STATE BUILDINGS (347380) <i>Assumed Business Name</i>	>	Active-Current	06/28/2007	NO AGENT
Forms	GEM STATE CANDLE CO & TIMBERWORKS LLC (626219) <i>Limited Liability Company (D)</i>	>	Active-Existing	09/19/2018	TYLER BOSIER
Lists	GEM STATE CANDLES (600134) <i>Assumed Business Name</i>	>	Active-Current	12/15/2017	NO AGENT
Help	GEM STATE CANINES LLC (607148) <i>Limited Liability Company (D)</i>	>	Active-Existing	05/03/2018	BRITTANY HEINER
	GEM STATE CAPITAL FUND I, LLC (194237) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/29/2007	BRETT HAYES
	GEM STATE CAPITAL, LLC (194232) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/29/2007	BRETT HAYES
	Gem State Care, Inc (3519029) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	05/21/2019	Ali Abdulwahab
	GEM STATE CARNIVORES (467987) <i>Assumed Business Name</i>	>	Active-Current	03/09/2012	NO AGENT
	GEM STATE CARPET AND UPHOLSTERY CLEANING (274057) <i>Assumed Business Name</i>	>	Active-Current	05/24/2005	NO AGENT
	GEM STATE CASH OFFER LLC (3414260) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/28/2019	CASEY AMES
	GEM STATE CATALOG CALLER (120020)	>	Active-Current	08/11/2010	NO AGENT

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Assumed Business Name

Gem State Chapter of
the Association of
Legal Administrators
(3509989)



Active-
Current

05/14/2019

NO AGENT

Assumed Business Name

GEM STATE CHOPAS
(309475)



Active-
Current

05/19/2006

NO AGENT

Assumed Business Name

GEM STATE CHRISTIAN
BOWHUNTERS
INCORPORATED
(630096)



Active-
Good
Standing

01/17/2017

WAYNE
CROWNOVER

Non-Profit Corporation (D)

GEM STATE CLEANING
(138619)



Active-
Current

01/29/2001

NO AGENT

Assumed Business Name

GEM STATE CLEANING
(599773)



Active-
Current

12/07/2017

NO AGENT

Assumed Business Name

GEM STATE CLUB, LLC
(326997)



Active-
Existing

08/18/2011

STEPHEN B MCCREA

Limited Liability Company (D)

GEM STATE COATINGS
(375988)



Active-
Current

06/11/2008

NO AGENT

Assumed Business Name

GEM STATE COLLEGE
(80917)



Active-
Current

01/19/1999

NO AGENT

Assumed Business Name

GEM STATE COLLEGE
OF NATUROPATHY
(124000)



Active-
Current

07/05/2000

NO AGENT

Assumed Business Name

GEM STATE
COMMERCIAL
CLEANING (92087)



Active-
Current

05/26/1999

NO AGENT

Assumed Business Name

Gem State
Commodities (3531053)



Active-
Current

06/04/2019

NO AGENT

Assumed Business Name

Home	GEM STATE COMMUNITY DEVELOPMENT LLC (136462) <i>Limited Liability Company (D)</i>	>	Active- Existing	07/27/2005	SHARON FISHER
Search	GEM STATE COMPANIES (THE) (232217) <i>Assumed Business Name</i>	>	Active- Current	03/09/2004	NO AGENT
Forms	GEM STATE COMPUTERS (560770) <i>Assumed Business Name</i>	>	Active- Current	03/31/2016	NO AGENT
Lists	Gem State Concepts LLC (3388413) <i>Limited Liability Company (D)</i>	>	Active- Existing	01/04/2019	KIMBERLY SMITH
Help	GEM STATE CONCRETE (239139) <i>Assumed Business Name</i>	>	Active- Current	05/13/2004	NO AGENT
	GEM STATE CONCRETE COATINGS (388594) <i>Assumed Business Name</i>	>	Active- Current	12/15/2008	NO AGENT
	GEM STATE CONCRETE PUMPING (58028) <i>Assumed Business Name</i>	>	Active- Current	05/04/1998	NO AGENT
	GEM STATE CONSOLIDATED MINES, INC. (84552) <i>General Business Corporation (D)</i>	>	Active- Good Standing	03/29/1948	KIM UNDERWOOD
	GEM STATE CONSTRUCTION & FLOORING (269670) <i>Assumed Business Name</i>	>	Active- Current	04/12/2005	NO AGENT
	GEM STATE CONSTRUCTION & LANDSCAPING (41331) <i>Assumed Business Name</i>	>	Active- Current	10/02/1997	NO AGENT
	GEM STATE CONSTRUCTION (29715) <i>Assumed Business Name</i>	>	Active- Current	06/05/1997	NO AGENT

Home	GEM STATE CONSULTATION (546658) <i>Assumed Business Name</i>	>	Active-Current	08/10/2015	NO AGENT
Search	Gem State Contracting, LLC (3456731) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/18/2019	Roberto Corral
Forms	GEM STATE CONTRACTORS INC. (608621) <i>General Business Corporation (D)</i>	>	Active-Good Standing	04/14/2014	EMANUEL S MANGEAC
Lists	GEM STATE COPYWRITING (283377) <i>Assumed Business Name</i>	>	Active-Current	09/01/2005	NO AGENT
Help	GEM STATE CREATIONS (550036) <i>Assumed Business Name</i>	>	Active-Current	10/08/2015	NO AGENT
	GEM STATE CREATIVE DESIGN (549339) <i>Assumed Business Name</i>	>	Active-Current	09/28/2015	NO AGENT
	GEM STATE CRYSTALS, INC. (229055) <i>General Business Corporation (D)</i>	>	Active-Good Standing	05/18/1983	WILLIAM L MABBUTT
	GEM STATE CURB APPEAL LLC (483237) <i>Limited Liability Company (D)</i>	>	Active-Existing	12/03/2015	CRISTINA MICHELE SKEERS
	GEM STATE CURBING (353609) <i>Assumed Business Name</i>	>	Active-Current	09/11/2007	NO AGENT
	GEM STATE CUSTOM COLORS LLC (425415) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/26/2014	ERIC FLEMING
	GEM STATE CUSTOM'S (532689) <i>Assumed Business Name</i>	>	Active-Current	01/12/2015	NO AGENT
	GEM STATE DAIRY PRODUCTS, LLC (626880)	>	Active-Existing	09/24/2018	WRIGHT, WRIGHT BROTHERS LAW OFFICE PLLC

Home	GEM STATE DATA MANAGEMENT (575964) <i>Assumed Business Name</i>	>	Active-Current	12/02/2016	NO AGENT
Search	GEM STATE DEALER SERVICES, LLC (606878) <i>Limited Liability Company (D)</i>	>	Active-Existing	04/30/2018	PATRICK WHITE
Forms	GEM STATE DE-MILL (578102) <i>Assumed Business Name</i>	>	Active-Current	01/17/2017	NO AGENT
Lists	GEM STATE DENT REPAIR (569461) <i>Assumed Business Name</i>	>	Active-Current	08/15/2016	NO AGENT
Help	GEM STATE DENT REPAIR L.L.C. (527317) <i>Limited Liability Company (D)</i>	>	Active-Existing	11/14/2016	ERIC GRUBAUGH
	Gem State Dental Group L.L.C. (3467096) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/29/2019	CORPORATE FILING SOLUTIONS LLC
	GEM STATE DERMATOLOGY (57762) <i>Assumed Business Name</i>	>	Active-Current	04/30/1998	NO AGENT
	GEM STATE DERMATOLOGY, P.A. (448797) <i>Professional Service Corporation (D)</i>	>	Active-Good Standing	01/29/2003	MICHELLE MORGAN
	GEM STATE DESIGNS (497455) <i>Assumed Business Name</i>	>	Active-Current	06/17/2013	NO AGENT
	GEM STATE DESIGNS (525567) <i>Assumed Business Name</i>	>	Active-Current	09/03/2014	NO AGENT
	GEM STATE DEVELOPMENTAL CENTER, INCORPORATED (232542) <i>General Business Corporation (D)</i>	>	Active-Good Standing	10/07/1983	MARTIN J LANDHOLM

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(1)

Gem State Direct
(3304390)

Assumed Business Name



Active-
Current

10/02/2018

NO AGENT

GEM STATE DISC
GOLFERS, INC (635522)

Non-Profit Corporation (D)



Active-
Good
Standing

06/04/2018

Charles D Hallett

GEM STATE
DISTRIBUTION LLP
(18269)

*Limited Liability
Partnership (D)*



Active-
Existing

12/15/2017

JOEL A MYERS

GEM STATE
DISTRIBUTOR (47421)

Assumed Business Name



Active-
Current

01/08/1998

NO AGENT

GEM STATE
DISTRIBUTORS, INC.
(103776)

*General Business
Corporation (D)*



Active-
Good
Standing

10/08/1958

D. PAUL NOORDA

GEM STATE DOODLES
(612439)

Assumed Business Name



Active-
Current

06/01/2018

NO AGENT

GEM STATE DOORS
AND MILLWORK LLC
(298583)

*Limited Liability Company
(D)*



Active-
Existing

09/15/2010

WESLEY ARTHUR
WAGGONER

GEM STATE DORPERS
(137456)

Assumed Business Name



Active-
Current

01/12/2001

NO AGENT

GEM STATE ELECTRIC
(466726)

Assumed Business Name



Active-
Current

02/23/2012

NO AGENT

GEM STATE ELECTRIC
CO. (207605)

*General Business
Corporation (D)*



Active-
Good
Standing

12/23/1980

MIKE R. LOCKWOOD

GEM STATE ELECTRIC
MOTORS & PUMPS
(466730)

Assumed Business Name



Active-
Current

02/23/2012

NO AGENT

Home	(158876) <i>Limited Liability Company (D)</i>	>			
Search	GEM STATE ENT, PLLC (290766) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/01/2010	JOHN A COLEMAN
Forms	GEM STATE ENTERPRISES (325490) <i>Assumed Business Name</i>	>	Active-Current	11/13/2006	NO AGENT
Lists	GEM STATE ENTERPRISES (532105) <i>Assumed Business Name</i>	>	Active-Current	12/31/2014	NO AGENT
Help	GEM STATE ENTERTAINMENT LLC (432996) <i>Limited Liability Company (D)</i>	>	Active-Existing	09/11/2014	MICHAEL L CHRISTENSEN
	GEM STATE ERECTORS (73849) <i>Assumed Business Name</i>	>	Active-Current	11/18/1998	NO AGENT
	GEM STATE EXCAVATION (547408) <i>Assumed Business Name</i>	>	Active-Current	08/24/2015	NO AGENT
	GEM STATE EXTERIORS (548877) <i>Assumed Business Name</i>	>	Active-Current	09/17/2015	NO AGENT
	GEM STATE EXTERIORS INC (624802) <i>General Business Corporation (D)</i>	>	Active-Good Standing	12/21/2015	ANDREW J FINLEY
	GEM STATE FABRICATION (20247) <i>Assumed Business Name</i>	>	Active-Current	04/09/1997	NO AGENT
	GEM STATE FAMILY (502990) <i>Assumed Business Name</i>	>	Active-Current	09/19/2013	NO AGENT
	GEM STATE FAMILY EYECARE, P.C. (579167) <i>Professional Service Corporation (D)</i>	>	Active-Good Standing	07/27/2011	WILLIAM WARDWELL
	GEM STATE FAMILY	>	Active-	07/16/2018	TARYNA GOODMAN

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GEM STATE FARMS (71210) <i>Assumed Business Name</i>	>	Active-Current	10/10/1998	NO AGENT
GEM STATE FENCE CO. (114314) <i>Assumed Business Name</i>	>	Active-Current	03/09/2000	NO AGENT
GEM STATE FENCING AND STAINING LLC (580216) <i>Limited Liability Company (D)</i>	>	Active-Existing	11/20/2017	ERNIEST MYATT
GEM STATE FIDDLERS INCORPORATED (446661) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	12/16/2002	LESLIE L HAYNES
GEM STATE FINANCIAL GROUP (573406) <i>Assumed Business Name</i>	>	Active-Current	10/19/2016	NO AGENT
GEM STATE FINANCIAL SERVICE (135982) <i>Assumed Business Name</i>	>	Active-Current	12/18/2000	NO AGENT
GEM STATE FIRE PROTECTION, A PARTNERSHIP (80487) <i>Assumed Business Name</i>	>	Active-Current	01/25/1999	NO AGENT
GEM STATE FIRE SAFETY (185199) <i>Assumed Business Name</i>	>	Active-Current	09/04/2002	NO AGENT
Gem State Fireplace Company LLC (3340912) <i>Limited Liability Company (D)</i>	>	Active-Existing	10/31/2018	Andrew J McNew
Gem State First LLC (3351964) <i>Limited Liability Company (D)</i>	>	Active-Existing	11/21/2018	REGISTERED AGENTS INC
GEM STATE FISH BAITS (81867) <i>Assumed Business Name</i>	>	Active-Current	02/04/1999	NO AGENT
GEM STATE FITNESS (547035) <i>Assumed Business Name</i>	>	Active-Current	08/17/2015	NO AGENT

Home	GEM STATE FOAM CO (213561) <i>Assumed Business Name</i>	>	Active- Current	07/31/2003	NO AGENT
Search	GEM STATE FORMS & SYSTEMS, INC. (402505) <i>General Business Corporation (D)</i>	>	Active- Good Standing	12/22/1999	ROGER THURSTON
Forms	GEM STATE FRENCH BULLDOGS, LLC (575529) <i>Limited Liability Company (D)</i>	>	Active- Existing	10/17/2017	HEATHER CLARK
Lists	GEM STATE FUEL INJECTION & TURBO REPAIR (135879) <i>Assumed Business Name</i>	>	Active- Current	12/18/2000	NO AGENT
Help	GEM STATE FUEL INJECTION & TURBO REPAIR LLC (306042) <i>Limited Liability Company (D)</i>	>	Active- Existing	12/17/2010	JOE BORTON
	GEM STATE FUNDING (108464) <i>Assumed Business Name</i>	>	Active- Current	01/06/2000	NO AGENT
	GEM STATE FUNDRAISING (481213) <i>Assumed Business Name</i>	>	Active- Current	10/02/2012	NO AGENT
	GEM STATE GARAGE DOOR COMPANY (98965) <i>Assumed Business Name</i>	>	Active- Current	08/23/1999	NO AGENT
	GEM STATE GEMS (416000) <i>Assumed Business Name</i>	>	Active- Current	01/20/2010	NO AGENT
	GEM STATE GENERATORS (90056) <i>Assumed Business Name</i>	>	Active- Current	04/30/1999	NO AGENT
	GEM STATE GOLD & SILVER LLC (227014) <i>Limited Liability Company (D)</i>	>	Active- Existing	03/10/2008	MARVIN S TANNER
	GEM STATE GOPHER MARSHAL L.L.C. (499071)	>	Active- Existing	03/30/2016	SHANE-KENNETH R WELLS

Home	<i>Assumed Business Name</i>				
	GEM STATE GRILL (35859)	>	Active-Current	07/31/1997	NO AGENT
Search	<i>Assumed Business Name</i>				
	GEM STATE GRILL (582026)	>	Active-Current	03/13/2017	NO AGENT
Forms	<i>Assumed Business Name</i>				
	GEM STATE GROTTTO, INC. (THE) (203547)	>	Active-Good Standing	06/23/1980	ROBERT J STRAUB
Lists	<i>Non-Profit Corporation (D)</i>				
	GEM STATE GUARDIANS (461225)	>	Active-Current	11/30/2011	NO AGENT
Help	<i>Assumed Business Name</i>				
	GEM STATE GUTTERS, LLC (480842)	>	Active-Existing	11/09/2015	BRIAN CHAPMAN
	<i>Limited Liability Company (D)</i>				
	GEM STATE GYMNASTICS (612156)	>	Active-Current	05/29/2018	NO AGENT
	<i>Assumed Business Name</i>				
	GEM STATE HANDY MAN SERVICES (491367)	>	Active-Current	03/21/2013	NO AGENT
	<i>Assumed Business Name</i>				
	Gem State Handyman (3372646)	>	Active-Current	12/15/2018	NO AGENT
	<i>Assumed Business Name</i>				
	GEM STATE HARDWOOD FLOORS LLC. (453892)	>	Active-Existing	03/16/2015	TRAVIS JENNINGS
	<i>Limited Liability Company (D)</i>				
	GEM STATE HEALTH CLAIMS (194984)	>	Active-Current	01/08/2003	NO AGENT
	<i>Assumed Business Name</i>				
	Gem State Heating & Cooling Inc (3349733)	>	Active-Good Standing	11/16/2018	Patrick T O'DONNELL
	<i>General Business Corporation (D)</i>				
	Gem State Heating And Air Conditioning LLC (3437280)	>	Active-Existing	02/26/2019	Andrew J McNew

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Limited Liability Company (D)

GEM STATE HOLIDAY LIGHTING (573434)
Assumed Business Name

> Active-Current

10/19/2016

NO AGENT

GEM STATE HOME BUYERS LLC (438498)
Limited Liability Company (D)

> Active-Existing

11/03/2014

DAVID BENOIT

GEM STATE HOME GROUP, LLC (557381)
Limited Liability Company (D)

> Active-Existing

06/16/2017

MEGAN MILLER

GEM STATE HOME IMPROVEMENTS, LLC (618955)
Limited Liability Company (D)

> Active-Existing

07/23/2018

Angstman, Johnson, Christensen & May, PLLC

GEM STATE HOME INSPECTIONS (542758)
Assumed Business Name

> Active-Current

06/01/2015

NO AGENT

GEM STATE HOME INSPECTIONS, LLC (614759)
Limited Liability Company (D)

> Active-Existing

06/19/2018

TIMBER TURNER

GEM STATE HOME MAINTENANCE (182512)
Assumed Business Name

> Active-Current

08/02/2002

NO AGENT

GEM STATE HOMEBREW COMPETITION (96409)
Assumed Business Name

> Active-Current

07/20/1999

NO AGENT

GEM STATE HOOKERS BASS CLUB, INCORPORATED (266752)
Non-Profit Corporation (D)

> Active-Good Standing

01/14/1988

ROBERT BLAUVELT

Gem State Hot Dogs LLC (3515315)
Limited Liability Company (D)

> Active-Existing

05/17/2019

Christopher Sylvia

GEM STATE HOUSEKEEPING

> Active-Current

02/20/2018

NO AGENT

Home	LLC (296694) <i>Limited Liability Company (D)</i>	>	Existing		
Search	GEM STATE HUBCAPS (93796) <i>Assumed Business Name</i>	>	Active-Current	06/15/1999	NO AGENT
Forms	GEM STATE HYPNOSIS (579688) <i>Assumed Business Name</i>	>	Active-Current	02/08/2017	NO AGENT
Lists	GEM STATE IMAGING (142636) <i>Assumed Business Name</i>	>	Active-Current	03/14/2001	NO AGENT
Help	GEM STATE INDEPENDENT (3419791) <i>Assumed Business Name</i>	>	Active-Current	02/01/2019	NO AGENT
	GEM STATE INDUSTRIAL LLC (3463256) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/26/2019	3915 LLC
	GEM STATE INDUSTRIES (523887) <i>Assumed Business Name</i>	>	Active-Current	08/04/2014	NO AGENT
	Gem State Infrastructure, LLC (3534249) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/10/2019	C T CORPORATION SYSTEM
	GEM STATE INSPECTIONS (239860) <i>Assumed Business Name</i>	>	Active-Current	05/20/2004	NO AGENT
	GEM STATE INSPECTIONS, L.L.C. (107732) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/29/2004	RICK ROONEY
	GEM STATE INSTALLATIONS (190122) <i>Assumed Business Name</i>	>	Active-Current	11/04/2002	NO AGENT
	GEM STATE INSURANCE COMPANY (36308) <i>General Business</i>	>	Active-Good Standing	04/30/1910	DEPARTMENT OF INSURANCE

Home	GEM STATE INTERNET GROUP (70048) <i>Assumed Business Name</i>	>	Active-Current	10/02/1998	NO AGENT
Search	GEM STATE INTERPRETING LLC (621475) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/03/2018	MICHELLE SCHOONDERWOERD
Forms	GEM STATE INVESTIGATIONS & SECURITY (122384) <i>Assumed Business Name</i>	>	Active-Current	06/14/2000	NO AGENT
Lists	GEM STATE INVESTMENT ADVISORS (396610) <i>Assumed Business Name</i>	>	Active-Current	04/06/2009	NO AGENT
Help	GEM STATE INVESTMENT ADVISORS, LLC (307955) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/12/2011	RONALD GAMBASSI
	GEM STATE INVESTMENT GROUP, LLC (518510) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/29/2016	WESLEY GREGORY
	GEM STATE INVESTMENT PROPERTIES, LLC (611949) <i>Foreign Limited Liability Company</i>	>	Active-Existing	06/01/2018	REGISTERED AGENTS INC
	GEM STATE INVESTMENTS, CORP. (482102) <i>General Business Corporation (D)</i>	>	Active-Good Standing	02/07/2005	KIRKLYN R SMITH
	GEM STATE INVESTORS, LLC (138660) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/22/2005	JASON HOPKINS
	GEM STATE IRIS SOCIETY (330614) <i>Assumed Business Name</i>	>	Active-Current	01/16/2007	NO AGENT

Home	GEM STATE JEWELERS (181116) <i>Assumed Business Name</i>	>	Active-Current	07/17/2002	NO AGENT
Search	GEM STATE JEWELRY (62698) <i>Assumed Business Name</i>	>	Active-Current	06/26/1998	NO AGENT
Forms	GEM STATE JUDGMENT RECOVERY (173380) <i>Assumed Business Name</i>	>	Active-Current	04/15/2002	NO AGENT
Lists	GEM STATE JUDGMENT RECOVERY (195206) <i>Assumed Business Name</i>	>	Active-Current	01/10/2003	NO AGENT
Help	GEM STATE KENNELS LLC (486559) <i>Limited Liability Company (D)</i>	>	Active-Existing	12/30/2015	SETH SIMPSON
	GEM STATE KNIVES (613586) <i>Assumed Business Name</i>	>	Active-Current	06/20/2018	NO AGENT
	Gem State KnockerBall (3460387) <i>Assumed Business Name</i>	>	Active-Current	03/22/2019	NO AGENT
	Gem State Lacrosse LLC (3427516) <i>Limited Liability Company (D)</i>	>	Active-Existing	02/11/2019	Tom Blanchard
	GEM STATE LANDSCAPE MAINTENANCE (333588) <i>Assumed Business Name</i>	>	Active-Current	02/14/2007	NO AGENT
	GEM STATE LAW GROUP (457746) <i>Assumed Business Name</i>	>	Active-Current	09/30/2011	NO AGENT
	GEM STATE LAWN CARE (417597) <i>Assumed Business Name</i>	>	Active-Current	02/10/2010	NO AGENT
	GEM STATE LAWNS (340640) <i>Assumed Business Name</i>	>	Active-Current	04/18/2007	NO AGENT
	GEM STATE LAWNS (340640) <i>Assumed Business Name</i>	>	Active-Current	07/20/2012	NO AGENT

Home	NURSE CONSULTING (156255) <i>Assumed Business Name</i>	>	Current		
Search	GEM STATE LIGHTING (579077) <i>Assumed Business Name</i>	>	Active-Current	01/30/2017	NO AGENT
Forms	GEM STATE LINEUPS (76134) <i>Assumed Business Name</i>	>	Active-Current	12/14/1998	NO AGENT
Lists	GEM STATE LIQUIDATORS (104091) <i>Assumed Business Name</i>	>	Active-Current	10/28/1999	NO AGENT
Help	GEM STATE LIQUIDATORS (71523) <i>Assumed Business Name</i>	>	Active-Current	10/22/1998	NO AGENT
	Gem State Livestock, LLC (3307096) <i>Limited Liability Company (D)</i>	>	Active-Existing	10/09/2018	Jordan Hepton
	GEM STATE LOCATING, INC. (382813) <i>General Business Corporation (D)</i>	>	Active-Good Standing	07/21/1998	EDWARD E BELT
	Gem State Logging LLC (3457848) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/19/2019	Scott Schiermeister
	GEM STATE LOGISTICS, LLC (192782) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/19/2007	GREGORY P SARGIS
	GEM STATE LUMBER COMPANY (45288) <i>Assumed Business Name</i>	>	Active-Current	12/03/1997	NO AGENT
	GEM STATE MACHINING L L C (462067) <i>Limited Liability Company (D)</i>	>	Active-Existing	05/22/2015	KELLY M BROWN
	GEM STATE MANUFACTURING, INC. (274687) <i>General Business Corporation (D)</i>	>	Active-Good Standing	12/30/1988	C T CORPORATION SYSTEM

Home	GEM STATE MARKETING (607406) <i>Assumed Business Name</i>	>	Active-Current	03/26/2018	NO AGENT
Search	GEM STATE MASONRY (458231) <i>Assumed Business Name</i>	>	Active-Current	10/07/2011	NO AGENT
Forms	GEM STATE MATTRESS WHOLESALE (557594) <i>Assumed Business Name</i>	>	Active-Current	02/16/2016	NO AGENT
Lists	GEM STATE MECHANICAL (28358) <i>Assumed Business Name</i>	>	Active-Current	05/27/1997	NO AGENT
Help	GEM STATE MECHANICAL, INC. (509704) <i>General Business Corporation (D)</i>	>	Active-Good Standing	07/28/2006	JASON MEANS
	GEM STATE MEDEQUIP (596408) <i>Assumed Business Name</i>	>	Active-Current	10/13/2017	NO AGENT
	GEM STATE MEDIA (391432) <i>Assumed Business Name</i>	>	Active-Current	01/29/2009	NO AGENT
	Gem State Mediation and Consulting (3508669) <i>Assumed Business Name</i>	>	Active-Current	05/12/2019	NO AGENT
	GEM STATE MEDICAL BILLING LLC (436794) <i>Limited Liability Company (D)</i>	>	Active-Existing	10/17/2014	SUSAN DEBAUGH
	GEM STATE MEDICAL GROUP (71969) <i>Assumed Business Name</i>	>	Active-Current	10/27/1998	NO AGENT
	GEM STATE MEDICAL, LLC (383177) <i>Limited Liability Company (D)</i>	>	Active-Existing	05/07/2013	TODD REDDY
	GEM STATE MERCANTILE, LLC (598384) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/22/2018	BUD CONDEE

Home	GEM STATE MHP BUYING & LEASING, LLC (573457) <i>Limited Liability Company (D)</i>	>	Active-Existing	10/12/2017	ANNUAL \$46.00-BLAKE'S REGISTERED AGENTS LLC
Search	GEM STATE MINING CO. (635012) <i>General Business Corporation (D)</i>	>	Active-Good Standing	04/16/2018	JORDAN BALLS
Forms	GEM STATE MINT (490655) <i>Assumed Business Name</i>	>	Active-Current	03/12/2013	NO AGENT
Lists	GEM STATE MOBILE BLIND CLEANING CO (15593) <i>Assumed Business Name</i>	>	Active-Current	03/17/1997	NO AGENT
Help	GEM STATE MOBILE DETAILING, LLC (590047) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/23/2018	TYLER SAUNDERS
	GEM STATE MOBILE HOME TRANSFER (252669) <i>Assumed Business Name</i>	>	Active-Current	10/12/2004	NO AGENT
	Gem State Mobile Notary (3390140) <i>Assumed Business Name</i>	>	Active-Current	01/08/2019	NO AGENT
	Gem State Mobile Pressure Washing LLC (3431509) <i>Limited Liability Company (D)</i>	>	Active-Existing	02/17/2019	James Ercanbrack
	GEM STATE MOBILE SHARPENING (246046) <i>Assumed Business Name</i>	>	Active-Current	07/29/2004	NO AGENT
	GEM STATE MODEL & SUPPLY (5076) <i>Assumed Business Name</i>	>	Active-Current	02/03/1997	NO AGENT
	GEM STATE MORTGAGE (238024) <i>Assumed Business Name</i>	>	Active-Current	04/28/2004	NO AGENT

Home	LLC (606852) <i>Limited Liability Company (D)</i>	>	Existing		
Search	GEM STATE MOVING (80596) <i>Assumed Business Name</i>	>	Active-Current	01/21/1999	NO AGENT
Forms	GEM STATE MULE COMPANY, LLC (412224) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/04/2014	COGENCY GLOBAL INC.
Lists	GEM STATE MUTUAL LIFE INSURANCE COMPANY (89289) <i>General Business Corporation (D)</i>	>	Active-Good Standing	12/22/1950	DEPT. OF INSURANCE
Help	GEM STATE NEIGHBORHOOD GREETERS INFORMATION RESOURCES (77137) <i>Assumed Business Name</i>	>	Active-Current	12/22/1998	NO AGENT
	GEM STATE NETWORKS (369010) <i>Assumed Business Name</i>	>	Active-Current	03/21/2008	NO AGENT
	GEM STATE NON-EMERGENT TRANSPORTATION (435307) <i>Assumed Business Name</i>	>	Active-Current	10/18/2010	NO AGENT
	GEM STATE NORTHWEST REALTY (283226) <i>Assumed Business Name</i>	>	Active-Current	08/31/2005	NO AGENT
	Gem State of Mind (3428463) <i>Assumed Business Name</i>	>	Active-Current	02/12/2019	NO AGENT
	GEM STATE OIL RECOVERY (299467) <i>Assumed Business Name</i>	>	Active-Current	02/21/2006	NO AGENT
	GEM STATE OIL SERVICES, INC. (584269) <i>General Business Corporation (D)</i>	>	Active-Good Standing	01/27/2012	DOUGLAS E STOWERS

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GEM STATE OUTDOOR AND LANDSCAPE LIGHTING LLC (481474)
Limited Liability Company (D)

Active-Existing

11/16/2015

CHARLES E WARD

GEM STATE PAINTING CO. (172166)
Assumed Business Name

Active-Current

04/03/2002

NO AGENT

GEM STATE PAPER & SUPPLY CO. (93905)
General Business Corporation (D)

Active-Good Standing

01/02/1954

JOHN C ANDERSON

GEM STATE PARTNERS, INC. (572790)
General Business Corporation (D)

Active-Good Standing

01/06/2011

JARED SIMKINS

GEM STATE PATRIOT (THE) (505383)
Assumed Business Name

Active-Current

10/28/2013

NO AGENT

Gem State Paving LLC (3403974)
Limited Liability Company (D)

Active-Existing

01/20/2019

MARK F BOISVERT II

GEM STATE PERFORMANCE (137546)
Assumed Business Name

Active-Current

01/12/2001

NO AGENT

GEM STATE PEST CONTROL (40591)
Assumed Business Name

Active-Current

09/22/1997

NO AGENT

GEM STATE PEST SOLUTIONS (532955)
Assumed Business Name

Active-Current

01/15/2015

NO AGENT

GEM STATE PEST SOLUTIONS LLC (448340)
Limited Liability Company (D)

Active-Existing

03/01/2015

DARREN WOLTERS

GEM STATE PLASTER AND RENOVATION LLC (518208)
Limited Liability Company (D)

Active-Existing

08/25/2016

RICK ROONEY

GEM STATE PLUMBING

Active

01/06/2000

VINCENT NEWKIRK

Home	GEM STATE POLYGRAPH (215346) <i>Assumed Business Name</i>	>	Active-Current	08/20/2005	NO AGENT
Search	GEM STATE POWDER COATING, INC. (506708) <i>General Business Corporation (D)</i>	>	Active-Good Standing	05/30/2006	CODY PORTER
Forms	GEM STATE PRINTING (601363) <i>Assumed Business Name</i>	>	Active-Current	01/08/2018	NO AGENT
Lists	GEM STATE PROCESSING, LLC (314830) <i>Foreign Limited Liability Company</i>	>	Active-Existing	03/28/2011	STEVEN SCHOSSBERGER
Help	Gem State Promotions LLC (3441048) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/04/2019	Veronica Guajardo
	GEM STATE PROPERTIES LLC (338739) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/10/2012	RANDALL PAXTON QUIGLEY
	GEM STATE PROPERTY GROUP LLC. (282632) <i>Limited Liability Company (D)</i>	>	Active-Existing	02/25/2010	JENIFER MANT
	GEM STATE PROPERTY MANAGEMENT (287560) <i>Assumed Business Name</i>	>	Active-Current	10/17/2005	NO AGENT
	GEM STATE PROPERTY MANAGEMENT (292656) <i>Assumed Business Name</i>	>	Active-Current	12/12/2005	NO AGENT
	GEM STATE PROPERTY MANAGEMENT LLC (234716) <i>Limited Liability Company (D)</i>	>	Active-Existing	05/30/2008	FRANK HAGAMAN
	GEM STATE PROPERTY MANAGEMENT SERVICES (232214) <i>Assumed Business Name</i>	>	Active-Current	03/09/2004	NO AGENT

Home	GEM STATE PUBLIC AUCTION (205892) <i>Assumed Business Name</i>	>	Active-Current	05/01/2003	NO AGENT
Search	GEM STATE PUBLISHING (160360) <i>Assumed Business Name</i>	>	Active-Current	11/05/2001	NO AGENT
Forms	GEM STATE QUILTING (268751) <i>Assumed Business Name</i>	>	Active-Current	04/04/2005	NO AGENT
Lists	GEM STATE RACING PIGEON CLUB (15072) <i>Unincorporated Nonprofit Association (D)</i>	>	Active-Current	06/10/2011	RICK POST
Help	GEM STATE RACK, LLC (604315) <i>Limited Liability Company (D)</i>	>	Active-Existing	04/12/2018	JACOB E BARCLAY
	GEM STATE RADIOLOGY (78141) <i>Assumed Business Name</i>	>	Active-Current	12/31/1998	NO AGENT
	GEM STATE RADIOLOGY, LLP (422) <i>Limited Liability Partnership (D)</i>	>	Active-Existing	03/20/1996	JEFFREY R CLIFF
	Gem State Real Estate (3508070) <i>Assumed Business Name</i>	>	Active-Current	05/10/2019	NO AGENT
	GEM STATE REALTY, INC. (251189) <i>General Business Corporation (D)</i>	>	Active-Good Standing	01/17/1986	WALT HESS
	GEM STATE REC.COM (115337) <i>Assumed Business Name</i>	>	Active-Current	03/20/2000	NO AGENT
	GEM STATE REMODELING (68549) <i>Assumed Business Name</i>	>	Active-Current	09/16/1998	NO AGENT
	GEM STATE RENTALS (255600) <i>Assumed Business Name</i>	>	Active-Current	11/12/2004	NO AGENT
	GEM STATE RENTALS	>	Active-	03/22/2005	NO AGENT

Home	(523883) <i>Assumed Business Name</i>	>	Current		
Search	GEM STATE RENTALS, LLC (614758) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/19/2018	TIMBER TURNER
Forms	GEM STATE REPTILES (348296) <i>Assumed Business Name</i>	>	Active-Current	07/10/2007	NO AGENT
Lists	GEM STATE RESEARCH (465630) <i>Assumed Business Name</i>	>	Active-Current	02/08/2012	NO AGENT
Help	Gem State Restoration (3533843) <i>Assumed Business Name</i>	>	Active-Current	06/07/2019	NO AGENT
	GEM STATE ROCK SUPPLY (48178) <i>Assumed Business Name</i>	>	Active-Current	01/16/1998	NO AGENT
	GEM STATE ROLLER DERBY COMPANY (3336819) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	10/17/2018	KATIE LEWIS
	GEM STATE ROOFING (37324) <i>Assumed Business Name</i>	>	Active-Current	08/12/1997	NO AGENT
	GEM STATE ROOFING (96181) <i>Assumed Business Name</i>	>	Active-Current	07/16/1999	NO AGENT
	GEM STATE ROOFING, INCORPORATED (417519) <i>General Business Corporation (D)</i>	>	Active-Good Standing	12/18/2000	RICHARD G SILVIA
	GEM State Rugby (3528034) <i>Reservation of Legal Entity Name</i>	>	Active-Current	05/31/2019	NO AGENT
	GEM STATE RV PARK AND CAMPGROUND (554360) <i>Assumed Business Name</i>	>	Active-Current	12/28/2015	NO AGENT
	GEM STATE SAND AND	>	Active	08/10/2015	NO AGENT

Home	KARATE (90387) <i>Assumed Business Name</i>	>	Current		
Search	GEM STATE SECURITY & INVESTIGATIONS (246045) <i>Assumed Business Name</i>	>	Active-Current	07/29/2004	NO AGENT
Forms	GEM STATE SECURITY & INVESTIGATIONS (377330) <i>Assumed Business Name</i>	>	Active-Current	07/01/2008	NO AGENT
Lists	GEM STATE SECURITY, INC. (279924) <i>General Business Corporation (D)</i>	>	Active-Good Standing	08/11/1989	DAN RAMOS
Help	GEM STATE SEED, INC. (592883) <i>General Business Corporation (D)</i>	>	Active-Good Standing	11/09/2012	RYAN MILES
	GEM STATE SERVERS (583883) <i>Assumed Business Name</i>	>	Active-Current	04/05/2017	NO AGENT
	Gem State Shelter Homes, LLC (3453197) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/14/2019	Jan Taylor
	Gem State Siding LLC (3462056) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/25/2019	jose d loera
	GEM STATE SIGN INSTALLATION (35316) <i>Assumed Business Name</i>	>	Active-Current	07/25/1997	NO AGENT
	GEM STATE SILVER, INC. (120269) <i>General Business Corporation (D)</i>	>	Active-Good Standing	11/02/1964	DENNIS OBRIEN
	GEM STATE SMALL ENGINE REPAIR (471952) <i>Assumed Business Name</i>	>	Active-Current	05/02/2012	NO AGENT
	GEM STATE SOFTWARE LLC (517344) <i>Limited Liability Company (D)</i>	>	Active-Existing	08/19/2016	MARK LATHAM

Home	GEM STATE SPECIALISTS, INC. (363959) <i>General Business Corporation (D)</i>	>	Active-Good Standing	02/28/1997	FREDRIC E MANTHEY
Search	GEM STATE SPECIALIZED LAWN CARE (50725) <i>Assumed Business Name</i>	>	Active-Current	02/13/1998	NO AGENT
Forms	GEM STATE STAFFING (362938) <i>Assumed Business Name</i>	>	Active-Current	01/10/2008	NO AGENT
Lists	GEM STATE STAFFING (362943) <i>Assumed Business Name</i>	>	Active-Current	01/10/2008	NO AGENT
Help	GEM STATE STAFFING (362944) <i>Assumed Business Name</i>	>	Active-Current	01/10/2008	NO AGENT
	GEM STATE STAFFING (366341) <i>Assumed Business Name</i>	>	Active-Current	04/04/2008	NO AGENT
	GEM STATE STAFFING, LLC (54199) <i>Limited Liability Company (D)</i>	>	Active-Existing	11/01/2000	MICHAEL A GIBSON
	GEM STATE STARS (247870) <i>Assumed Business Name</i>	>	Active-Current	08/18/2004	NO AGENT
	GEM STATE STARS PERFORMING ARTS (378672) <i>Assumed Business Name</i>	>	Active-Current	07/22/2008	NO AGENT
	GEM STATE STEEL ERECTORS LLC (586405) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/03/2018	HEATHER HUBBARD
	GEM STATE STOCK HORSE ASSOCIATION, INC. (372970) <i>Non-Profit Corporation (D)</i>	>	Active-Good Standing	11/13/1997	Callee Miller
	GEM STATE STORAGE, LLC (559395) <i>Limited Liability Company (D)</i>	>	Active-Existing	06/21/2017	JEROME ANDERSON

Home	GEM STATE TECH (487913) <i>Assumed Business Name</i>	>	Active-Current	02/01/2013	NO AGENT
Search	GEM STATE TECHNICAL SERVICES (533336) <i>Assumed Business Name</i>	>	Active-Current	01/21/2015	NO AGENT
Forms	GEM STATE TECHNOLOGIES LLC (373155) <i>Limited Liability Company (D)</i>	>	Active-Existing	02/01/2013	TODD VANDEHEY
Lists	GEM STATE TECHNOLOGY (425066) <i>Assumed Business Name</i>	>	Active-Current	05/18/2010	NO AGENT
Help	GEM STATE THRIFT (554935) <i>Assumed Business Name</i>	>	Active-Current	01/08/2016	NO AGENT
	GEM STATE TILE & DESIGN (583680) <i>Assumed Business Name</i>	>	Active-Current	04/03/2017	NO AGENT
	GEM STATE TILE & STONE, LLC (625016) <i>Limited Liability Company (D)</i>	>	Active-Existing	09/06/2018	BILL DOWNS
	GEM STATE TILE (280579) <i>Assumed Business Name</i>	>	Active-Current	08/04/2005	NO AGENT
	GEM STATE TILE (315059) <i>Assumed Business Name</i>	>	Active-Current	07/19/2006	NO AGENT
	GEM STATE TIRE LLC (626674) <i>Limited Liability Company (D)</i>	>	Active-Existing	09/24/2018	TAMMY ALVAREZ
	GEM STATE TOBACCO SUPPLIES LLC (598872) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/27/2018	Katrina Brady
	GEM STATE TOOL (374272) <i>Assumed Business Name</i>	>	Active-Current	05/20/2008	NO AGENT

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GEM STATE TOWING (3100) <i>Assumed Business Name</i>	>	Active-Current	01/22/1997	NO AGENT
GEM STATE TOWING AND RECOVERY, INC. (362358) <i>General Business Corporation (D)</i>	>	Active-Good Standing	01/17/1997	RANDAL J WATERS
GEM STATE TRADING POST (526849) <i>Assumed Business Name</i>	>	Active-Current	09/26/2014	NO AGENT
GEM STATE TRANSPORT (222755) <i>Assumed Business Name</i>	>	Active-Current	11/18/2003	NO AGENT
GEM STATE TRANSPORTATION, INC. (266545) <i>General Business Corporation (D)</i>	>	Active-Good Standing	01/04/1988	STEVE WOLTERS
GEM STATE TRAVEL (353048) <i>Assumed Business Name</i>	>	Active-Current	09/04/2007	NO AGENT
GEM STATE TREE SERVICES (615850) <i>Assumed Business Name</i>	>	Active-Current	07/25/2018	NO AGENT
Gem State Trimlight (3421704) <i>Assumed Business Name</i>	>	Active-Current	02/04/2019	NO AGENT
GEM STATE TROPHIES (70827) <i>Assumed Business Name</i>	>	Active-Current	10/14/1998	NO AGENT
GEM STATE TRUSS COMPANY, LLC (339162) <i>Limited Liability Company (D)</i>	>	Active-Existing	01/13/2012	JOHN LITTLETON HUBBARD
GEM STATE TUB REPAIR & RESURFACING (7675) <i>Assumed Business Name</i>	>	Active-Current	02/13/1997	NO AGENT
GEM STATE TUB REPAIR & RESURFACING, INCORPORATED (566575) <i>General Business Corporation (D)</i>	>	Active-Good Standing	06/14/2010	MARK ROBINSON

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*Non-Profit Corporation (D)*GEM STATE UTILITIES
AND CONSTRUCTION
INC. (633897)Active-
Good
Standing

01/12/2018

TANNER L MOORE

*General Business
Corporation (D)*GEM STATE UTILITY
DEVELOPMENT GROUP,
LLC (388025)Active-
Existing

07/01/2013

DOUGLAS R NELSON

*Limited Liability Company
(D)*GEM STATE VAPORS
(490668)Active-
Current

03/12/2013

NO AGENT

*Assumed Business Name*GEM STATE VENDING
(358688)Active-
Current

11/09/2007

NO AGENT

*Assumed Business Name*Gem State Water
Company, LLC
(3363573)Active-
Existing

12/06/2018

C T CORPORATION
SYSTEM*Limited Liability Company
(D)*GEM STATE WELDERS
SUPPLY, INC. (515032)Active-
Good
Standing

11/15/2006

WILLIAM WATT

*General Business
Corporation (D)*GEM STATE
WHOLESALE (352578)Active-
Current

08/29/2007

NO AGENT

*Assumed Business Name*GEM STATE
WILDFLOWERS
(371645)Active-
Current

04/21/2008

NO AGENT

*Assumed Business Name*Gem State Window
Cleaning (3437196)Active-
Current

02/26/2019

NO AGENT

*Assumed Business Name*GEM STATE WIRELESS
(113060)Active-
Current

02/25/2000

NO AGENT

*Assumed Business Name*Gem State Wood
Works LLC (3305230)Active-
Existing

10/03/2018

Tristan Walker

*Limited Liability Company
(D)*

Home	GEM STATE WORM PRODUCTS (270251) <i>Assumed Business Name</i>	>	Active-Current	04/18/2005	NO AGENT
Search	GEM STATE WRANGLERS (1794) <i>Unincorporated Nonprofit Association (D)</i>	>	Active-Current	09/11/2001	KEVIN L BROYLES
Forms	GEM STATE WRITING SERVICES (177578) <i>Assumed Business Name</i>	>	Active-Current	05/30/2002	NO AGENT
Lists	GEM STATE YOUNG MARINES (3311) <i>Unincorporated Nonprofit Association (D)</i>	>	Active-Current	04/07/2004	MATTHEW THORUSEN
Help	GEM STATE, LLC (177642) <i>Limited Liability Company (D)</i>	>	Active-Existing	10/16/2006	DAVID P MCANANEY
	GEM STATE'S FINEST (319500) <i>Assumed Business Name</i>	>	Active-Current	09/06/2006	NO AGENT
	GEMSTATE AUSTRALIAN SHEPHERDS (249666) <i>Assumed Business Name</i>	>	Active-Current	09/08/2004	NO AGENT
	GEMSTATE DISTRIBUTING (207353) <i>Assumed Business Name</i>	>	Active-Current	05/15/2003	NO AGENT
	GEMSTATE GOLD & SILVER (182577) <i>Assumed Business Name</i>	>	Active-Current	08/05/2002	NO AGENT
	GEMSTATE JEWELERS LLC (601856) <i>Limited Liability Company (D)</i>	>	Active-Existing	04/10/2018	HALEY MILLER
	GEMSTATE PARTNERS, LLC (159014) <i>Limited Liability Company (D)</i>	>	Active-Existing	03/31/2006	JAMES B HAYNES
	GEMSTATEHOMES.COM (489134) <i>Assumed Business Name</i>	>	Active-Current	02/19/2013	NO AGENT

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Oasis View Farm
(453347)
Assumed Business Name



Active-
Current

07/18/2011

NO AGENT

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McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	) Case No. CV01-18-13437
Plaintiff,)	
vs. )	) STIPULATION RE: UNDISPUTED FACTS
UNITED COMPONENTS, INC. dba GEM)	
STATE ROOFING,)	
Defendant.)	

Plaintiff Gem State Roofing, Incorporated, by and through its undersigned counsel of record, and Defendant United Components, Inc. dba Gem State Roofing, by and through its undersigned counsel of record, hereby stipulate and agree that the facts attached hereto as Exhibit A may be accepted by the Court as true and undisputed at the trial of this matter.

DATED this 19th day of July 2019.

PICKENS COZAKOS, P.A.

/s/Terri Pickens Manweiler
Terri Pickens Manweiler
Attorneys for Defendant

DATED this 19th day of July 2019.

McFarland Ritter PLLC

/s/Ryan T. McFarland_____

Ryan T. McFarland
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July 2019, I caused to be served a true copy of the foregoing STIPULATION RE: UNDISPUTED FACTS by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

Exhibit A

No.	Facts	Stipulated?
1	In 1995, Jeff Flynn and Michelle Flynn, acting as directors, created Flynn, Inc. and filed Articles of Incorporation for Flynn, Inc. with the Idaho Secretary of State. <i>See Memorandum Decision and Order (hereinafter, "MSJ Decis. ")</i> , at 2	√
2	In August, 1997, Rick Silvia filed a Certificate of Assumed Business Name with the Idaho Secretary of State, indicating that he was doing business as "Gem State Roofing." <i>MSJ Dec. at 5</i>	√
3	In 1998, Jeff Flynn, President, and Michelle Flynn, Secretary, filed Articles of Amendment of Flynn, Inc. with the Idaho Secretary of State changing the name of Flynn, Inc. to Gem State Roofing & Asphalt Maintenance, Inc. <i>MSJ Decis. at 2.</i>	√
4	In 1999, Michelle Flynn, Secretary, filed a Certificate of Assumed Business Name with the Idaho Secretary of State indicating that Gem State Roofing & Asphalt Maintenance, Inc. was doing business as Gem State Roofing. <i>MSJ Decis. at 2.</i>	√
5	In 2000, Rick Silvia filed Articles of Incorporation for Plaintiff, Gem State Roofing, Inc. <i>MSJ Decis. at 5.</i>	√
6	Plaintiff Gem State Roofing, Inc. primarily does business in Blaine County, Idaho. <i>MSJ Decis. at 5.</i>	√
7	Plaintiff has continuously conducted business in Blaine County, Idaho, under the name "Gem State Roofing" since it was formed in 2000.	√
8	In October 2005, Plaintiff (Gem State Roofing, Inc.) and Defendant's predecessor (Gem State Roofing & Asphalt Maintenance, Inc.) executed the Trademark Settlement Agreement (the "TSA"). <i>MSJ Decis. at 1</i>	√
9	Gem State Roofing, Inc. and Gem State Roofing & Asphalt Maintenance, Inc. agreed, via the TSA, that their names are confusingly similar to each other. <i>MSJ Decis. at 6.</i>	√
10	Gem State Roofing, Inc. and Gem State Roofing & Asphalt Maintenance, Inc. agreed, via the TSA, that they provide similar services. <i>MSJ Decis. at 6.</i>	√
11	Gem State Roofing, Inc. and Gem State Roofing & Asphalt Maintenance, Inc. agreed, via the TSA, that there was a likelihood of confusion as to source, origin, and sponsorship of their respective services. <i>MSJ Decis. at 6.</i>	√
12	Via the TSA, Gem State Roofing & Asphalt Maintenance, Inc., agreed that it would not advertise or solicit business in Blaine County. <i>MSJ Decis. at 7.</i>	√

13	Via the TSA, Gem State Roofing & Asphalt Maintenance, Inc. agreed it would not perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a), and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors. <i>MSJ Decis. at 7.</i>	√
14	Via the TSA, Gem State Roofing, Inc. and Gem State Roofing & Asphalt Maintenance, Inc. agreed that if they receive a request for work that they were prohibited from performing under the TSA, they would direct the person or entity requesting the work to the other party. <i>MSJ Decis. at 8.</i>	√
15	In 2011, Jeff Flynn created Defendant United Components Inc. <i>MSJ Decis. at 3.</i>	√
16	Defendant United Components Inc. has, since its creation, conducted business under the name “Gem State Roofing.”	√
17	Defendant, operating under the name Gem State Roofing, has bid on and performed work in Blaine County. <i>MSJ Decis. at 9.</i>	√
18	Defendant accepted an over \$200,000 roofing project for the Wood River Valley’s new animal shelter. <i>MSJ Decis. at 9.</i>	√
19	Pioneer West Property Management paid Defendant \$1,950.00 for roofing work on August 22, 2016. <i>See Defendant0003</i>	√
20	Standard Plumbing Supply paid Defendant \$2,481.00 for asphalt work on a property in Hailey, Idaho on August 25, 2016. <i>See Defendant0005</i>	√
21	On January 22, 2018, Kerry Armstrong paid Defendant \$750.00 for roofing work on a property in Ketchum, Idaho. <i>See Defendant0004</i>	√
22	Plaintiff has no evidence that UCI provided services, beyond an estimate, to Bruce Bothwell.	√
23	Plaintiff has no evidence that UCI provided services, beyond an estimate, to Larry Isham.	√
24	Plaintiff has no evidence that UCI provided services, beyond an estimate, to Snow Mountain Apartments.	√
25	Plaintiff has no evidence that UCI provided services, beyond an estimate, to ESI Construction Management, LLC.	√
26	Plaintiff has no evidence that UCI provided services, beyond an estimate, to Brashears & Sons, Inc.	√

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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Defendant United Components, Inc., dba Gem State Roofing, breached the Trademark Settlement Agreement. However, Plaintiff Gem State Roofing, Inc. has failed to prove its damages and is thus not entitled to collect any damages. Neither party is entitled to attorney fees.

IT IS SO ORDERED.


SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

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ROOFING,
Defendant.

Case No. CV01-18-13437

FINDINGS OF FACT & CONCLUSIONS OF
LAW

THIS MATTER came before the Court on a court trial held on August 5, 2019. For the reasons contained herein, the Court finds that although Defendant United Components, Inc. breached the Trademark Settlement Agreement, Plaintiff Gem State Roofing, Inc. has failed to prove damages, and is thus not entitled to damages or attorney fees.

FINDINGS OF FACT

1. Jeffrey Flynn (“Flynn”) started a roofing company in the early 1980s in Nampa, Idaho, which he called Gem State Roofing. Flynn moved to Boise in 1987 and added asphalt maintenance to his roofing business.
2. In 1995, Flynn and his then-wife Michelle Flynn (“Michelle”), acting as directors, created Flynn, Inc. and filed a Certificate of Incorporation with the Idaho Secretary of State.
3. In 1997, Rick Silvia (“Silvia”) filed a Certificate of Assumed Business Name with the Idaho Secretary of State for his roofing construction business, which declared that his company was operating under the name “Gem State Roofing.”

4. In 1998, Flynn filed an Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance, Inc.
5. In 1999, Michelle filed a Certificate of Assumed Business Name stating that Gem State Roofing & Asphalt Maintenance, Inc. would do business under the name “Gem State Roofing.”
6. In 2000, Silvia filed Articles of Incorporation for Gem State Roofing, Inc.
7. Since 2000, Gem State Roofing, Inc. has primarily conducted business in Blaine County, Idaho under the name “Gem State Roofing.”
8. On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Blaine stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. There is no evidence that the trademark has been renewed since 2012.
9. The Certificate of Registration shows the trademark assigned to Gem State Blaine is as follows:



10. On December 29, 2004, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Boise stating that the first use of the trademark was in 1985 and that the trademark would expire on December 29, 2014.
11. The Certificate of Registration showed that the Trademark assigned to Gem State Boise is as follows:



12. On December 1, 2014, the above trademark was assigned to UCI and renewed until December 29, 2024.
13. There is no evidence that either party has ever obtained a registered trademark for the name “Gem State Roofing.”
14. There are 387 businesses in Idaho using or that have used the name “Gem State.”
15. The “Gem State” is a well-known nickname for the State of Idaho.¹
16. In 2005, following the realization that their roofing companies were operating under the same name, the owners of Gem State Roofing, Inc. (“Gem State Blaine”) and Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State Boise”) entered into a Trademark Settlement Agreement (“TSA”) delineating boundaries for where each company could solicit and do business.
17. The Recitals of the Agreement state that the “parties’ names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services” and that the parties “wish to resolve this matter without litigation by agreeing not to do business or advertise in the other’s primary market.”
18. Under the TSA the parties agreed (in part) that:
 - a. Gem State Boise would not “advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County;”

¹ The Court takes judicial notice of this fact. *See* I.R.E. 201(b)(1) (“The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction.”).

- b. Gem State Boise would not “perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a),² and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors;”
 - c. “If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.”
19. Gem State Blaine made the same agreements above, except that they were with respect to Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.
20. In 2010, Flynn and Michelle’s marriage dissolved, and at the same time, Gem State Boise had incurred significant tax liability.
21. In order to resolve Gem State Boise’s tax liability, the IRS directed Flynn to dissolve Gem State Boise and start a new company with a new name.
22. In 2012, Gem State Boise was thus dissolved and Flynn created United Components Incorporated (“UCI”), which continued to operate under the same business name, “Gem State Roofing.”
23. Michelle has no ownership interest in UCI.
24. Since the TSA was signed, UCI (operating as Gem State Roofing) has done four roofing projects in Blaine County, which are as follows:
- a. **Brashears & Sons/Shay Construction** – UCI submitted multiple bids on a project for Brashears & Sons and Shay Construction to perform roofing services for Terry

² The customers listed in Section 3(a) include: Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.

and Mike Higgs. UCI performed roofing services on the project and, on October 13, 2011, was paid \$17,424 for its work.

- i. The client on this job specifically reached out to UCI, because they had a positive experience working with UCI on a project located in Twin Falls, Idaho.
- b. **Pioneer West Property Management** – UCI was paid \$1,950 on July 29, 2016 for work done in Ketchum, Idaho.
 - i. Pioneer West Property Management is the successor to Advance Maintenance Services, to which (under the TSA) Gem State Blaine was allowed to provide roofing services.
 - ii. Silvia testified that Gem State Blaine also did work for Pioneer West Property Management. He testified based on a hearsay statement that UCI had performed “shoddy work” on this project.
- c. **Kerry Armstrong** – UCI was paid \$750 for work done in Ketchum, Idaho in 2017.
- d. **Animal Shelter of the Wood River Valley** – UCI bid on and was awarded a contract with McAlvain Construction, Inc. (“McAlvain”) to perform over \$200,000 in roofing work on the Wood River Animal Shelter.
 - i. As of October 2018, McAlvain has paid UCI a total of \$279,540.
 - ii. Flynn and Kerrie Kuhn (UCI’s Corporate Secretary) testified that UCI has sustained at least \$12,000 in losses on this project.
 - iii. Tracey Felix, a project manager for McAlvain, testified that McAlvain specifically solicited and wanted UCI to do the roofing work on this project, because it had a positive experience working with UCI on Shore Lodge in McCall, Idaho.

25. Since the TSA was signed, UCI (operating as Gem State Roofing) bid on at least four jobs in Blaine County for working totaling over \$100,000. However, it did not win those bids and consequently did not receive any income or profit as a result of those bids.
26. UCI did not believe it was bound by the TSA because Gem State Boise was shut down as part of the deal with the IRS.
27. Silvia testified that for all of the projects described in Sections 22 and 23, UCI did not refer any of the work to him, and Gem State Blaine was qualified to do the work.
28. Silvia testified as to his gross revenue and profit from the years 2000 to 2018.
29. Silvia experienced a drop in business in 2008 and for a few years thereafter. Silvia testified that this drop was likely due to the economic crash and to the fact that UCI was doing business under the same name as his company in Blaine County.
30. However, the exhibit prepared by Silvia setting forth his gross revenue, profit, and profit margin shows that his profit margin has increased overall in 18 years. In fact, in 2018, he had the highest profit margin ever for his business at over 56%.
31. On July 20, 2018, Gem State Blaine filed the instant action against UCI alleging (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) trademark infringement, (4) unjust enrichment,³ (5) preliminary injunction, and (6) permanent injunction.
32. This Court previously determined that UCI is a successor corporation to Gem State Boise, is liable under the terms of the TSA, and breached the TSA by performing work in Blaine County for clients that were not specifically excluded in the TSA. However, the Court held that there were genuine issues of material fact as whether Gem State Blaine has incurred damages and as to Gem State Blaine's claims regarding trademark infringement and injunctive relief. *See* Memorandum Decision and Order (filed April 26, 2019).

³ This claim has been dismissed. *See* Memorandum Decision and Order pp. 20—21 (filed April 26, 2019).

STANDARD OF REVIEW

It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006); I.R.C.P. 52(a). If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Id.* However, the trial court's conclusions of law are freely reviewed to determine whether the applicable law was correctly stated and whether the legal conclusions are sustained by the facts found. *Id.*

ANALYSIS & CONCLUSIONS OF LAW

The primary issues before the Court are whether Gem State Blaine has presented sufficient evidence regarding injunctive relief and money damages, and whether it is entitled to relief on its claim for trademark infringement.

a. Damages

Gem State Blaine asserts that it is entitled to injunctive relief as well as \$220,000 in money damages for UCI's breach of the TSA. Gem State Blaine asserts that its calculation of damages is based on the law regarding non-competition agreements as the TSA is essentially an agreement not to compete in the parties' respective geographical territories.

i. Injunction

The decision of whether to impose injunctive relief is within the discretion of the district court. *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). “The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion.” *Id.* “It is true that injunctions should issue only where irreparable injury is actually threatened.” *O’Boskey v. First Fed. Sav. & Loan Ass’n of Boise*, 112 Idaho 1002, 1007, 739 P.2d 301, 306 (1987). Where the conduct causing injury has been discontinued, the dispute is moot and the injunction should be denied. *Id.* However, as the United States Supreme Court observed, the trial court must be convinced that “there is no reasonable expectation that the wrong will be repeated.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted). Further, the burden on the defendant to make this showing “is a heavy one.” *Id.* “It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.” *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

Here, Gem State Blaine has not demonstrated that it has suffered irreparable injury by UCI’s conduct. Instead, the evidence demonstrates that Gem State Blaine’s profit margin has overall been increasing for the past 18 years, with a dip that coincided with the so-called “great recession.” Gem State Blaine failed to present any evidence regarding UCI’s profits and its corresponding losses (other than a speculative statement by Silvia that his company likely experienced a dip due to the economy as well as UCI’s presence in Blaine County).

Gem State Blaine experienced its highest profit margin just last year at over 56%. While it is true that UCI breached the TSA by doing work for three clients that were not specifically excluded in the TSA,⁴ and by bidding on certain other projects, there is no evidence that Gem State Blaine would have gotten the same work or what its profits would have been had it been awarded that work. Silvia testified that his company was equipped to perform the same services on these projects. However, there is no evidence or testimony from any of these clients (potential or otherwise) that they would have hired Gem State Blaine had UCI referred these clients to Gem State Blaine. There is also no evidence as to what Gem State Blaine's profit on these projects would have been had it done the work.

There is no evidence that UCI performed shoddy work that has harmed Gem State Blaine's reputation. Instead, Silvia testified (based on hearsay) that UCI performed "shoddy work" for Prior West Property Management, which was a successor to a client to whom UCI was specifically allowed to provide services under the TSA. The Court cannot find that UCI was performing "shoddy work" that harmed Gem State Blaine based on this hearsay statement.

Finally, there was no evidence that UCI has done work in Blaine County recently (other than on the animal shelter, upon which it has sustained a loss). The evidence of work performed in Blaine County is minimal. In over 14 years (from 2005 to 2019), UCI has worked on three jobs that are in violation of the TSA, all of which stemmed from UCI's existing client relations. Accordingly, the Court does not find that Gem State Blaine is actually threatened by irreparable

⁴ The Court finds that the work for Pioneer West Property Management was permissible under the TSA, because it was a successor to Advanced Maintenance Services.

injury. Therefore, a permanent injunction will not be issued as Gem State Blaine has failed to prove any actual damages from UCI's conduct.

ii. Money Damages

Gem State Blaine asserts that it is entitled to damages under the damages calculation for a violation of a non-competition agreement, and that it need only show it has lost profits and UCI has had corresponding gains. UCI disputes that it actually breached the TSA and argues that Gem State Blaine has not shown that it has suffered any damages as a result of its breach of the TSA.

“A trial court’s award of general damages is reviewed under the deferential standard of clear error.” *Moeller v. Harshbarger*, 118 Idaho 92, 93, 794 P.2d 1148, 1149 (Ct. App. 1990). The findings of the trial court on the question of damages will not be set aside when based on substantial and competent evidence. *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983).

Here, the Court finds that the TSA is essentially an anti-competition agreement and that UCI (as the successor to Gem State Boise) breached the TSA by performing services for customers in Blaine County that were not exceptions set forth in the TSA (*see* TSA ¶ 3). Therefore, the Court will apply the law regarding damages for anti-competition agreements in this case.

The measure of damages for the breach of an anti-competition clause is the amount that the plaintiff lost by reason of the breach, not the amount of profits made by the defendant. *Dunn v. Ward*, 105 Idaho 354, 356, 670 P.2d 59, 61 (Ct. App. 1983). The measure of damages for loss of profits is “rarely susceptible of accurate proof” *Ryska v. Anderson*, 70 Idaho 207, 213, 214 P.2d 874, 876 (1950). Therefore, the law does not require “accurate proof with any degree of mathematical certainty” *Vancil v. Anderson*, 71 Idaho 95, 105, 227 P.2d 74, 80 (1951). Damages need be proved only with a “reasonable certainty[,]” and this means “that [the] existence of damages must be taken out of the realm of speculation.” *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 182–83, 595 P.2d 709, 716–17 (1979) (citations omitted). “The mere fact that it is difficult to arrive at [an] exact amount of damages, where it is shown that damages resulted, does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount.” *Bumgarner v. Bumgarner*, 124 Idaho 629, 640, 862 P.2d 321, 332 (Ct.App.1993) (citation omitted). The profits realized by the defendant may be considered by the trier-of-fact, if shown to correspond with the loss of the plaintiff. *Dunn*, 105 Idaho at 356, 670 P.2d at 61.

The facts in this case are akin to *Trilogy Network Systems v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007). In that case, Johnson was employed by Trilogy Network Systems, Inc. (“Trilogy”). Johnson terminated his employment with Trilogy. The parties subsequently entered into an agreement that (in part) forbade Johnson for one year from doing business with Seastrom Manufacturing, Inc. (“Seastrom”). Johnson and Trilogy subsequently both submitted bids to Seastrom during that one year period. Seastrom awarded the contract to Johnson. Trilogy then sued Johnson for breach of the non-competition agreement. A court trial was held, and the trial

court determined that although Johnson had breached the agreement, Trilogy had failed to prove its damages with reasonable certainty. The trial court entered a judgment in favor of Trilogy, but did not award it damages or attorney fees, and Trilogy appealed.

On appeal, the Supreme Court affirmed the trial court's decision. The Supreme Court found that the trial court's determination was supported by the record that Trilogy had failed to prove its damages because it had failed to offer into evidence its original bid to Seastrom or any comparison between its costs and the costs to Johnson. During the court trial, the president of Trilogy testified that Trilogy and Johnson's profit margins were similar. He also stated that Trilogy would have made a comparable profit to Johnson's profit on the Seastrom project. Trilogy argued that stating a conclusion regarding its profit margin, without any factual support, is enough to take the issue of damages out of the realm of speculation. The Supreme Court disagreed and noted that the law requires more:

Trilogy failed to offer into evidence any proof of what its costs and profits would have been had Seastrom awarded it the contract. Its only proof was conclusory statements that Johnson and Trilogy would have made similar profits. Trilogy failed to offer into evidence its bid to Seastrom for the software portion of the project, which would have shown its costs and the profit margin it expected for that portion of the bid. Although Trilogy had a list of the software Johnson supplied Seastrom, there was no showing as to what the costs to Trilogy would have been for the software ultimately used by Johnson to complete the project. As such, Trilogy failed to persuade the district court of any correspondence between what its profit would have been and Johnson's actual profit, and thus failed to take the measure of its damages out of the realm of speculation. Therefore, the district court did not err when it declined to award damages.

Id. at 847, 172 P.3d at 1122.

Similarly, here, Gem State Blaine failed to offer into evidence any proof as to what its costs and profits would have been had it been awarded the contracts for the work for Brashears &

Sons/Shay Construction, Kerry Armstrong, or the Animal Shelter. In addition, there is no evidence before the Court as to what UCI's profits were on these projects, other than it sustained a \$12,000 loss. There is no evidence that had Gem State Blaine been awarded the Animal Shelter contract that it would have not sustained the same loss. Moreover, there is insufficient proof that Gem State Blaine has lost profits during the years that UCI performed services in Blaine County. While Gem State Blaine's business did take a downturn during the recession, it has since recovered and has had its highest profit margin to date in 2018. Gem State Blaine has failed to show any correspondence between what its profits would have been and UCI's actual profit, and thus has failed to take the measure of its damages out of the realm of speculation. *See id.* Accordingly, the Court finds that Gem State Blaine has failed to prove its damages with reasonable certainty.

b. Trademark Infringement

Gem State Blaine claims that UCI has violated its trademark rights to the name "Gem State Roofing." UCI spent much briefing and argument claiming that the logo is the trademark at issue;⁵ however, Gem State Blaine has made clear that it is not alleging trademark infringement on its logo, but rather on its use of the name, "Gem State Roofing." Accordingly, the Court will determine whether Gem State Blaine has a protectable trademark in the name "Gem State Roofing," and whether it has sustained damages from any alleged trademark infringement.

⁵ UCI also claimed that a name cannot be trademarked; however, that argument fails as trademarks are specifically defined as "any **word, name**, symbol, or device." I.C. § 48-501(11).

i. Protectable Trademark

Trademarks are “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish the goods of such person . . . from those manufactured or sold by others.” I.C. § 48-501(11); *see also* 15 U.S.C. § 1127. Trademarks may be registered both federally and with a state government.⁶ The federal trademark system is governed by the Lanham Act, while Idaho provides a simpler but similar statutory scheme at Idaho Code § 48-501, *et. seq.*⁷

Registration of a trademark is not required in order to have a valid and enforceable trademark, and an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. *Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“The Lanham Act protects both registered and unregistered trademarks.”). Under both state and federal law, a trademark must be first used in connection with the sale of goods or services in order to gain legal protection. *See e.g. King’s of Boise, Inc. v. M. H. King Co.*, 88 Idaho 267, 274, 398 P.2d 942, 945 (1965); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 979 (9th Cir. 2006) (“Registration does not create a mark or confer ownership; only use in the marketplace can establish a mark.”); *See Cal. Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1454 (9th Cir.1985) (“[A] trademark is a common law property right that exists independently of statutory provisions for registration.”).

⁶ The evidence shows that both parties have registered only their logos. There is no evidence before the Court that either party has registered the name “Gem State Roofing.” However, the Court notes that registration is not required to have a protectable trademark.

⁷ “The intent of this act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the trademark act of 1946, as amended. To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing this act.” I.C. § 48-518.

Thus, in order to obtain a registered trademark, an applicant must certify that his mark is “in use.” I.C. § 48-503(4). “Use” is defined as

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this act, a mark shall be deemed to be in use: (a) on goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

Here, the un rebutted evidence is that Flynn used the name “Gem State Roofing” as early as the 1980s. There is insufficient evidence regarding the exact areas he did business in at that time. Silvia did not start using the name “Gem State Roofing” in Blaine County until the late 1990s. There is insufficient evidence regarding the first use of the name “Gem State Roofing” in the Blaine County area. However, even if Gem State Blaine was the first to use the name, the Court finds that the name “Gem State Roofing” is not a protectable trademark as it is primarily geographically descriptive.

Idaho Code § 48-502(2)(e) provides:

A mark⁸ by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

...

Consists of a mark which: (i) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or (ii) **when used on or in connection with the goods or services of the applicant is primarily geographically descriptive** or deceptively misdescriptive of them; or (iii) is primarily merely a surname, provided however, that nothing in this subsection shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as used on

⁸ “Mark” is defined as “any trademark, service mark, collective mark or certification mark entitled to registration under this act whether registered or not.” I.C. § 48-501(7).

or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five (5) years before the date on which the claim of distinctiveness is made[.]

(Emphasis added). Neither generic nor descriptive terms are protectable without establishing secondary meaning. *20th Century Wear, Inc. v. Sanmark–Stardust Inc.*, 747 F.2d 81, 87 (2nd Cir.1984). “A mark is descriptive if it describes: the intended purpose, function or use of the goods; the size of the goods; the class of users of the goods; a desirable characteristic of the goods; or the end effect upon the user.” *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1190 (6th Cir. 1988). If the mark “imparts information directly, it is descriptive.” *Anheuser–Busch, Inc. v. Stroh Brewery Co.*, 587 F.Supp. 330, 335 (E.D.Mo.1984); affirmed 750 F.2d 631 (8th Cir.1984).

The Lanham Act does not protect primarily geographically descriptive marks.

“It is plain that the congressionally established prohibition against registration of geographical names or terms basically stems from the realization that most terms in the vocabulary of this science are generic or descriptive. Thus, Congress has expressly left accessible to all potential users those names of subdivisions of the earth—regions, nations, counties, town, rivers, lakes, and other natural and artificial geographical units—which could be employed to draw public attention to the origin of a product or the situs of a business. It would obviously promote unfair competition to proscribe for all save a single producer the name of a region and thereby preclude other producers of the same product in the same region from indicating their product's origin.”

Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc., 871 F.2d 590, 594 (6th Cir. 1989) (citing *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 485 (5th Cir.1971)).

Where it is determined that the mark as perceived by potential purchasers describes the geographic origin of the goods the mark is primarily geographically descriptive. *Id.* (citation omitted). If there is a possibility that the geographic term is “minor, obscure, remote or

unconnected with the goods,” then the mark may be protectable and not precluded under the primarily geographically descriptive category. *See Nat’l Lead Co. v. Wolfe*, 223 F.2d 195 (9th Cir. 1955) (use of word “Dutch” to describe paint was not geographical or descriptive); *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 486 (5th Cir. 1971) (use of word “world” to describe carpets was too broad to suggest any identifiable unit or place of origin, and was thus not geographically descriptive).

The Legislative History of the Lanham Act points out that where a logical connection can be made between the product and the geographical term, the term is geographically descriptive. “To illustrate, the word ‘Alaska’ would probably have no descriptive or geographical meaning applied to bananas, but applied to canned salmon would unquestionably have a descriptive as well as geographical meaning.” *In re Nantucket, Inc.*, 677 F.2d 95, 107 (C.C.P.A. 1982).

Though more than a geographic name is required in order to meet the “primarily geographically descriptive” category, there is no requirement that the challenger to a trademark demonstrate that the area is noted for the goods in question. The proper inquiry is “What meaning, if any, does the term convey to the public with respect to the goods on which the name is used?” When a geographic name is used on goods, it does not represent a single source but refers to the area in which the goods originated. A “goods/place association” by the public is therefore presumed.

Burke-Parsons-Bowlby Corp., 871 F.2d at 595 (citations omitted).

A trademark that is primarily geographically descriptive must have acquired secondary meaning to invoke the protection of the Lanham Act. *Id.* The purpose of requiring the establishment of secondary meaning is to give effect to those geographic marks which no longer cause the public to associate the goods with a particular place but to associate the goods with a particular source.

American Footwear Corp. v. General Footwear Co. Ltd., 609 F.2d 655 (2nd Cir.1979). The geographical term no longer primarily denotes the geographic area, but with secondary meaning it primarily denotes a single source for the product. *Id.*

Secondary meaning is proved when by a preponderance of the evidence it can be determined that the attitude of the consuming public toward the mark denotes “a single thing coming from a single source.” *Aloe Cream Laboratories v. Milsan, Inc.*, 423 F.2d 845, 849 (5th Cir. 1970) (citation omitted). Direct proof of secondary meaning is difficult to obtain. *Id.* Absent direct proof, the Court must draw reasonable inferences from evidence of long-term usage, from considerable effort and expenditure of money toward developing a reputation and good will for the trademark. *WLWC Centers, Inc. v. Winners Corp.*, 563 F. Supp. 717, 723 (M.D. Tenn. 1983). Sales volume, though relevant, is not necessarily sufficient to indicate recognition of the mark by purchasers as an indication of the source. *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1345 (U.S.C.C.P.A.1977). Advertising expense also is relevant but will not, standing alone, establish secondary meaning. *Scientific Applications v. Energy Conservation Corp.*, 436 F.Supp. 354, 361 (N.D.Ga.1977). Where advertising expenditures are required to “merely survive” in the competitive market, advertising expenditures cannot be used to prove secondary meaning. *WLWC Centers*, 563 F.Supp. at 724. However, extensive advertising which results in consumer association with a single source can establish secondary meaning. *Scott Paper Co. v. Scott’s Liquid Gold Inc.*, 589 F.2d 1225, 1228 (3rd Cir.1978). The duration of use of the mark can establish secondary meaning where the duration is more than a relatively short period. In *WLWC Centers*, the Court determined that three years was insufficient to prove that the mark had acquired secondary meaning. *WLWC Centers*, 563 F.Supp. at 723.

In *Burke-Parsons-Bowlby v. Appalachian Log Homes*, 871 F.2d 590 (6th Cir. 1989), the holder of the registered trademark, “Appalachian Log Structures,” sought to enjoin a competitor’s use of the mark, “Appalachian Log Homes.” The Sixth Circuit Court of Appeals held that the mark was not a protectable trademark, because it was primarily geographically descriptive. The court noted that the Appalachian region is publicly acknowledged as a distinct, identifiable region, and the regionally descriptive term “Appalachian” is used in 132 businesses located in the Appalachian region. *Id.* at 594. Appalachian Log Structures was located in Virginia, one of the “Appalachian” states. *Id.* at 595. The court also held that there was insufficient evidence that “Appalachian Log Structures” had acquired secondary meaning even though the company had achieved \$2 million in gross sales in about three years and had expended approximately \$100,000 in advertising the mark over the course of one year. The court noted that no consumer evidence was submitted and that the evidentiary burden necessary to establish secondary meaning is substantial. *Id.* at 596. Although the advertising expenditures for the mark were relevant, there was no evidence to establish the amount as extensive or to distinguish it as beyond that necessary to survive in the market. *Id.*

Here, UCI provided evidence that there are 387 currently active businesses using the words “Gem State” in their business names. It is commonly known that “Gem State” is the nickname for the State of Idaho. It is undisputed that Gem State Blaine provides roofing services in the State of Idaho, or rather, the “Gem State.” There is no evidence that Gem State Blaine’s use of the name “Gem State Roofing” has acquired secondary meaning. Accordingly, the Court concludes that Gem State Roofing is geographically descriptive, and as such, is not a protectable trademark.

ii. Damages

Even if Gem State Roofing was a protectable trademark, and Gem State Blaine had a protectable interest in it, Gem State Blaine has failed to show it is entitled to damages under trademark law.

In a trademark infringement case, a plaintiff must prove both the fact and the amount of damage. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 511 (2d ed. 1984). Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement. *Id.* at 509. Because proof of actual damage is often difficult, a court may award damages based on defendant's profits on the theory of unjust enrichment. *Id.* at 511; *see also Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 918 (Fed. Cir. 1984). "To establish damages under the lost profits method, a plaintiff must make a "prima facie showing of reasonably forecast profits." *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).

Trademark remedies are guided by tort law principles. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 509 (2d ed. 1984). ("Plaintiff's damages should be measured by the tort standard under which the infringer-tortfeasor is liable for all injuries caused to plaintiff by the wrongful act"). As a general rule, damages which result from a tort must be established with reasonable certainty. Dan B. Dobbs, *Remedies* § 3.3, at 151 (1973). The Supreme Court has held that "[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness," yet, a reasonable basis for computation must exist. *Eastman Kodak Co. v.*


Southern Photo Materials Co., 273 U.S. 359, 379, 47 (1927). Many courts have denied a monetary award in infringement cases when damages are remote and speculative. *See generally Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 642 (D.C.Cir.1982) (“any award based on plaintiff’s damages requires some showing of actual loss”); *Burndy Corp. v. Teledyne Industries, Inc.*, 584 F.Supp. 656, 664 (D.C.Conn.) (“no assessment of damages is authorized if it is not based on actually proven damages.”), *aff’d* 748 F.2d 767 (2d Cir.1984); *Invicta Plastics (USA) Ltd. v. Mego Corp.*, 523 F.Supp. 619, 624 (S.D.N.Y.1981) (“damages will not be awarded in the absence of credible evidence demonstrating injury to the plaintiff from defendant’s sales.”); *Vuitton et Fils, S.A. v. Crown Handbags*, 492 F.Supp. 1071, 1077 (S.D.N.Y.1979) (“The discretionary award of either damages or profits assumes an evidentiary basis on which to rest such an award. Without such a basis there can be no recovery.”), *aff’d mem.*, 622 F.2d 577 (2d Cir.1980).

For the reasons set forth in Section (a)(ii) above, the Court concludes that Gem State Blaine has failed to demonstrate injury as a result of UCI’s work in Blaine County. Gem State Blaine failed to provide any evidence as to UCI’s profits and its corresponding losses. Instead, the only evidence was that UCI sustained a \$12,000 loss on the Animal Shelter project and that Gem State Blaine experienced a dip in business that coincided with the economic crash. There is no evidence as to what Gem State Blaine’s profits would have been had it been awarded the jobs UCI completed. As such, the Court finds that any damages are remote and speculative. Accordingly, Gem State Blaine is not entitled to damages on its trademark infringement claim.

CONCLUSION

For the reasons set forth herein, the Court concludes that although UCI breached the TSA, Gem State Blaine has failed to show damages for its breach of contract and trademark infringement claims. The Court finds that neither party prevailed, and thus, neither party is entitled to attorney fees. Accordingly, the Court will enter a declaratory judgment that UCI breached the TSA, but Gem State Blaine is not entitled to collect damages or attorney fees.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



Terri Pickens Manweiler, ISB No. 5828
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**MOTION FOR COSTS AND
ATTORNEYS' FEES**

Defendant United Components Incorporated, by and through their counsel of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby moves this Court for an award of costs and attorneys' fees pursuant to Idaho Rule of Civil Procedure 54(d) and (e), Idaho Code § 12-120(3), and Idaho Rule of Civil Procedure 68, against Plaintiff Gem State Roofing, Inc. This Motion is supported by *Memorandum of Costs and Attorney Fees* and the *Affidavit of Terri Pickens Manweiler Re: Memorandum of Costs and Attorney Fees*, both of which are filed herewith.

DATED: September 19, 2019.

PICKENS LAW, P.A.

By: /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2019, a true and correct copy of the foregoing document was served as follows:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler _____

Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant.

Case No. CV01-18-13437

**MEMORANDUM OF COSTS AND
ATTORNEYS' FEES**

Defendant United Components Incorporated, dba Gem State Roofing (“UCI”) by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., hereby submits its Memorandum of Costs and Attorneys’ Fees. Despite this Court finding “Neither party is entitled to attorney fees” in its Findings of Fact & Conclusions of Law and Judgment, UCI should be considered the prevailing party in this case because it prevailed on all claims in the lawsuit, while Plaintiff failed to prevail on any.

In the alternative, UCI is at least entitled to recover all of its attorneys’ fees incurred from July 10, 2019 forward because on July 10, 2019, UCI submitted a formal Offer of Judgment to Plaintiff, which was rejected.

Accordingly, as the prevailing party, UCI is seeking costs and attorney fees against Plaintiff for costs as a matter of right and all attorneys' fees. Under the circumstances, UCI is the prevailing party and is entitled to an award of costs and attorney fees for successfully litigating this matter. All attorneys' fees and cost incurred in this matter by UCI are attached hereto as Exhibit A and incorporated herein by reference. All attorneys' fees and costs incurred in this matter after service of the Rule 68 Offer of Judgment are attached hereto as Exhibit B and incorporated herein by reference.

I. UCI IS ENTITLED TO COSTS AS THE PREVAILING PARTY PURSUANT TO I.R.C.P. 54(d)(1).

Pursuant to Idaho Rule of Civil Procedure 54(d)(1), the prevailing party to an action is entitled to costs. This Court ruled that Plaintiff failed to establish damages against UCI, thus UCI is the prevailing party.

A. COSTS AS A MATTER OF RIGHT

I.R.C.P. 54(d)(1) specifies which costs are allowable as a matter of right. Those costs include, without limitation, court filing fees, service of process fees, trial exhibit preparation fees, witness fees, and travel expenses for witnesses. I.R.C.P. 54(d)(1)(C). The costs as a matter of right incurred by UCI are as follows:

<u>DESCRIPTION</u>	<u>AMOUNT</u>
<u>Court Filing Fee: Answer, August 8, 2018.</u>	\$140.08
<u>Deposition Transcript Fee: Michelle Flynn</u>	\$107.01
<u>Deposition Transcript Fee: Jeff Flynn</u>	\$412.76
<u>Service of Process: Tracy Felix – Trial Subpoena</u>	\$58.00
<u>Trial Witness Fee: Tracy Felix</u>	\$22.25

Total Costs as a Matter of Right: \$802.55

UCI seeks reimbursement of their costs as a matter of right in the amount of \$802.55.

B. DISCRETIONARY COSTS

The court also has discretion to award certain discretionary costs pursuant to the Idaho Rules of Civil Procedure. The relevant portion of the I.R.C.P 54(d)(1)(D) states:

Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed....

UCI is not seeking reimbursement for any discretionary costs.

II. UCI IS ENTITLED TO ATTORNEY FEES PURSUANT TO IDAHO LAW

UCI is the prevailing party for defending the claims against it. The issue here is determining under what circumstances, and in what amount, should attorney fees be awarded. The issue incorporates aspects of Rule 68 (Offer of Judgment) and Rule 54 (Judgements and Costs). The outcome will turn on the determination of who is the prevailing party. UCI *should* be deemed the prevailing party, and as such be entitled to all reasonable attorney fees and costs in the amount of \$35,584.00. In the alternate, UCI should be entitled to attorney fees and costs from the time of its Offer of Judgment forward. Since the Offer of Judgment was served on Plaintiff, UCI accrued \$13,602.00 in attorney fees to defend this litigation. As the prevailing party, UCI is entitled to attorney fees under I.R.C.P. 54(e), Idaho Code § 12-120(3), and I.R.C.P. 68.

A. I.R.C.P. 54(e)

The Idaho Rules of Civil Procedure govern when a party is entitled to an award of attorney's fees. The rule states:

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.

I.R.C.P. 54(e).

In this case, UCI is the prevailing party. To determine who prevails, the court must comply with the rules of civil procedure, which state in relevant part:

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed “in the action”; that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005).

A trial court’s determination as to which party, if any, prevailed, is discretionary. *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P. 2d 595 (Ct. App. 1994), citing *Badell v. Badell*, 122 Idaho 442, 450, 835 P.2d 677, 685 (Ct.App. 1992). The exercise of that discretion is guided by I.R.C.P. 54(d)(1)(B). For this determination a court does not adopt a claim by claim analysis, but rather the question is examined and determined from a comprehensive view, looking at the success overall. *Eighteen Mile Ranch*, 141 Idaho at 719, 117 P.3d at 133 (2005). Some specific considerations can include the award compared to what was sought, what other damages were recoverable, and the extent to which the parties had a choice in proceeding to trial. *Zenner v. Holcomb*, 147 Idaho 444, 447, 210 P.3d 552, 555 (2009). The prevailing party analysis includes offers of judgment, though

it is not the most significant factor in the prevailing party analysis. *Polk v. Larrabee*, 135 Idaho 303, 313.

When reviewing whether a trial court abused its discretion in the prevailing party analysis and determination, a three-step inquiry is employed: (1) whether the trial court properly perceived the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason. *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014). Prevailing party determinations are rarely disturbed on appeal. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1125 (2009).

In the present case, Plaintiff (Gem State) sued UCI, UCI prevailed on all claims, yet this Court made a finding that neither party prevailed. This prevailing party determination is inappropriate. UCI was clearly the prevailing party, and to issue a decision otherwise is an abuse of discretion by the Court. If this Court relies on the theory that UCI “breached the Trademark Settlement Agreement” as set forth in the Findings of Fact and Conclusions of Law, as a factor in determining prevailing party, UCI urges this Court to review the Idaho Civil Jury Instruction on breach of contract. It states as follows:

INSTRUCTION NO. ____

The plaintiff has the burden of proving each of the following propositions:

1. A contract existed between plaintiff and defendant;
2. The defendant breached the contract;
3. **The plaintiff has been damaged on account of the breach; and**
4. **The amount of the damages.**

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then you must consider the issue of the affirmative defenses raised by the defendant and explained in the next instruction. If you find from your consideration of all the evidence that any of the propositions in this instruction has not been proved, your verdict should be for the defendant.

IDJI 6.10.1 (emphasis added). As this Court can see, breach is not a recoverable cause of action without (1) damages as a result, that have been (2) proven in a specific amount. To make a finding that UCI was not prevailing because it “breached” would be an abuse of discretion because it would be outside the bounds of what a jury in Idaho would be able to decide according to IDJI 6.10.1.

Gem State sued UCI for breach of the Trademark Settlement Agreement. Gem State further claimed that UCI committed trademark infringement. Finally, Gem State claimed that it was entitled to injunctive relief, as well as two-hundred and twenty thousand dollars (\$220,000) in monetary damages. UCI successfully defended against the trademark infringement claim. UCI successfully defended against Gem State’s request for a permanent injunction. And lastly, UCI successfully defended against Gem State’s claim for monetary damages. Gem State was denied any form of injunctive relief. Essentially, Gem State did not prevail on a single issue in the Court’s Findings of Fact and Conclusions of Law or Judgment, yet UCI was deemed not the prevailing party. UCI submits this is in error.

1. Looking at the Case as a Whole: Non-liability as a Consideration in Prevailing Party Analysis.

In the prevailing party analysis, a court should not be assessing on a claim by claim basis, but rather looking at the case in whole. In the case *Eighteen Mile* it expands on this analysis point and directs the court to look at what is successfully defended against in the entire case. In *Eighteen Mile*, the trial court determined that although the defendants had successfully defended against plaintiff’s complaint, because they recovered only a small portion of what they desired on their counterclaim, they were not prevailing parties. This was considered by the appellate court as an abuse of discretion. The determination was reversed, and the appeals court emphasized that a

defendant's non-liability is evidence that it is the prevailing party. *Eighteen Mile*, 141 Idaho at 719, 117 P.3d at 133; *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009).

The facts of *Eighteen Mile* parallel the facts in the present case and strongly support a finding of prevailing party status. UCI successfully defended against every claim in the lawsuit brought against it, resulting in a Judgment awarding Plaintiff no damages, no injunctive relief, in fact no relief whatsoever. These facts mirror *Eighteen Mile*, where the defendants successfully defended against Plaintiff's complaint in its entirety. As articulated in *Eighteen Mile*, non-liability is an indication that a party has prevailed and is included in that analysis. UCI was not liable on any of the counts brought against it, and yet this Court found that UCI was not a prevailing party. This decision of the Court should be reversed and a finding that UCI was the prevailing party should be made.

2. Damages Claimed Versus Awarded as a Consideration in Prevailing Party Analysis

Another consideration that would favor UCI being found the prevailing party is to look at what damages were claimed versus what damages were actually awarded. In *Crumps v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009) after "considering the amount claimed by the Crumps and the amount settled for in the stipulated judgment, and the foregoing authorities, the court properly concluded that the Crumps were not a prevailing party in the action, but rather Bromley was, at least in part." *Id.*, 148 Idaho at 175, 219 P.3d at 1191. This case outcome illustrates another component in the prevailing party analysis that should favor UCI.

In the *Crumps* case, the trial court drew a distinction between the amount claimed, and the amount of the judgment and how that influenced the prevailing party analysis. Crumps sought two-thousand eight-hundred and twenty dollars (\$2,820) in damages and recovered six hundred (\$600), while Bromley sought four hundred (\$400) and was awarded four hundred (\$400). The appellate

court held that, based on that respective monetary outcomes, the trial court was within its discretion to determine that Crumps was not the prevailing party but rather Bromley was. In the present case, Gem State sought two-hundred and twenty thousand dollars (\$220,000) and was awarded zero (0). Gem State completely failed in proving its damages claim, while UCI succeeded in defending against the action. If this Court applied the same analysis from *Crumps*, identifying what was claimed versus what was awarded, this Court should determine that UCI is the prevailing party.

3. Offers of Judgement Are a Consideration in Prevailing Party Analysis

UCI's Offer of Judgment before trial should be a consideration in determining whether UCI was the prevailing party. In the case *Zenner v. Holcomb*, 147 Idaho 444, 447, 210 P.3d 552, 555 (2009), the Idaho Supreme Court confirmed that offers of judgment should be considered as factors in the prevailing party analysis. *Id.*, 147 Idaho at 447, 210 P.3d at 555.

In the present case, there was an Offer for Judgment submitted by UCI in the amount of five thousand dollars (\$5,000) to Gem State. The award to Gem State was zero (\$0). The fact that UCI made an Offer of Judgment should be considered by this Court in determining the prevailing party. Additionally, because Gem State had an offer to consider (more than the zero it was awarded) had it acted reasonably and assessed the merits of its case, Gem State should have accepted the offer and an entire trial could have been avoided. Trial was not the only option to the parties. In accordance with the reasoning in *Zenner*, the Offer of Judgment should weigh in favor of UCI being held to be the prevailing party.

Even though prevailing party determinations are rarely reversed, this is a clear case of abuse of discretion in which a reversal would be appropriate. UCI successfully defended against every claim and all damages and they submitted an offer of judgment for a reasonable amount prior to trial. There is no clear reason, other than abuse of discretion, that they should not be the

prevailing party. Accordingly, UCI respectfully requests that this Court reverse its initial finding that UCI was not the prevailing party.

B. Idaho Code § 12-120(3).

UCI is entitled to an award of attorneys' fees pursuant to statute. Idaho Code § 12-120(3) compels an award of attorney fees to the prevailing party in an action to recover on a commercial transaction. The statute states:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean **all transactions except transactions for personal or household purposes**. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-120(3) (emphasis added).

To prevail under I.C. §12-120(3), the commercial transaction must be the gravamen of the claim at issue. *Great Plains Equip., Inc. v. Nw. Pipeline Co.*, 36 P.3d 218, 224, 136 Idaho 466, 472 (2001). To determine if the commercial transaction is actually the gravamen of a claim, a court may look to "whether the transaction is integral to the claim, and whether the transaction serves as the basis of the party's theory of recovery on that claim." *Sims v. Jacobson*, 342 P.3d 907, 912, 157 Idaho 980, 985 (2015).

In this case, the gravamen of the claims related to the Trademark Settlement Agreement. The Trademark Settlement Agreement constitutes a commercial transaction for purposes of I.C. § 12-120(3). The remainder of the claim, trademark infringement, also stems from the commercial

nature of the parties' respective businesses. Thus, the entirety of the lawsuit stemmed from a commercial transaction, warranting an award of attorneys' fees to the prevailing party.

Defendant accrued \$35,584.00 in attorney fees throughout the pendency of this litigation, as more thoroughly listed in the attached Exhibit A. In making an award of attorney fees, the Court should consider several factors in determining the amount of such fees. I.R.C.P. 54(e)(3); *Zenner v. Holcomb*, 210 P.2d 552, 558-559 (Idaho 2009). These factors are addressed in the Affidavit of Terri Pickens Manweiler in Support of Memorandum of Costs and Attorney Fees, filed concurrently herewith.

C. I.R.C.P. 68

In addition to being entitled to an award of costs and fees pursuant to I.R.C.P. 54 and Idaho Code Section 12, 120(3), UCI is entitled to recover its costs, and attorneys' fees taxed as costs, pursuant to Rule 68.

In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against offeree must be based upon a comparison of the offer and the "adjusted award."

...

If the adjusted award obtained by the offeree is less than the offer, then:

- (i) The offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after making the offer;
- (ii) The offeror must pay those costs of the offeree as allowed under Rule 54(d)(1), incurred before the making of the offer; and
- (iii) the offeror is not be [sic] liable for costs and attorney fees of the offeree awardable under Rules 54(d)(1) and 54(e)(1) incurred after the making of the offer.

I.R.C.P. 68. Rule 68 applies only to offers made by defendant and only to judgments obtained by the plaintiff. *Zenner*, 558 (quoting *Jones v. Berezay*, 120 Idaho 332, 334, 815 P.2d 1072, 1074 (1991)). Rule 68 in effect mandates an award of costs where an offeror makes an offer of judgment that is rejected by the offeree and the ultimate result is less favorable to the offeree than was the offer. See *Evans v. Sawtooth Partners*, 111 Idaho 381, 387, 723 P.2d 925, 931 (Ct. App. 1986);

Masters v. Dewey, 109 Idaho 576, 580, 709 P.2d 149, 153 (Ct. App. 1985). When the conditions of Rule 68 are satisfied, the award of costs incurred after the offer is made is mandatory. The award of costs to a prevailing party under rule 54(d)(1) is broad. It includes all costs, but is also discretionary, i.e., “shall be allowed ... unless otherwise ordered by the court.” I.R.C.P. 54(d)(1). *Masters*, 109 Idaho at 580, 709 P.2d at 153 (emphasis added); *Stewart v. McKarnin*, 141 Idaho 930, 932, 120 P.3d 748, 750 (Ct. App. 2005).

In the present case, Gem State sought monetary relief in the form of money damages in the amount of \$220,000. Pursuant to Rule 68, UCI submitted an Offer of Judgment in the amount of five thousand dollars (\$5,000). The offer was not accepted by Gem State and the case proceeded to trial. The Judgment resulted in a denial for all relief sought by Gem State. Because the Offer of Judgment was more favorable than this Court’s Judgment, UCI is entitled to costs, including attorney’s fees that are taxed as costs pursuant to Idaho Code Section 12-120(3). If this Court does not amend its prevailing party finding, UCI is, at a minimum, entitled to its post Offer of Judgment costs and post Offer of Judgment attorneys’ fees. The post Offer of Judgment attorneys’ fees are set forth in Exhibit B attached hereto, in the amount of \$13,602.00.

DATED: September 19, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

STATE OF IDAHO)
) ss.
 County of Ada)

TERRI PICKENS MANWEILER, being first duly sworn upon oath, deposes and says:

I am the attorney for Defendant in the above-entitled action and, as such, I am better informed as to the items charged in the memorandum, including Exhibits A and B attached hereto, than the Defendant. To the best of my knowledge and belief, the items are correct and the costs claimed are in compliance with Rule 54 of the Idaho Rules of Civil Procedure.

/s/ Terri Pickens Manweiler
 TERRI PICKENS MANWEILER

SUBSCRIBED AND SWORN to before me on September 19, 2019.



/s/ Nicole Pickens
 Notary Public for the State of Idaho
 Residence: Boise, Idaho
 Commission Expires: 12/15/2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
 McFarland Ritter PLLC
 P.O. Box 1335
 Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
 Terri Pickens Manweiler

EXHIBIT A

Date	Staff	T/E	Description	Dur/Qty	Amount
6/28/2018	TRP	T	Analyze and review Demand Letter and Trademark Settlement Agreement; Meet with clients to discuss the same and issues with Gem State Roofing - Hailey; Email from client with customer information.	1	\$270.00
6/29/2018	TRP	T	Draft response to demand letter from Ryan McFarland; Email to client for review and comment; Finalize and serve letter.	1	\$270.00
7/30/2018	TRP	T	Telephone conference with client regarding new lawsuit filed by Gem State Roofing Blaine County; Analyze and revise Summons and Complaint and United Components' billing invoices for Blaine County.	0.5	\$135.00
8/08/2018	SNP	T	Review complaint and exhibits attached. Access Secretary of State Website for trademark registration search and business search. Review Idaho Statutes for trademark infringement authority, access Federal Code re patent and trademark infringement as cited in Complaint. Draft Answer, give to TPM for review.	1	\$200.00
8/08/2018	TRP	T	Review and finalize Defendant's Answer to Plaintiff's Complaint.	0.4	\$108.00
8/14/2018	TRP	T	Emails with client regarding status of Answer; Email answer to client.	0.1	\$27.00
8/23/2018	TRP	T	Review and file Request for Trial Setting.	0.1	\$7.00
8/27/2018	TRP	T	Review Notice of Scheduling Conference.	0.1	\$27.00
9/03/2018	SNP	T	First draft of initial discovery requests to Plaintiff.	0.6	\$120.00
9/05/2018	TRP	T	Review email from client with questions on status of case; Confer with SNP on matter.	0.1	\$27.00
9/11/2018	TRP	T	Review First Set of Discovery to United Components; Forward to client for review.	0.2	\$54.00
9/12/2018	SNP	T	Begin responses to Gem State Discovery Requests.	1	\$200.00
9/14/2018	SNP	T	Continue drafting our initial discovery to Plaintiff.	1	\$200.00
9/24/2018	SNP	T	Receive email from client, review documents provided.	0.6	\$120.00
10/02/2018	SNP	T	Finish discovery responses, prep docs for bates stamping.	1	\$200.00
10/04/2018	TRP	T	Review and approve Stipulation for Scheduling and Planning; Emails with counsel regarding the same.	0.3	\$81.00
10/04/2018	LAL	T	Draft Stipulation for Scheduling; email same to opposing counsel;	0.3	\$21.00
10/08/2018	SNP	T	Finalize initial discovery requests, give to TPM for review.	0.7	\$140.00
10/09/2018	TRP	T	Telephone conference with Kerry regarding settlement options.	0.2	\$54.00
10/11/2018	TRP	T	Prepare and send 408 Offer of Settlement to counsel for Gem State Roofing Hailey.	0.4	\$108.00
10/12/2018	TRP	T	Analyze and review Scheduling Order for Gem State Roofing lawsuit.	0.1	\$27.00

Date	Staff	T/E	Description	Dur/Qty	Amount
10/12/2018					
10/17/2018	TRP	T	Analyze and review Second Set of Interrogatories and Requests for Production to United Components, Inc.	0.2	\$54.00
10/22/2018	TRP	T	Review Meet and Confer: Gem State Roofing v. UCI; Email counsel to set up discussion regarding the same.	0.2	\$54.00
10/23/2018	TRP	T	Emails with client regarding discovery issues and counteroffer rejection; Review Meet and Confer letter prior to telephone conference regarding the same.	0.3	\$81.00
10/24/2018	TRP	T	Attend Meet and Confer with counsel for Gem State Roofing; Review follow up email from counsel regarding deadline for supplementing discovery.	0.7	\$189.00
10/31/2018	TRP	T	Begin working on Supplemental Responses to Interrogatories, Requests for Production and Requests for Admission.	0.5	\$135.00
11/05/2018	TRP	T	Draft and revise First Supplemental Responses to Interrogatories, Requests for Production and Requests for Admission; Request Additional Documents from client; Email Verification to client to sign.	1.4	\$378.00
11/06/2018	TRP	T	Finalize Supplemental Responses to Discovery; Emails with client with verification page; Serve supplemental responses.	0.4	\$108.00
11/07/2018	TRP	T	Emails with client regarding additional discovery requests to Gem State Roofing Hailey; Begin preparing Second Set of Interrogatories and Requests for Production to Gem State Hailey.	1	\$270.00
11/08/2018	LAL	T	Draft/serve Notice of Errata--Defendant's Second Interrogatories and Requests for Production of Documents to Plaintiff;	0.2	\$14.00
11/08/2018	TRP	T	Emails with client regarding discovery responses served.	0.1	\$27.00
11/16/2018	SNP	T	Review second discovery requests, discuss with TPM, email client for information. Begin drafting responses.	0.6	\$107.00
11/19/2018	TRP	T	Analyze and review Second Meet and Confer Letter from McFarland.	0.1	\$27.00
11/19/2018	SNP	T	Review client documents and email received. Organize invoices for work in chronological order, bates stamp, prepare for production. Emails with client regarding additional information needed. Finalize responses to Second Set of Discovery, draft Notice of Service, filed with Court and serve on counsel. Begin drafting supplemental discovery responses.	2	\$400.00
11/20/2018	SNP	T	Review Meet and Confer letter, draft supplemental responses, emails with client for additional information. Bates stamp documents to submit via supplement. Give to TPM for review.	1.3	\$260.00
11/21/2018	SNP	T	Review correspondence and subpoenas from opposing counsel.	0.3	\$60.00
11/21/2018	SNP	T	Draft Notice of Service and file with court. Submit Second Supplemental Responses, with bates docs, to counsel. Email	0.7	\$140.00

Date	Staff	T/E	Description	Dur/Qty	Amount
11/21/2018			copies to client.		
11/26/2018	TRP	T	Review proposed Subpoenas from Ryan McFarland for Blaine County businesses; Emails with Kerry regarding the same.	0.3	\$81.00
11/28/2018	TRP	T	Analyze and review Notice of Depo--Michelle Flynn; Review letter from McFarland regarding additional subpoenas.	0.4	\$108.00
11/28/2018	TRP	T	Telephone conference with Jeff Flynn regarding deposition of Michelle Flynn and outstanding discovery issues.	0.4	\$108.00
12/06/2018	LAL	T	Analyze and review Plaintiff's Responses to Second Set of Interrogatories and Requests for Production.	0.7	\$49.00
12/07/2018	TRP	T	Emails with counsel Hickman regarding deposition dates for Jeff Flynn.	0.3	\$81.00
12/10/2018	TRP	T	Emails with Lori Hickman and client regarding scheduling deposition of Jeff Flynn.,	0.1	\$27.00
12/11/2018	TRP	T	Telephone call to Jeff Flynn regarding deposition dates; Emails with Kerrie and counsel regarding the same.	0.3	\$81.00
12/12/2018	TRP	T	Analyze and review Amended Notice of Deposition of Michelle Flynn and Subpoena Duces Tecum for Michelle Flynn.	0.2	\$54.00
12/13/2018	TRP	T	Emails with client regarding deposition of Jeff Flynn.	0.1	\$27.00
12/19/2018	TRP	T	Emails with client regarding upcoming deposition of Jeff Flynn.	0.1	\$27.00
12/20/2018	TRP	T	Attend the deposition of Jeff Flynn; Emails with Kerrie regarding deposition of Kerrie Kuhn.	5.2	\$1,404.00
12/21/2018	TRP	T	Attend deposition of Michelle Flynn.	1.8	\$486.00
1/02/2019	TRP	T	Review deposition transcripts of Jeff Flynn and Michelle Flynn; Confer with SNP on motion for summary judgment.	1	\$270.00
1/04/2019	SNP	T	Review Deposition Transcript of Michelle Flynn. Review Deposition Transcript of Jeff Flynn. Highlight items on each to incorporate into deposition summary. Begin deposition summary of Michelle.	1	\$200.00
1/07/2019	TRP	T	Confer with SNP on strategies for motion for summary judgment.	0.3	\$81.00
1/07/2019	SNP	T	Finish drafting Deposition Summary of Michelle Flynn. Draft Deposition Summary of Jeff Flynn. Begin drafting Motion for Summary Judgment.	0.3	\$60.00
1/09/2019	SNP	T	Review third party subpoenas from Ryan McFarland, access file to see if documents were produced as a result of subpoenas, email to LAL to obtain copies of documents.	0.3	\$60.00
1/10/2019	SNP	T	Read through Jeff and Michelle depo transcripts for documents requested to be produced.	0.7	\$140.00
1/17/2019	TRP	T	Email from client regarding Meridian Building Department info.	0.1	\$27.00
1/18/2019	SNP	T	Begin review of thumbdrive of documents from third party subpoenas.	1.3	\$260.00

Date	Staff	T/E	Description	Dur/Qty	Amount
1/18/2019 1/29/2019	SNP	T	Create chart and timeline of Secretary of State filings and Trademark Filings to incorporate into motion for summary judgment. Compile additional documents to submit via discovery.	1.2	\$240.00
1/29/2019	TRP	T	Review Gem State's Motion to Compel; Confer with SNP on preparing objection.	0.3	\$81.00
2/07/2019	TRP	T	Analyze and review Gem State's Motion for Partial Summary Judgment; Emails with client regarding the same.	0.5	\$135.00
2/08/2019	SNP	T	Continue work on Motion for Summary Judgment, draft legal standard to show cross motion for summary judgment. Finalize trademark timeline to input into argument section. Research Trademark Infringement for federally registered trademarks and state registered trademarks. Review US Code and Idaho Statute regarding trademark infringement. Finalize breach of contract portion of argument and breach of covenant of good faith and fair dealing. Read through Plaintiff's Motion for Partial Summary Judgment.	1	\$200.00
2/09/2019	SNP	T	Research Unjust Enrichment, Permanent Injunction, incorporate into legal argument. Draft Statement of Facts based off of deposition transcripts, draft Declaration of TPM, attach exhibits, draft Declaration of Jeff Flynn, attach exhibits. Finalize and submit to TPM for review.	3	\$600.00
2/11/2019	SNP	T	Read through Motion to Compel, Memorandum, two declarations. Begin drafting response. Review meet and confer letters to determine if information sought was properly requested prior to filing motion.	1	\$200.00
2/12/2019	TRP	T	Review Plaintiff's Amended Notice of Hearing re Motion to Compel and our Notice of Hearing for Motions for Summary Judgment.	0.2	\$54.00
2/13/2019	TRP	T	Review and finalize our cross motion for summary judgment, memo in support and declarations of TPM and Jeff Flynn, direct for filing.	0.5	\$135.00
2/13/2019	SNP	T	Finalize Declarations and Memo in Support of Cross Motion for Summary Judgment. Give to LAL to file with court and serve on counsel.	0.4	\$80.00
2/14/2019	SNP	T	Email client regarding document production for Motion to Compel. Continue working on opposition to Motion to Compel. Review rules for 'meet and confer' requirements.	0.8	\$160.00
2/19/2019	SNP	T	Finalize Opposition to Motion to Compel. Begin work on opposition to Motion for Partial Summary Judgment.	1	\$200.00
2/21/2019	SNP	T	Review Statement of Facts, draft response statement of facts with citations to deposition transcript and declaration of Jeff Flynn. Review Customer Estimates and Invoices attached to Summary Judgment Declarations that allegedly show breach	3	\$600.00

Date	Staff	T/E	Description	Dur/Qty	Amount
2/21/2019			of Settlement Agreement, review client notes for each customer, draft argument as to how those customers do not constitute a breach of trademark settlement agreement.		
2/22/2019	SNP	T	Continue work on opposition to MSJ, draft statement of facts in response to Plaintiff's statement of facts, incorporate into supplemental declaration of Jeff Flynn. Begin research on successor liability.	4	\$800.00
2/25/2019	SNP	T	Research successor liability and exceptions, incorporate case law into legal argument portion of opposition to cross motion for summary judgment. Review email from client with attachments.	1.5	\$300.00
2/26/2019	SNP	T	Review documents and CD brought in by client. Coordinate documents from emails to supplement in discovery.	1.6	\$320.00
2/27/2019	SNP	T	Finalize Opposition to Motion for Partial Summary Judgment, begin declaration of Jeff Flynn and TPM.	2.5	\$500.00
2/28/2019	SNP	T	Finalize Declaration of TPM, attach exhibits. Attach exhibit to Jeff Flynn Declaration. Incorporate into Memorandum in Opposition to Plaintiff's MPSJ. Draft Third Supplemental Responses, provide Laurie documents to bates stamp for production. Review email from client with additional documentation to produce.	2.5	\$500.00
3/01/2019	TRP	T	Review and revise Opposition to Plaintiff's Motion for Summary Judgment and Supplemental Declaration of TPM in support; Review and revise Objection to Motion to Compel.	0.4	\$108.00
3/01/2019	SNP	T	Emails with Kerrie regarding declaration, revise declaration and submit.	0.2	\$40.00
3/04/2019	SNP	T	Finalize Motion for Summary Judgment and Response to Motion to Compel. Finalize discovery responses and prepare for serving on counsel. Review opposition to our MSJ, begin drafting Reply in Further Support of MSJ. Review and research MSJ standards regarding declarations, affidavits, statements to support contentions of client.	4	\$800.00
3/11/2019	SNP	T	Finalize Reply in Further Support of Motion for Summary Judgment.	2	\$400.00
3/11/2019	TRP	T	Review and revise Reply In Further Support of Motion for Summary Judgment.	0.3	\$81.00
3/12/2019	LAL	T	Draft/eFile Motion to Strike March 11, 2019 Affidavit of Rick Silvia;	0.4	\$28.00
3/12/2019	TRP	T	Analyze and review Gem State's Reply in Further Support of their motion for summary judgment and Affidavit of Richard Silva in support; Review and file Motion to Strike Affidavit of Richard Silva for late filing; Emails with Kerrie regarding upcoming hearing.	0.7	\$189.00

Date	Staff	T/E	Description	Dur/Qty	Amount
3/15/2019	TRP	T	Review Reply in Further Support of Motion to Compel.	0.3	\$81.00
3/19/2019	TRP	T	Plan and prepare for hearings on motion to compel and motions for summary judgment; Attend hearings.	2	\$540.00
3/20/2019	TRP	T	Review Proposed Order Granting P's Motion to Compel; Work with LL to get supplemental responses for service.	0.1	\$27.00
3/25/2019	TRP	T	Review signed Order Granting Motion to Compel; Email from client regarding the same.	0.2	\$54.00
4/02/2019	TRP	T	Emails with clerk and counsel McFarland regarding error in Gem State Roofing v. UCI regarding incorrect date no discovery order.	0.3	\$81.00
4/02/2019	SNP	T	Emails between counsel and court clerk regarding motion to compel order.	0.3	\$60.00
4/03/2019	TRP	T	Emails with clerk and counsel regarding actual deadline for filing discovery responses.	0.2	\$54.00
4/08/2019	TRP	T	Review Plaintiff's Witness Disclosure.	0.2	\$54.00
4/17/2019	TRP	T	Finalize Fourth Supplemental Responses to Interrogatories and Requests for Production and First Supplemental Responses to Second Set of Interrogatories and Requests for Production; Email draft to Kerrie for review and approve; Finalize and serve.	1	\$270.00
4/26/2019	SNP	T	Review decision of court regarding MSJ. Discuss with TPM witnesses and trial strategy.	1.1	\$220.00
4/26/2019	TRP	T	Review Memorandum Decision and Order on Cross Motions for Summary Judgment; Confer with SNP on trial strategies and disclosures for trial.	0.5	\$135.00
5/01/2019	TRP	T	Emails with Kerrie on Memorandum Decision and Order and issues remaining for trial.	0.2	\$54.00
5/03/2019	TRP	T	Email and letter from Ryan McFarland with 408 offer of settlement; Emails with client regarding the same.	0.3	\$81.00
5/06/2019	SNP	T	Review Lay Witness Disclosure, revise. Compare to individuals disclosed in discovery, statements of employees. Prep for filing.	0.7	\$140.00
5/06/2019	TRP	T	Draft and revise Lay Witness Disclosure; Review with SNP for additions; File with court.	1	\$270.00
5/31/2019	TRP	T	Analyze and review Motion for Sanctions and Declarations of Ryan McFarland and Rick Silva in support; Begin drafting Objection to Motion for Sanctions and Declaration of Terri Pickens Manweiler in response.	0.6	\$162.00
6/05/2019	SNP	T	Review Motion for Sanctions, Affidavit of Rick, Affidavit of Ryan. Begin drafting objection and declaration of TPM. Review documents attached to McFarland Affidavit with documents produced in discovery. Research jobs in Blaine County per Building Permit registration, note no jobs for UCI, note jobs	0.9	\$180.00

Date	Staff	T/E	Description	Dur/Qty	Amount
6/05/2019			done by Gem State.		
6/11/2019	TRP	T	Review and finalize objection to motion for sanctions and Declaration of TPM.	0.3	\$81.00
6/17/2019	TRP	T	Emails with client regarding emails for document production; Review McFarland's corrected affidavit and reply in support of sanctions.	0.5	\$135.00
6/19/2019	SNP	T	Review McFarland Reply in Further Support of Sanctions and Amended Declaration. Brief review of argument in Defendants Brief in Opposition to Sanctions. Attend hearing on Motion for Sanctions.	2	\$400.00
6/20/2019	TRP	T	Draft Proposed Order Granting Plaintiff's Motion for Sanctions.	0.2	\$54.00
6/20/2019	SNP	T	Review Plaintiff's Proposed Order on Sanctions, edit, give to TPM. Submit TPM redlined version to court and counsel via iCourts and email. Compile notes from hearing and email TPM status of case. Review email from counsel with proposed order to court and argument in support. Emails from counsel requesting electronic information. Email from counsel regarding stipulation to vacate pre trial status conference, discuss with TPM, submit approval to counsel to file.	1.4	\$280.00
6/21/2019	SNP	T	Emails regarding proposed order for sanctions and request for account info.	0.2	\$40.00
6/24/2019	SNP	T	Review Order for Sanctions, draft Motion for Reconsideration, Memo in Support of Motion for Reconsideration, Declaration of Kerrie, Declaration of Terri, Notice of Hearing. File with court and serve on counsel.	2.5	\$500.00
6/24/2019	TRP	T	Analyze and review Order on sanctions; Telephone conference with Bar Counsel regarding the same; Revise and finalize Motion for Reconsideration and Motion for Protective Order.	0.5	\$135.00
6/25/2019	SNP	T	Attend Pre Trial Status Conference, review trademark settlement agreement for reference to asphalt work prohibited. Compare invoices and estimates for Blaine County work to Building Permit records for Plaintiff. Identify possible recoverable amount for each project.	1.5	\$300.00
6/25/2019	TRP	T	Emails with clerk regarding hearing; Attend status conference.	1.2	\$324.00
6/27/2019	SNP	T	Meet with Kerrie and Jeff, email Kerrie with trial info. Review emails to and from Digital Analyst.	0	\$0.00
6/27/2019	TRP	T	Meet with clients to go over Order Granting Motion for Sanctions; Emails with McFarland and computer analyst to schedule email and site review.	1.1	\$297.00
Subtotal				89.8	\$20,091.00

Date	Attorney	Notes	Quantity	Rate	Total
06/28/2019	TPM	Emails with counsel and client regarding email and device review.	0.20	\$270.00	\$54.00
07/01/2019	TPM	Emails with computer analyst and client regarding email searches.	0.30	\$270.00	\$81.00
07/02/2019	TPM	Emails with client and third party computer analyst regarding status of access to email accounts; Review Objection to Motion for Protective Order and Affidavit of Ryan McFarland; Email to McFarland regarding lies in Affidavit and demand to clarify record; Response from McFarland refusing to clarify record.	0.60	\$270.00	\$162.00
07/03/2019	TPM	Emails with client and third party computer analyst regarding status of email download; Analyze and revise Notice Letter of Subpoenas to Google, AOL, and Verizon; Review Motion for Protective Order, Motion for Order Shortening Time, Proposed Order Shortening Time, Revise Memorandum in Support of Motion for Protective Order and Declaration of TPM in support; File all documents in iCourts.	1.00	\$270.00	\$270.00
07/03/2019	SNP	Review letter and subpoenas from opposing counsel, draft Motion for Protective Order, Memorandum, Declaration, Motion for Order Shortening Time and proposed order, redact emails, give to TPM for review.	1.80	\$200.00	\$360.00
07/08/2019	TPM	Review Order Shortening Time; Emails with client regarding the same.	0.30	\$270.00	\$81.00
07/08/2019	SNP	Review order shortening time, review opposition to Motion for Protective Order.	0.50	\$200.00	\$100.00
07/09/2019	TPM	Emails with client regarding motion hearing; Attend hearing on motions for protective order and reconsideration.	1.50	\$270.00	\$405.00
07/09/2019	TPM	Review Privilege Log of documents extracted from email collection from Streamline.	0.30	\$270.00	\$81.00
07/10/2019	TPM	Draft and revise Proposed Protective Order and Proposed Order on Reconsideration; Email drafts to counsel; File with court; Email Privilege Lot to court; Review final Subpoenas for Google and AOL.	0.70	\$270.00	\$189.00
07/10/2019	TPM	Telephone conference with clients regarding Offer of Judgment; Approve for service.	0.40	\$270.00	\$108.00
07/10/2019	SNP	Draft Offer of Judgment, submit to counsel.	0.70	\$200.00	\$140.00
07/11/2019	SNP	Receive email from Judge's Clerk with signed orders,	0.20	\$200.00	\$40.00
07/12/2019	SNP	Emails from counsel regarding attorney conference,	0.30	\$200.00	\$60.00

07/15/2019	TPM	Review Orders and signed Subpoenas to AOL and Google.	0.20	\$270.00	\$54.00
07/15/2019	SNP	Draft Trial Brief, Witness List, Exhibit List. Compile all exhibits for attorney conference.	7.50	\$200.00	\$1,500.00
07/16/2019	TPM	Review Plaintiff's Trial Brief; Meet with Ryan McFarland and Lori Hickman for attorney conference; Emails with counsel regarding stipulations and trial exhibits; Finalize Defendant's Trial Brief, file with iCourts.	2.50	\$270.00	\$675.00
07/17/2019	TPM	Review proposed trial exhibits; Begin putting together trial documents; Emails with counsel regarding the same.	0.50	\$270.00	\$135.00
07/17/2019	SNP	Review Trial Brief filed by Plaintiff, draft stipulated facts regarding witness testimony, draft comparison of trial exhibits, stipulated exhibits.	2.00	\$200.00	\$400.00
07/18/2019	TPM	Review Plaintiff's Exhibit List, identify documents we can stipulate for admissibility; Email list to counsel for Plaintiff; Review and modify Stipulated Facts; Email draft to counsel.	1.00	\$270.00	\$270.00
07/19/2019	TPM	Review and revise Gem State Stipulated Undisputed Facts; Email revisions to counsel McFarland; Email update to client; Review Stipulation for Undisputed Facts; Approve for filing; Emails with counsel regarding the same.	1.00	\$270.00	\$270.00
07/19/2019	TPM	Emails with counsel regarding Defendant's witnesses.	0.20	\$270.00	\$54.00
07/22/2019	SNP	Draft Findings of Fact and Conclusions of Law, file with court and counsel. File Witness List and Exhibit List. Trial schedule and planning with TPM.	4.00	\$200.00	\$800.00
07/23/2019	TPM	Review and approve Proposed Findings of Fact and Conclusions of Law; Plan and prepare for Pretrial Conference; Attend final Pretrial Conference.	1.80	\$270.00	\$486.00
07/24/2019	TPM	Review Court's Pretrial Conference Checklist, filed by clerk.	0.30	\$270.00	\$81.00
07/24/2019	TPM	Emails with client regarding witnesses for trial.	0.30	\$270.00	\$81.00
07/24/2019	SNP	Create trial binder, update list of jobs/customers for use at trial, review updated profit lists from client.	1.00	\$200.00	\$200.00
07/25/2019	SNP	Draft subpoena and letter to Tracey Felix, calculate witness fee. Begin outline of trial testimony for Jeff and Kerrie. Create Proof Chart of elements to testify to as well as which witness and exhibits to admit. Update list of customers with profits.	2.10	\$200.00	\$420.00
07/26/2019	SNP	Continue work on trial outlines and trial prep. Begin outline for Richard Silvia testimony. Review exhibits to be used by Plaintiff.	2.00	\$200.00	\$400.00
07/30/2019	SNP	Trial prep - case outline, compile trial binder, review stipulated exhibits versus proposed exhibits.	2.50	\$200.00	\$500.00

07/31/2019	SNP	Draft outline of Kerrie Kuhn, Rich Silvia, compare profit and loss statement from 2008 through 2018 and compare to UCI jobs alleged to be in breach. Continue trial prep.	4.00	\$200.00	\$800.00
08/01/2019	TPM	Trial prep with SNP.	1.20	\$270.00	\$324.00
08/01/2019	SNP	Trial outline for Flynn, exhibit prep and review, submit outlines to Kerrie and Mike for meeting. Prep trial binder.	3.20	\$200.00	\$640.00
08/02/2019	TPM	Meet with clients to go over trial testimony; Trial preparation.	3.50	\$270.00	\$945.00
08/02/2019	SNP	Meet with Jeff and Kerrie, revise outlines, draft outline for directed verdict, prep exhibit binders, witness binders, CMN, draft outline for Tracey Felix, Andrew, Robert, Patrick. Update binders. Draft Table of contents for rebuttal and refresh memory exhibits. Mark UCI exhibits, add proof chart to trial binder.	3.00	\$200.00	\$600.00
08/04/2019	TPM	Plan and prepare for trial; Review and revise witness outlines for trial; Review all trial exhibits and highlight for testimony at trial.	4.00	\$270.00	\$1,080.00
08/05/2019	TPM	Attend trial; Confer with clients after trial to discuss testimony, argument, and potential outcomes.	5.50	\$270.00	\$1,485.00
08/05/2019	SNP	Attend Trial.	5.00	\$200.00	\$1,000.00
08/21/2019	TPM	Emails with Kerrie regarding lien recorded by Gem State Roofing Hailey against McAlvain.	0.10	\$270.00	\$27.00
9/17/2019	TPM	Analyze and review Findings of Fact and Conclusions of Law and Judgment	0.5	\$270.00	\$135.00
		Attorney fees after June 28, 2019 subtotal	67.7		\$15,493.00
		Attorney fees up to June 27, 2019 subtotal	89.8		\$20,091.00
		TOTAL ATTORNEY FEES	157.5		\$35,584.00

Expenses

Date	Type	Notes	Quantity	Rate	Total
8/08/2018	Expense	Clerk of Court – Filing fee	1.00	\$140.08	\$148.08
1/3/2019	Expense	Deposition Transcript – Michelle Flynn	1.00	\$107.01	\$107.01
1/3/2019	Expense	Deposition Transcript – Jeff Flynn	1.00	\$412.76	\$412.76
07/25/2019	Expense	Witness Fee: Witness Fee - Tracy Felix	1.00	\$22.25	\$22.25
07/31/2019	Expense	Service of Process: Service upon Tracy Felix	1.00	\$58.00	\$58.00
08/27/2019	Expense	Copies: Trial Exhibits	363.00	\$0.15	\$54.45
		TOTAL EXPENSES			\$802.55

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EXHIBIT B

EXHIBIT B

Date	Attorney	Notes	Quantity	Rate	Total
07/10/2019	SNP	Draft Offer of Judgment, submit to counsel.	0.70	\$200.00	\$140.00
07/11/2019	SNP	Receive email from Judge's Clerk with signed orders, submit to client	0.20	\$200.00	\$40.00
07/12/2019	SNP	Emails from counsel regarding attorney conference, review scheduling order, schedule attorney conference.	0.30	\$200.00	\$60.00
07/15/2019	TPM	Review Orders and signed Subpoenas to AOL and Google.	0.20	\$270.00	\$54.00
07/15/2019	SNP	Draft Trial Brief, Witness List, Exhibit List. Compile all exhibits for attorney conference.	7.50	\$200.00	\$1,500.00
07/16/2019	TPM	Review Plaintiff's Trial Brief; Meet with Ryan McFarland and Lori Hickman for attorney conference; Emails with counsel regarding stipulations and trial exhibits; Finalize Defendant's Trial Brief, file with iCourts.	2.50	\$270.00	\$675.00
07/17/2019	TPM	Review proposed trial exhibits; Begin putting together trial documents; Emails with counsel regarding the same.	0.50	\$270.00	\$135.00
07/17/2019	SNP	Review Trial Brief filed by Plaintiff, draft stipulated facts regarding witness testimony, draft comparison of trial exhibits, stipulated exhibits.	2.00	\$200.00	\$400.00
07/18/2019	TPM	Review Plaintiff's Exhibit List, identify documents we can stipulate for admissibility; Email list to counsel for Plaintiff; Review and modify Stipulated Facts; Email draft to counsel.	1.00	\$270.00	\$270.00
07/19/2019	TPM	Review and revise Gem State Stipulated Undisputed Facts; Email revisions to counsel McFarland; Email update to client; Review Stipulation for Undisputed Facts; Approve for filing; Emails with counsel regarding the same.	1.00	\$270.00	\$270.00
07/19/2019	TPM	Emails with counsel regarding Defendant's witnesses.	0.20	\$270.00	\$54.00
07/22/2019	SNP	Draft Findings of Fact and Conclusions of Law, file with court and counsel. File Witness List and Exhibit List. Trial schedule and planning with TPM.	4.00	\$200.00	\$800.00
07/23/2019	TPM	Review and approve Proposed Findings of Fact and Conclusions of Law; Plan and prepare for Pretrial Conference; Attend final Pretrial Conference.	1.80	\$270.00	\$486.00
07/24/2019	TPM	Review Court's Pretrial Conference Checklist, filed by clerk.	0.30	\$270.00	\$81.00
07/24/2019	TPM	Emails with client regarding witnesses for trial.	0.30	\$270.00	\$81.00
07/24/2019	SNP	Create trial binder, update list of jobs/customers for use at trial, review updated profit lists from client.	1.00	\$200.00	\$200.00

07/25/2019	SNP	Draft subpoena and letter to Tracey Felix, calculate witness fee. Begin outline of trial testimony for Jeff and Kerrie. Create Proof Chart of elements to testify to as well as which witness and exhibits to admit. Update list of customers with profits.	2.10	\$200.00	\$420.00
07/26/2019	SNP	Continue work on trial outlines and trial prep. Begin outline for Richard Silvia testimony. Review exhibits to be used by Plaintiff.	2.00	\$200.00	\$400.00
07/30/2019	SNP	Trial prep - case outline, compile trial binder, review stipulated exhibits versus proposed exhibits.	2.50	\$200.00	\$500.00
07/31/2019	SNP	Draft outline of Kerrie Kuhn, Rich Silvia, compare profit and loss statement from 2008 through 2018 and compare to UCI jobs alleged to be in breach. Continue trial prep.	4.00	\$200.00	\$800.00
08/01/2019	TPM	Trial prep with SNP.	1.20	\$270.00	\$324.00
08/01/2019	SNP	Trial outline for Flynn, exhibit prep and review, submit outlines to Kerrie and Mike for meeting. Prep trial binder.	3.20	\$200.00	\$640.00
08/02/2019	TPM	Meet with clients to go over trial testimony; Trial preparation.	3.50	\$270.00	\$945.00
08/02/2019	SNP	Meet with Jeff and Kerrie, revise outlines, draft outline for directed verdict, prep exhibit binders, witness binders, CMN, draft outline for Tracey Felix, Andrew, Robert, Patrick. Update binders. Draft Table of contents for rebuttal and refresh memory exhibits. Mark UCI exhibits, add proof chart to trial binder.	3.00	\$200.00	\$600.00
08/04/2019	TPM	Plan and prepare for trial; Review and revise witness outlines for trial; Review all trial exhibits and highlight for testimony at trial.	4.00	\$270.00	\$1,080.00
08/05/2019	TPM	Attend trial; Confer with clients after trial to discuss testimony, argument, and potential outcomes.	5.50	\$270.00	\$1,485.00
08/05/2019	SNP	Attend Trial.	5.00	\$200.00	\$1,000.00
08/21/2019	TPM	Emails with Kerrie regarding lien recorded by Gem State Roofing Hailey against McAlvain.	0.10	\$270.00	\$27.00
9/17/2019	TPM	Analyze and review Findings of Fact and Conclusions of Law and Judgment	0.5	\$270.00	\$135.00
Attorney fees subtotal			60.1		\$ 13,602.00

Expenses

Date	Type	Notes	Quantity	Rate	Total
8/08/2018	Expense	Clerk of Court – Filing fee	1.00	\$140.08	\$148.08
1/3/2019	Expense	Deposition Transcript – Michelle Flynn	1.00	\$107.01	\$107.01
1/3/2019	Expense	Deposition Transcript – Jeff Flynn	1.00	\$412.76	\$412.76
07/25/2019	Expense	Witness Fee: Witness Fee - Tracy Felix	1.00	\$22.25	\$22.25
07/31/2019	Expense	Service of Process: Service upon Tracy Felix	1.00	\$58.00	\$58.00
08/27/2019	Expense	Copies: Trial Exhibits	363.00	\$0.15	\$54.45
Expenses Subtotal					\$802.55
Attorney Fees Subtotal					\$13,602.00
Total					\$14,404.55

4. UCI is entitled to an award of reasonable attorney fees and costs as the prevailing party in this matter.

5. The attorney fees incurred in this action are specifically listed in Exhibit A to Defendant's Memorandum of Costs and Attorney Fees ("Memorandum"), filed herewith. The attorney fees incurred after the service of the Offer of Judgment are attached to the Memorandum as Exhibit B.

6. The forgoing attorney fees were reasonably and necessarily incurred and are commensurate with fees charged by other attorneys in this area for litigation of this type.

7. The undersigned has taken into consideration in charging attorney fees the following factors pursuant to IRCP 54(e)(3): 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; and K) the reasonable costs of automatic legal research.

8. With regard to IRCP 54(e)(A): The undersigned and her associate Shannon Pearson, and her paralegal Laurie Loyd, dedicated just over 157 hours to the above entitled case. Litigation spanned over 13 months, which averages out as 12 hours per month spent on this litigation, which is reasonable and commensurate with the outcome of this matter especially considering the discovery, extensive motion practice which included cross motions for summary judgment, two motions to compel, a motion for sanctions, and court trial.

9. With regard to IRCP 54(e)(B): The novelty and difficulty of the questions involved in this litigation were facially relatively simple, however the amount of questions in this case, in such a short amount of time, was significant (injunctive relief, breach of contract, trademark infringement, and damages). Additionally, difficult and novel questions presented themselves during the litigation which included unusual discovery practice requiring the facilitation of external hard drive and email searches.

10. With regard to IRCP 54(e)(C) and (D): The undersigned, Shannon Pearson, and Laurie Loyd each demonstrate a clear knowledge of the issues that were addressed in this matter and the skill and experience were demonstrated throughout the entirety of this litigation.

- i. The undersigned, Terri Pickens Manweiler's time is charged at the rate of \$270.00 per hour. Terri Pickens Manweiler has been lead counsel in at least seventeen jury trials and at least forty court trials, clearly this experience and a review of the outcome of this case is enough to justify the rate of \$270.00 per hour for acting as lead counsel in the above-entitled matter. The prevailing charges for like-work are relatively similar for other attorneys working on similar issues. It is not unusual in Idaho for an attorney with over 20 years of experience in a particular field of work to charge at least \$270.00 per hour for services. Accordingly, the rates of Terri Pickens Manweiler are comparable to attorneys of similar skill and experience.
- ii. Shannon Pearson's time is charged at \$200.00 per hour. Shannon became a licensed attorney in April 2017. Prior to being a licensed attorney, Shannon was a paralegal for 9 years and a limited licensed attorney for 2 years. Shannon

Pearson has at least 13 years of litigation experience; this skill and experience justifies her rate of \$200.00 per hour.

iii. Laurie Loyd's time is charged at \$70.00 per hour for paralegal services. Laurie Loyd has been a paralegal for over 27 years which justifies her hourly rate of \$70.00 per hour.

11. With regard to IRCP 54(e)(E): The fees in this matter were not contingent and therefore not relevant as a determining factor in the above-entitled case.

12. With regard to IRCP 54(e)(F): There were no unusual time constraints or circumstances imposed by UCI or Plaintiff, and accordingly, the amount of time actually spent by counsel is reasonable and commensurate with the ultimate outcome of the case.

13. With regard to IRCP 54(e)(G): The amount of time and money involved in this matter are clearly justified by the result obtained. UCI, from the beginning of this case, has claimed Plaintiff did not have a valid cause of action against UCI and that it could not establish damages. UCI attempted to keep fees and costs to a minimum and on July 10, 2019, UCI submitted a formal Offer of Judgment in the amount of \$5,000.00; Plaintiff did not accept this offer and litigation proceeded. A true and accurate copy of the IRCP 68 Offer of Judgment is attached hereto as **Exhibit A**. Additional fees and costs were expended due to certain behaviors of Plaintiff refusing to accept the very reasonable Offer of Judgment. Despite having no physical evidence to present at trial to support its claim for damages, Plaintiff argued in "opening argument" that it was entitled to recover \$220,166.49 in damages. A true and accurate copy of a portion of the Power Point presentation by Plaintiff for "opening argument" is attached hereto as **Exhibit B**. Furthermore, the only offer of settlement ever made by Plaintiff (\$100,0000) was well outside the risk for UCI. A true and accurate copy of the offer of settlement is attached hereto as **Exhibit C**.

14. With regard to IRCP 54(e)(H), (I), and (J): Factors relating to the undesirability of the case, nature and length of professional relationship between counsel and client, and awards in similar cases, do not necessarily apply to this case.

15. With regard to IRCP 54(e)(K): Automatic legal research was required throughout the litigation to investigate case law, potential claims, and the pertinent legal standard on cases relating to the issues in dispute. However, counsel was able to access all relevant legal research through Case-Maker, a legal research program offered to licensed attorneys in the state of Idaho, thus, no legal research charges were incurred.

16. UCI is entitled to attorney fees as the prevailing party under I.C. § 12-120(3).

17. Considering all the above factors, the attorney fees totaling \$35,584.00 and costs as a matter of right in the amount of \$802.55 are reasonable and commensurate with the standards in this legal community.

DATED: September 19, 2019.

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

SUBSCRIBED AND SWORN to before me on September 19, 2019.



/s/ Nicole Pickens
Notary Public for the State of Idaho
Residence: Boise, Idaho
Commission Expires: 12/15/2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2019, a true and correct copy of the foregoing document was served as follows:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler _____
Terri Pickens Manweiler

EXHIBIT A

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com
Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

**DEFENDANT'S OFFER OF
JUDGMENT**

Defendant United Components Incorporated, dba, Gem State Roofing ("Defendant"), by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Law, P.A., pursuant to Rule 68 of the Idaho Rules of Civil Procedure, hereby offers to allow judgment to be taken against it in the amount of FIVE THOUSAND US DOLLARS (\$5,000.00). This offer of judgment shall be deemed to include any and all claims Plaintiff has against Defendant, including any and all attorney fees allowed by contract or law, and any and all costs and fees.

This offer of judgment is made for the purpose specified in Rule 68 of the Idaho Rules of Civil Procedure and is not to be construed either as an admission that Defendant is liable in this action or that Plaintiff has suffered any damages.

DATED: July 10, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 10, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT B

Damages Calculation

Date	Job	Estimate/Paid Amount	Profit (45.72%)
9/30/2010	Brashears & Sons	\$18,840.00	\$8,613.65
6/20/2011	Larry Isham	\$10,500.00	\$4,800.60
10/13/2011	Shay Construction	\$17,424.00	\$7,966.25
8/17/2016	Snow Mountain Apartments	\$54,000.00	\$24,688.80
8/22/2016	Pioneer West Property Management	\$1,950.00	\$891.54
2/15/2017	ESI Construction	\$84,950.00	\$38,839.14
1/22/2018	Kerry Armstrong	\$750.00	\$342.90
3/17/2018	McAlvain Construction (Wood River Animal Shelter)	\$279,540.00	\$127,805.69
5/25/2018	Bruce Bothwell	\$13,600.00	\$6,217.92
Total:		\$481,554.00	\$220,166.49

EXHIBIT C



McFARLAND RITTER

15 October 2018

PROTECTED BY I.R.E. RULE 408

VIA U.S. MAIL

Terri Pickens Manweiler
Pickens Cozakos, P.A.
398 S. 9th Street, Ste. 240
Boise, ID 83701

Re: *Gem State Roofing, Incorporated v. United Components, Incorporated,
dba Gem State Roofing - CV01-18-13437*

Dear Ms. Manweiler,

I am in receipt of your Confidential Offer of Settlement letter dated October 11, 2018, and forwarded the letter to my client, Gem State Roofing, Inc. I discussed the terms of your settlement offer, and my client would like to respond with the following counteroffer:

1. United Components, Inc. will pay Gem State Roofing, Inc. the sum of \$100,000.00 to fully satisfy all claims up and through settlement;
2. United Components, Inc. shall complete any roofing work or jobs it is currently performing in Blaine County as soon as possible, and shall not accept any new work in Blaine County, regardless of the source of the work, e.g., based on referrals, subcontractor relationships, outstanding bids it may have issued that are still pending, etc.;
3. United Components, Inc. acknowledges and agrees that it is the successor and assignee of Gem State Roofing & Asphalt Maintenance, Inc. under that Trademark Settlement Agreement dated October 20, 2005, by and between Gem State Roofing & Asphalt Maintenance, Inc. and Gem State Roofing, Inc. (the "Agreement"), and agrees to abide by all the terms and conditions set forth in the Agreement;
4. United Components, Inc. shall pay Gem State Roofing, Inc.'s reasonable attorney's fees and costs incurred in connection with this lawsuit; and
5. Gem State Roofing, Inc. will dismiss this lawsuit with prejudice, and the Parties will release each other from all claims of any kind or description, except with respect to the obligations set forth in the Agreement.

In the alternative, I am preparing a second set of discovery requests and I wish to advise you that I will be seeking records related to your client's activities in Blaine County from 2005 to 2016, and therefore I formally advise your client to keep and preserve all such records.

If you have any questions or would like to discuss any of the foregoing, please give me a call.

Sincerely,

SENT WITHOUT SIGNATURE
TO AVOID DELAY

Lori Hickman
Legal Counsel

McFarland Ritter PLLC
 Ryan T. McFarland, ISB No. 7347
 P.O. Box 1335
 Meridian, ID 83680
 Telephone: 208.895.1291
 Facsimile: 208.895.1270
 Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)	
	)	Case No. <u>CV01-18-13437</u>
Plaintiff,)	
	)	PLAINTIFF'S MOTION FOR
vs.	)	ATTORNEYS' FEES AND COSTS
)	
UNITED COMPONENTS,)	
INCORPORATED dba GEM STATE)	
ROOFING,)	
)	
Defendant.)	
)	

Plaintiff Gem State Roofing, Incorporated (“Gem State”), by and through its undersigned counsel of record, moves this Court for an Award of Attorneys’ Fee and Costs. This Motion is supported by the concurrently-filed Memorandum and Affidavit in Support.

INTRODUCTION

In its Judgment entered in this above-captioned matter on September 17, 2019, this Court found that no party prevailed, and therefore neither party is entitled to attorneys’ fees. This Motion, however, is based not on the Judgment, but on the Order Granting Plaintiff’s Motion to Compel, entered by the Court March 25, 2019; the Amended Order Granting Plaintiff’s Motion

to Compel, entered by the Court on April 3, 2019; and the Order Granting Plaintiff's Motion for Sanctions, entered by the Court on June 24, 2019.

FACTS AND PROCEDURAL HISTORY

In September 2018, Gem State initiated discovery by propounding several discovery requests and requests for admission upon Defendant. Defendant's initial responses were deficient in many respects, so Gem State notified Defendant about its concerns, and fully complied with the meet-and-confer requirement of Idaho Rule of Civil Procedure 37(a)(1). Nonetheless, Defendant consistently demonstrated its unwillingness to provide timely, full and forthright discovery responses. To illustrate, Defendant produced the following documents according to the following timeline:

- On or about **October 4, 2018**, Defendant produced 27 pages (Bates Nos. 0001-27) in its initial discovery responses;
- On or about **November 6, 2018**, Defendant produced 58 more pages (Bates Nos. 00028-85) in its first supplemental response to Gem State's first set of requests;
- On or about **November 9, 2018**, Defendant produced 28 more pages (Bates Nos. 00086-113) in its responses to Gem-State Blaine's second set of discovery requests;
- On or about **November 21, 2018**, Defendant produced 5 more pages (Bates Nos. 00113-117) in its second supplemental response to Gem State's first set of requests;
- In **November and December 2018**, Gem State served eleven (11) third-party Subpoenas Duces Tecum upon some of Defendant's potential and existing customers in Blaine County. In response, those third parties produced hundreds of pages of documents, including numerous emails and contracts that had not been produced by UCI;

- On **December 20, 2018**, Gem State’s counsel deposed Jeff Flynn. Mr. Flynn’s deposition testimony and the documents obtained from third parties confirm that many of UCI’s discovery responses are still insufficient;
- On **January 28, 2019**, Gem State filed its Motion to Compel; and
- On or about **March 4, 2019**, Defendant produced **1,031** pages (Bates Nos. 00118-1148) in its third supplemental response to Gem State Blaine’s first set of requests.

That last, most substantial production (representing 90% of Defendant’s total production) occurred only after Gem State had expended significant money to obtain documents from third parties, after Gem State had taken depositions, and after Gem State had filed its Motion to Compel.

This Court granted Gem State’s Motion to Compel on March 25, 2019. As to Gem State’s attorneys’ fee request, this Court stated “**Plaintiff’s request for an award of costs and attorneys’ fees incurred in connection with the Motion to Compel under Idaho Rules of Civil Procedure 37(a)(5)(A), and with respect to Request for Admission Nos. 10, 12, and 17 under Idaho Rule of Civil Procedure 37(c)(2) is deferred until the conclusion of the matter.**”

On April 3, 2019, this Court entered an Amended Order Granting Plaintiff’s Motion to Compel, and said, with respect to Gem State’s attorneys’ fees request, “**the court granted the Motion, but deferred ruling on an award of costs and attorneys’ fees.**”

On or about April 17, 2019, and in response to this Court’s Order to Compel, Defendants served supplemental discovery responses, but no additional documents, stating instead:

UCI does not have an electronic record keeping system in place to maintain electronic communications (emails) with vendors, suppliers, customers, and clients. UCI conducted a diligent search for any electronic records that may have existed related to Blaine County projects, but no additional documents exist that have not already been produced or obtained through subpoena.

The claim, in 2019, that a commercial enterprise with a statewide business operation would have no email records is nothing short of ridiculous. Gem State filed a Motion for Sanctions, which the Court granted in a sweeping Order, dated June 24, 2019. The Court ordered Defendant to “make available to Plaintiff . . . for the purpose of allowing Plaintiff to inspect, copy or make mirror image copies of, any and all communication data stored or accesses [*sic*] by any of defendant’s personal or business-related electronic devices capable overeating or receiving electronic mail or text messages.” As to Gem State’s request for attorneys’ fee, the Court stated, again: “**The Court reserves its ruling on additional sanctions, including fees [and] costs . . . until further proceedings or trial.**”

ARGUMENT

Because Gem State prevailed on both its Motion to Compel and its Motion for Sanctions, attorneys’ fees and costs incurred in connection with those motions should be awarded against Defendant, in favor of Gem State, as follows:

A. Attorneys’ Fees Should be Awarded Under Idaho Rule of Civil Procedure 37(a)(5)

Rule 37(a)(5) unequivocally requires an award of costs and fees, because Defendant produced over 1,000 pages of documents – some 90% of its total production – after Gem State filed its Motion to Compel and practically on the eve of the hearing on that motion. The rule provides:

If the Motion Is Granted (or Discovery Is Provided After Filing). If the motion is granted, **or if the requested discovery is provided after the motion was filed, the court must**, after giving an opportunity to be heard, **require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.** But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

Idaho Rule of Civil Procedure 37(a)(5) (emphasis added). None of the stated exceptions apply, and this Court “must” award attorneys’ fees and other expenses incurred on the motion to Gem State, and against Defendant or its attorney. The question of whether Gem State ultimately prevailed at trial is irrelevant to the question of whether Gem State is entitled to fees and expenses on the Motion to Compel, arising as it did from Defendant’s refusal to comply with its discovery obligations until a Motion to Compel was filed.

B. Attorneys’ Fees Should be Awarded Under Idaho Rule of Civil Procedure 37(b)(2)(C).

As noted above, Defendant did not comply with the Order to Compel and so Gem State filed – and this Court granted – a Motion for Sanctions. Idaho Rule of Civil Procedure 37(b)(2)(C) similarly requires an award of attorneys’ fees and costs:

(C) Payment of Expenses. Instead of or in addition to the orders above, **the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure,** unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Idaho Rule of Civil Procedure 37(b)(2)(C) (emphasis added). Again, none of the stated exceptions apply, and this Court “must” award attorneys’ fees and other reasonable expenses, incurred as a result of Defendant’s conduct to Gem State against Defendant or their attorney. The question of whether Gem State ultimately prevailed at trial is irrelevant to the question of whether Gem State is entitled to fees and expenses on the Motion for Sanctions, arising as it did from Defendant’s refusal to comply with its Court-ordered discovery obligations.

C. Attorneys' Fees Should be Awarded Under Idaho Rule of Civil Procedure 37(c)(2).

Idaho Rule of Civil Procedure 37(c)(2) provides in part:

Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves ... the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof.

Gem State-Blaine included 28 Requests for Admission in its First Set of Discovery Requests, including these three requests:

- (1) Request for Admission No. 10: Admit that You [UCI] are doing business under the assumed business name "Gem State Roofing."**
- (2) Request for Admission No. 12: Admit that since 2016, You [UCI] have advertised, solicited, bid on, and performed roofing work in Blaine County under the assumed business name "Gem State Roofing."**
- (3) Request for Admission No. 17: Admit that despite Gem State's written demands that You [UCI] cease conducting Your roofing business in Blaine County, You [UCI] continue to advertise, solicit, bid on, and perform roofing work in Blaine County.**

McFarland Aff., ¶ 3, Exh. B. UCI responded "Deny" for each of these Requests for Admission (McFarland Aff., ¶ 4, Exh. C); however, Gem State-Blaine has proved the truth of these facts through:

1) Documents produced by UCI in its own Discovery Responses establish the truth of Request for Admission Nos. 10 and 12 (see, for example, Flynn Dep. Exh. 24) and Request for Admission 17 (see, for example, Flynn Dep. Exh. 65).

2) Documents produced by third parties in response to Subpoenas Duces Tecum establish the truth of Request for Admission Nos. 10 (see, for example, Flynn Dep. Exh. 51) and Request for Admission 17 (see, for example, Flynn Dep. Exh. 61).

3) Jeff Flynn's deposition testimony: when Gem State's counsel asked Mr. Flynn about UCI operating under the assumed business name "Gem State Roofing", Mr. Flynn admitted that

UCI has performed work in Blaine County under that business name in the last three years. Flynn Dep. at 59:6-9. Mr. Flynn further testified that UCI did not change any of the Gem State Roofing logos on any of the equipment it received from Gem State-Boise, and that he had been operating all of his corporate entities under the “Gem State Roofing” name since the 1980’s. Flynn Dep. at 44:5-7; 57:24-25, 58:1-4.

4) Defendant would ultimately stipulate to these facts. See Stipulation re: Undisputed Facts, filed July 19, 2019, Exh. A, Nos. 16, 17.

5) This Court found these facts to be true in its Findings of Fact & Conclusions of Law (Pgs. 4-6, Nos. 22, 24, 25).

Consequently, Gem State requests that this Court order UCI to pay Gem State’s reasonable expenses incurred in making this proof pursuant to I.R.C.P. 37(c)(2). The question of whether Gem State ultimately prevailed at trial is irrelevant to the question of whether Gem State is entitled to fees and expenses for proving matters that the Defendant should have admitted in the first instance.¹

CONCLUSION

For the reasons stated above, and as supported by the concurrently-filed Memorandum of Costs and Affidavit in Support, Gem State asks that this Court award it the amount of **\$36,347.16** in attorneys’ fees and costs.

DATED THIS 24th day of September 2019.

By /s/Ryan T McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

¹ It is manifestly difficult to breakdown the cost of proving a matter in, for example, a deposition. As set forth in the accompanying supporting materials, the fees and costs requested for failure to admit is 10% of the amount Gem State incurred on these activities. The 10% figure arises from the following: there were 28 Requests For Admission, and 3 of those are at issue here – slightly more than 10%.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2019, I caused to be served a true copy of the foregoing PLAINTIFF'S MOTION FOR ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)	
	)	Case No. <u>CV01-18-13437</u>
Plaintiff,)	
	)	MEMORANDUM OF COSTS AND
vs.	)	ATTORNEYS' FEES
)	
UNITED COMPONENTS,)	
INCORPORATED, dba, GEM STATE)	
ROOFING,)	
)	
Defendants.)	

Plaintiff Gem State Roofing, Incorporated ("Gem State"), by and through its counsel of record, McFarland Ritter PLLC, and pursuant to Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2), sets forth the costs, disbursements, and attorneys' fees incurred, as of September 20, 2019, as a result of Defendant's various discovery abuses throughout this case, as follows:

COSTS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(A)(5)
(the Motion to Compel)

1. Tri-County Process Serving L.L.C. (Service fee for Subpoenas (12)) \$1,325.40

TOTAL COSTS MOTION TO COMPEL: \$1,325.40

COSTS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(b)(2)(C)
(the Motion for Sanctions)

1. Streamline Imaging (Forensic collection of emails and bates number) \$2,438.10

2. Ada County Clerk (Certified Complaint for Subpoena) \$19.50

3. Santa Clara County Clerk (Google Subpoena) \$30.00

4. Loudoun County Clerk (Oath Subpoena) \$46.00

5. Tri-County Process Serving (Google Subpoena) \$135.00

TOTAL COSTS MOTION FOR SANCTIONS: \$2,668.60

COSTS UNDER IDAHO RULE OF CIVIL PROCEDURE 37(c)(2)
(failure to admit)

1. M&M Court Reporting Service (Jeffrey Flynn and Michelle Flynn
Depositions) \$107.03¹

TOTAL COSTS FOR FAILURE TO ADMIT: \$107.03

COSTS FOR MOTION TO COMPEL \$1,325.40

COSTS FOR MOTION FOR SANCTIONS \$2,668.60

COSTS FOR FAILURE TO ADMIT \$107.03

TOTAL COSTS \$4,101.03

¹ This represents 10% of the deposition costs.

ATTORNEYS' FEES

Gem State requests the Court also award a total of **\$32,246.13** as reasonable attorneys' fees incurred, as of July 11, 2019, pursuant to Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2). The legal basis for this request is set forth in the concurrently-filed Plaintiff's Motion for Attorneys' Fees and Costs. This request for attorneys' fees is further supported by the Affidavit of Ryan T. McFarland, filed concurrently herewith, stating the basis and method of computation of the attorneys' fees claim.

TOTAL COSTS AND ATTORNEYS' FEES REQUESTED: \$36,347.16.

Ryan T. McFarland, being first duly sworn upon oath, deposes and states:

1. I am an attorney of record for Gem State in the above-captioned case, and as such am informed regarding the costs, disbursements, and attorneys' fees set forth herein. To the best of my knowledge and belief, the items of costs, disbursements and attorneys' fees set forth above are correct, have been necessarily incurred in connection with Defendant's various discovery abuses in this case, and are in compliance with Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2).

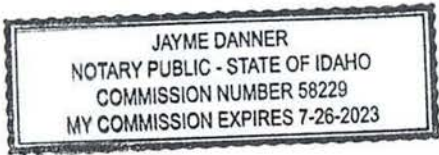


Ryan T. McFarland

STATE OF IDAHO)
) ss.
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 24th day of September 2019, personally appeared before me Ryan T. McFarland who, being by me first duly sworn, declared that he is an attorney for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document as the attorney for Gem State Roofing, Incorporated, and that the statements therein contained are true.

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



Jayme Danner
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2019, I caused to be served a true copy of the foregoing MEMORANDUM OF COSTS AND ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland
Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
)
Plaintiff,)
)
vs.)
)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
)
Defendants.)

Case No. CV01-18-13437

AFFIDAVIT OF RYAN T.
MCFARLAND IN SUPPORT OF
MEMORANDUM OF COSTS AND
ATTORNEYS' FEES

I, Ryan T. McFarland declare as follows:

1. I am licensed to practice law in Idaho and before this Court.
2. I am legal counsel for Gem State Roofing, Incorporated ("Gem State") in the above-captioned action.
3. I have personal knowledge of the costs, expenses and attorneys' fees reasonably and necessarily incurred by Gem State in this matter as set forth in Exhibit A attached to this

Affidavit and, if called upon, could and would testify competently and truthfully to the facts and matters set forth herein.

4. My representation of Gem State in this matter is ongoing. Gem State has incurred attorneys' fees in this matter up to and including September 20, 2019, and will continue to accrue them in the future.

5. Attached as **Exhibit A** is a true and correct copy of a statement for professional services rendered by me from August 31, 2018, through July 11, 2019, and for which Gem State seeks an award in the amount of \$32,246.13 in attorneys' fees reasonably and necessarily incurred.

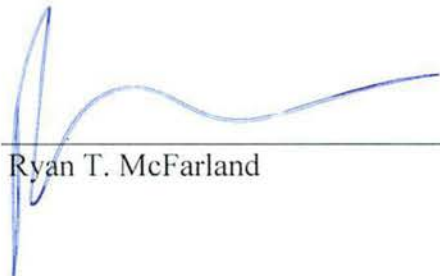
6. The amounts listed for Section C – based on Defendant's failure to admit basic, undisputed facts, represent 10% of the amount billed on such entries.

7. As reflected in the attached Exhibit, my services were billed to Gem State at a rate of \$300.00 per hour.

8. I am aware of billing rates that other firms charge clients in representations involving commercial litigation matters in the Ada County market. Based on my experience and knowledge, and in my opinion, the hourly rate is reasonable and well within the range of hourly rates for similarly situated attorneys in the Ada County market with comparable skills, expertise and reputation.

9. Based upon my experience and knowledge, and in my opinion, the total sum of **\$36,347.16** in attorneys' fees and costs, reflecting aggregate fees and costs incurred as a result of Defendant's violation of its discovery obligations and recoverable under Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2). In my experience, and in my opinion, the sums

reflected above are reasonable given the experience, skills and reputation of the timekeepers involved, and the nature of the legal, procedural and factual issues pertinent to this case.

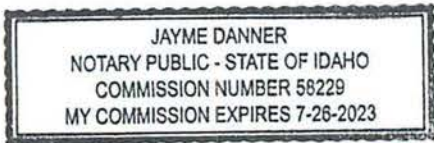


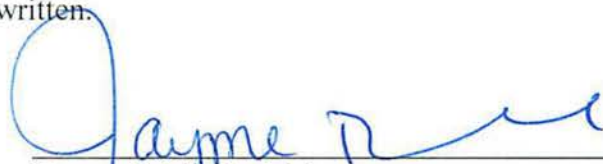
Ryan T. McFarland

STATE OF IDAHO)
) ss.
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 23rd day of September, 2019, personally appeared before me Ryan T. McFarland who, being by me first duly sworn, declared that he is an attorney for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document as the attorney for Gem State Roofing, Incorporated, and that the statements therein contained are true.

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





Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

EXHIBIT A



McFARLAND RITTER

STATEMENT

To Gem State Roofing, Incorporated
 Attn: Richard G. Silvia
 PO Box 3916
 Hailey, Idaho 83333
 gemroof1@centurylink.net

Date: 9/24/2019
 Statement # 072-101
 From Ryan McFarland
 PO Box 1335
 Meridian, ID 83680
 Fax: 895-1270
 Phone: 895-1291

Date	Attorney/Paralegal	Hours	Amount	Description of Legal Services
SECTION A				
10/12/18	Lori	1.0	\$225.00	Prepare meet & confer letter.
10/17/18	Ryan	0.2	\$120.00	Revise Meet and Confer letter and discovery requests, and email to L. Hickman re same.
10/24/18	Ryan	0.8	\$240.00	Meet and Confer phone call with counsel for Defendants.
10/24/18	Lori	0.8	\$180.00	Meet and confer with Ryan and Defendants counsel.
11/13/18	Ryan	1.0	\$300.00	Prepare third-party subpoena duces tecum and email with L. Hickman re same.
11/20/18	Lori	1.0	\$225.00	Prepare Subpoenas.
11/21/18	Jayme	0.8	\$80.00	Proof read and edit Subpoenas.
11/21/18	Ryan	0.5	\$150.00	Revise Subpoenas to third parties; review additional documents produced by defendants.
11/26/18	Lori	0.5	\$112.50	Review subpoena documents.
11/27/18	Lori	1.5	\$337.50	Draft additional subpoenas.
11/27/18	Ryan	0.2	\$60.00	Revise subpoenas and prepare for issuance.
11/28/18	Jayme	1.5	\$150.00	Proof read and edit Subpoenas and Notice of Deposition.
12/03/18	Ryan	0.1	\$30.00	Call with McAlvain re subpoena.
12/05/18	Ryan	0.3	\$90.00	Calls and email with J. Isham re subpoena; call to McAlvain counsel re subpoena.
12/06/18	Ryan	0.3	\$90.00	Calls and email with subpoena recipients re document requests.
12/10/18	Ryan	0.4	\$120.00	Calls and emails with third parties re subpoenas; review documents.
12/11/18	Ryan	0.5	\$150.00	Review documents from Standard Plumbing and McAlvain and from B. Bothwell.
01/03/19	Ryan	0.4	\$120.00	Begin preparing motion to compel, and email with L. Hickman re same.
01/12/19	Lori	21.5	\$4,837.50	Research, review deposition transcripts and discovery pleadings; and draft Motion to Compel.
01/12/19	Ryan	0.8	\$240.00	Revise Motion to Compel.
01/16/19	Ryan	0.7	\$210.00	Revise Motion to Compel.
01/25/19	Ryan	2.0	\$600.00	Revise Motion to Compel.
01/26/19	Ryan	1.8	\$540.00	Revise Motion to Compel, and email with R. Silvia re same.
01/28/19	Jayme	3.0	\$300.00	Proof read, edit, and file Motion to Compel.
01/28/19	Ryan	1.8	\$540.00	Revise, finalize, and file Motion to Compel, and email with R. Silvia re same.

01/30/19	Ryan	0.1	\$30.00	Email with L. Hickman re ESI documents.
01/30/19	Lori	1.5	\$337.50	Review ESI subpoena document production.
02/12/19	Ryan	0.2	\$60.00	Call with Court Clerk re scheduling hearing on Motion for Summary Judgment and Motion to Compel, and email with R. Silvia re same.
03/05/19	Ryan	0.7	\$210.00	Review Defendant's Opposition to Motion to Compel, and draft Reply outlines.
03/11-12/19	Lori	8.5	\$1,912.50	Research and draft Reply Memorandum and Affidavit for Motion to Compel.
03/13/19	Jayne	0.8	\$80.00	Proofread Reply in Support of Motion to Compel and Affidavit in Support.
03/13/19	Ryan	1.4	\$420.00	Revise, finalize, and file Reply in Support of Motion to Compel and Affidavit in Support.
03/15/19	Ryan	1.0	\$300.00	Prepare oral argument on motion to compel.
03/18/19	Ryan	2.0	\$600.00	Prepare oral argument; prepare power point for oral argument.
03/19/19	Jayne	1.6	\$160.00	Revise PowerPoint for Motion to Compel Hearing.
03/19/19	Ryan	2.5	\$750.00	Prepare for hearing; attend hearing on summary judgment; meet with Rick and S. Silvia after hearing. NO CHARGE FOR 1.0 HOURS.
03/19/19	Lori	0.6	\$135.00	Attend Motion for Summary Judgment and Motion to Compel Hearing.
03/20/19	Jayne	0.2	\$20.00	Proofread Order on Motion to Compel.
03/20/19	Ryan	0.6	\$180.00	Draft and revise Order on Motion to Compel.
All Attorney/Paralegal Fees Section A:			\$15,242.50	

<i>Costs & Third-Party Charges</i>	<i>Amount</i>	<i>Description of Costs/Third Party Charges</i>
Tri-County Process Serving L.L.C.	\$1,325.40	Service fee for Subpoenas (12)
All Costs & Third-Party Charges Section A:	\$1,325.40	

<i>Date</i>	<i>Attorney/Paralegal</i>	<i>Hours</i>	<i>Amount</i>	<i>Description of Legal Services</i>
SECTION B				
03/25/19	Ryan	0.2	\$60.00	Conference with L. Hickman re new Motion to Compel.
03/28/19	Ryan	0.6	\$180.00	Review document production from Defendant and email to L. Hickman re Motion to Compel strategy.
03/29/19	Lori	5.25	\$1,181.25	Draft Motion for Sanctions documents.
03/29/19	Ryan	0.2	\$60.00	Review Motion for Sanctions from L. Hickman.
05/02/19	Ryan	0.3	\$90.00	Revise Motion for Sanctions.
05/23/19	Ryan	0.6	\$180.00	Revise Memorandum in Support of Motion for Sanctions.
05/24/19	Ryan	2.0	\$600.00	Revise Memorandum in Support of Motion for Sanctions.
05/24/19	Ryan	2.0	\$600.00	Review documents produced by third parties and by UCI; revise Memorandum in Support of Motion to Compel.
05/28/19	Jayne	2.5	\$250.00	Proofread Motion for Sanctions, Memorandum, and Affidavits in Support.
05/28/19	Ryan	2.0	\$600.00	Revise Memorandum in Support of Motion to Compel.
05/30/19	Ryan	0.3	\$90.00	Finalize and file Motion for Sanctions.
06/13/19	Ryan	0.7	\$210.00	Review Opposition to Motion to Sanctions, and email to L. Hickman and R. Silvia re same.
06/14-16/19	Lori	5.75	\$1,293.75	Review Motion for Sanctions; Defendant's response; Westlaw research re court inferences and draft reply.
06/17/19	Lori	1.5	\$337.50	Westlaw research re sanctions for failure to produce emails.
06/17/19	Jayne	1.2	\$120.00	Proofread Reply in Support of Motion for Sanctions and Affidavit in Support.
06/17/19	Ryan	3.0	\$900.00	Revise and finalize Reply in Support of Motion for Sanctions; research law re sanctions for not producing emails.
06/18/19	Ryan	0.7	\$210.00	Prepare for hearing on Motion for Sanctions.
06/19/19	Ryan	2.5	\$750.00	Prepare for and attend hearing on Motion for Sanctions, and meet with R. Silvia and L. Hickman to plan next steps.
06/19/19	Lori	1.25	\$226.25	Attend hearing on sanctions; meeting with client.

06/20/19	Ryan	0.6	\$180.00	Draft Stipulation to Continue Pre-Trial Conference; revise proposed order; email with counsel re Stipulation to Continue Pre-Trial Conference and proposed order; email with Court re Order on Sanctions; call to Streamline Imaging re copying hard drives and smart phones.
06/20/19	Lori	0.75	\$168.75	Draft Order for Sanctions.
06/21/19	Ryan	0.2	\$60.00	Call and email with Streamline Imaging re copying Defendant's computers and phones.
06/24/19	Ryan	0.4	\$120.00	Review Court's Protective Order; review Motion for Reconsideration filed by Defendants; call with L. Hickman re discovery and responding to Motion for Reconsideration.
06/24/19	Lori	3.5	\$787.50	Review Order for Sanctions and Scheduling Order; telephone conference with Ryan; review Motion for Reconsideration; research legal basis; email client re same; draft outline for response.
06/25/19	Ryan	3.4	\$1,020.00	Review Motion for Reconsideration; call with R. Silvia re Motion for Reconsideration; call with Streamline Imaging re imaging emails; email with T. Pickens re imaging emails.
06/25/19	Lori	0.5	\$112.50	Review spoliation of evidence issue.
06/27/19	Ryan	0.1	\$30.00	Email with Shane at Streamline re imaging email boxes.
06/28/19	Ryan	0.3	\$90.00	Email with Streamline Imaging and T. Pickens re email account scan.
06/28/19	Lori	3.25	\$731.25	Draft Response to Motion to Reconsider; Westlaw research re same.
07/01/19	Ryan	0.1	\$30.00	Email with Streamline Imaging re copying email accounts.
07/01/19	Lori	2.0	\$450.00	Finish draft Opposition to Motion for Reconsideration.
7/1-2/19	Lori	7.0	\$1,575.00	Research procedure/rules for third party foreign subpoenas; draft foreign subpoenas.
07/02/19	Ryan	1.7	\$510.00	Revise, finalize, and file Opposition to Motion to Reconsider and Affidavit in Support; email with T. Pickens re Affidavit; email with R. Silvia re opposition.
07/03/19	Ryan	0.6	\$180.00	Work on Subpoenas to Google, AOL, Verizon.
07/08/19	Ryan	3.2	\$960.00	Draft, revise, and file Opposition to Motion for Protective Order, and email with R. Silvia re same.
07/09/19	Lori	0.75	\$168.75	Attend hearing on motion to reconsider.
07/09/19	Ryan	3.5	\$1,050.00	Prepare for and attend hearing on Motion for Protective Order and Motion for Sanctions, and call with R. Silvia re same.
07/10/19	Ryan	0.6	\$180.00	Review Protective Order and Order for Consideration and edit same; revise and serve subpoenas; review Offer of Judgment and email with R. Silvia re same; call with S. Sawyer re production of emails.
07/11/19	Ryan	0.5	\$150.00	Email with Defense counsel re Attorney Conference; work on Exhibit List with J. Danner and L. Hickman; review documents from Streamline Imaging; Conference with L. Hickman re documents from Streamline Imaging.
All Attorney/Paralegal Fees Section B:			\$16,492.50	

<i>Costs & Third-Party Charges</i>	<i>Amount</i>	<i>Description of Costs/Third Party Charges</i>
Streamline Imaging	\$2,438.10	Forensic collection of emails and bates number.
Ada County Clerk	\$19.50	Certified Complaint for Subpoena
Santa Clara County Clerk	\$30.00	Google Subpoena
Loudoun County Clerk	\$46.00	Oath Subpoena
Tri-County Process Serving	\$135.00	Google Subpoena
All Costs & Third-Party Charges Section B:	\$2,668.60	

<i>Date</i>	<i>Attorney/Paralegal</i>	<i>Hours</i>	<i>Amount</i>	<i>Description of Legal Services</i>
SECTION C				
12/12/18	Ryan	0.02	\$6.00	Prepare depositions of M. Flynn and J. Flynn.
12/14/18	Ryan	0.26	\$78.00	Prepare depositions of J. Flynn and M. Flynn.

12/15/18	Ryan	0.1	\$30.00	Prepare depositions of J. Flynn and M. Flynn.
12/17/18	Jayme	0.36	\$36.00	Prepare deposition documents for J. Flynn and M. Flynn depositions.
12/17/18	Ryan	0.01	\$3.00	Prepare depositions of M. Flynn and J. Flynn.
12/18/18	Ryan	0.04	\$12.00	Prepare depositions of M. Flynn and J. Flynn.
12/19/18	Ryan	0.15	\$45.00	Prepare for depositions of M. Flynn and J. Flynn.
12/20/18	Ryan	0.58	\$174.00	Prepare for and take deposition of J. Flynn; prepare for deposition of M. Flynn.
12/20/18	Lori	0.5	\$56.25	Attend J. Flynn Deposition. 50% HOURLY RATE REDUCTION
12/21/18	Ryan	0.18	\$54.00	Take deposition of M. Flynn.
12/21/18	Lori	0.15	\$16.88	Attend M. Flynn deposition. 50% HOURLY RATE REDUCTION
All Attorney/Paralegal Fees Section C:			\$511.13	

<i>Costs & Third-Party Charges</i>	<i>Amount</i>	<i>Description of Costs/Third Party Charges</i>
M&M Court Reporting Service	\$107.03	Deposition of Jeffrey Flynn and Michelle Flynn
All Costs & Third-Party Charges Section C:	\$107.03	

Total Attorney/Paralegal Fees Section A:	\$15,242.50
Total Costs & Third-Party Charges Section A:	\$1,325.40
Total Attorney/Paralegal Fees Section B:	\$16,492.50
Total Costs & Third-Party Charges Section B:	\$2,668.60
Total Attorney/Paralegal Fees Section C:	\$511.13
Total Costs & Third-Party Charges Section C:	\$107.03
Total Due from All Sections:	\$36,347.16

PAYMENT DUE IN U.S. DOLLARS WITHIN THIRTY (30) DAYS OF DATE OF INVOICE

Current charges only. Unpaid balances not included.

Disbursements not yet recorded will be included in future invoices.

After 30 days, a monthly interest charge of 1% per month from the invoice date (or such lower rate as required by applicable law) will be due. Should a collection action or proceeding be necessary, attorney's fees and costs for such collection effort will also be due.

Make all checks payable to McFarland Ritter PLLC

Thank you for your business!

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff,))	
vs. )	)	PLAINTIFF'S OPPOSITION TO
UNITED COMPONENTS, )	)	DEFENDANT'S MOTION FOR
INCORPORATED dba GEM STATE )	)	ATTORNEYS' FEES AND COSTS
ROOFING,))	
Defendant.))	
_____))	

Plaintiff Gem State Roofing, Incorporated (“Gem State”), by and through its undersigned counsel of record, opposes Defendant’s Motion for Costs and Attorneys’ Fees and requests that this Court deny such Motion for the following reasons.

INTRODUCTION

Defendant is not entitled to costs or attorneys’ fees because it is not the prevailing party. The Court’s Judgment rested largely on the case of *Trilogy Network Systems, Inc. v. Johnson*, 172 P.3d 1119 (Idaho 2007) (herein “*Trilogy*”). The *Trilogy* trial court held, like this Court did in this case, that (i) the plaintiff prevailed on the issue of breach, (ii) the defendant prevailed on the

issue of damages, and (iii) therefore, neither side prevailed. *Id.* at 1122. The Idaho Supreme Court affirmed. *Id.* Defendant has failed to show why this Court's reliance on *Trilogy* in making its prevailing party determination was misplaced – in fact, Defendant did not cite to *Trilogy* at all. Had Defendant reviewed *Trilogy*, Defendant might have realized that the Court's decision to find that there was no prevailing party was a proper exercise of its discretion, and supported by the Idaho Supreme Court.¹ This Court should deny Defendant's Motion for Attorneys' Fees and Costs.

ARGUMENT

A. This Court Properly Exercised its Discretion in Determining that Neither Party Prevailed.

In entering its Judgment in this case, this Court relied heavily on *Trilogy*. In that case, the plaintiff Trilogy, the former employer of Defendant Johnson, discovered that Defendant Johnson was violating a non-compete agreement. *Trilogy*, 172 P.3d at 1121. Trilogy filed suit against Johnson, claiming breach of contract and seeking damages. *Id.*

After a court trial, the district court found that Johnson had breached the agreement with Trilogy. However, the district court also found that Trilogy had failed to prove its damages with reasonable certainty. It then entered judgment in favor of Trilogy, but did not award Trilogy damages or attorney fees.

Trilogy, 172 P.3d at 1121.

On appeal by Trilogy, the Idaho Supreme Court held as follows:

The determination of who is the prevailing party is within the trial court's sound discretion, I.R.C.P. 54(d)(1)(B), and this Court will not disturb that decision unless there is an abuse of discretion.

¹ To be clear, Gem State believes that the Court's conclusion regarding damages in the instant case is inconsistent with *Saint Alphonsus Diversified Care, Inc. V. MRI Associates, LLP*, 334 P.3d 780 (Idaho 2014) (herein, "*St. Als*"), as will be argued on appeal; however, neither *St. Als* nor any other Idaho Supreme Court case has abrogated the Court's right to determine, in the proper exercise of its discretion, that (i) there was a contract breach, (ii) there were no damages, and (iii) therefore, there is no prevailing party.

When examining whether a trial court abused its discretion, this Court considers:

(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Here, the district court correctly perceived the issue as one of discretion (it cited to I.R.C.P. 54(d)(1)(B)). It also acted consistently with the legal standards. Rule 54 directs courts to consider who the prevailing party is in relation to the relief sought by each party. Here, Trilogy sought as damages the profits Johnson obtained, and Johnson sought to have his breach excused because of a unilateral mistake. The court noted this and considered the relief sought when determining whether to award attorney fees. Finally, it reached its decision through the exercise of reason. Therefore, we affirm the decision to have each party bear its own costs and fees.

Trilogy, 172 P.3d at 1122–23.

In the instant case, the District Court followed the *Trilogy* pattern: the Court found that Defendant breached, but also found that Gem State failed to show damages, and therefore that neither party prevailed and neither party is entitled to attorneys' fees. Defendant has not so much as cited to *Trilogy*, let alone distinguished it, and has shown no basis for concluding that the Court abused its discretion. As a result:

- Defendant is not entitled to costs. Idaho Rule of Civil Procedure 54(d)(1)(A) makes clear that “costs are allowed as a matter of right **to the prevailing party** . . .” (emphasis added). Because Defendant is not the prevailing party, it is not entitled to costs.
- Defendant is not entitled to attorney's fees. Idaho Rule of Civil Procedure 54(e)(1) makes clear that “the court may award reasonable attorney fees, including paralegal fees, **to the prevailing party** . . .” (emphasis added). Furthermore, this Court was explicit in the

Judgment: “Neither party is entitled to attorney fees” Because Defendant is not the prevailing party, it is not entitled to attorney fees.

B. None of the Cases Cited by Plaintiff Find that the Court Abused its Discretion in Finding No Prevailing Party.

The cases cited by Defendant do not require the Court to reverse its no-prevailing-party conclusion:

- *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 117 P.3d 130 (Idaho 2005) was decided *prior to Trilogy*, so that case certainly does not reverse *Trilogy*, on which the decision in this case was based. As *Eighteen Mile Ranch* makes clear, this Court has discretion to answer the prevailing party question by “examin[ing] and determin[ing] from an overall view, not a claim-by-claim analysis.” *Id.*, at 133.
- *Holmes v. Holmes*, 874 P.2d 595 (Idaho 1994) also predates, and so does not overrule, *Trilogy*. Moreover, in *Holmes* the Plaintiff prevailed in all of her claims (although the court did not agree on all of her arguments). *Id.* at 597. In such a case, she should have been deemed the prevailing party. *Id.* at 598. In this instant case, Defendant did not prevail on all of its claims: critically, it lost the claim that it did not breach the Settlement Agreement at issue.
- *Zenner v. Holcomb*, 210 P.3d 552 (Idaho 2009) holds that “Although offers of judgment may be considered, we have cautioned that they should not be the only, or even most significant, factor in the trial court’s prevailing party analysis.” *Id.* at 557. Thus, the offer of judgment in this case need not – indeed, should not – affect the Court’s no-prevailing-party analysis.
- In *Shore v. Peterson*, 204 P.3d 1114 (Idaho 2009), the Idaho Supreme Court held that “When both parties are partially successful, however, it is within the court’s discretion to

decline an award of attorney fees to either side.” *Id.*, at 1125. *See also Crump v. Bromley*, 219 P.3d 1188, 1190 (Idaho 2009) (“when both parties are partially successful, it is within the court’s discretion to decline an award of attorney fees to either side”).

Moreover, “Only in rare cases has this Court of the Court of Appeals reversed a trial court’s determination of which party prevailed.” *Shore*, 204 P.3d at 1124.

None of these cases overrule or are in any way contrary to *Trilogy*, and nothing in them require this Court to change its “no-prevailing-party” conclusion.

C. Defendant is Not Entitled to Recover Attorneys’ Fees for Opposing Gem State’s Discovery Motions.

Without waiving the foregoing arguments, should the Court be inclined to award attorneys’ fees in favor of Defendant, an entire category of fees and costs should be disallowed because they were incurred in opposing Gem State’s Motion to Compel and Motion for Sanctions. As is clear from the record, and as more fully set forth in Gem State’s own Motion for Attorneys’ Fees, Gem State won both its Motion to Compel and Motion for Sanctions. Regardless of the Court’s decision on Defendant’s Motion for Costs and Attorneys’ Fees, Defendant should not be awarded attorneys’ fees that derive from Defendant’s own discovery abuses. Those fees include the following:

Date	Attorney	Notes	Quantity	Rate	Total
1/29/2019	SNP	T	Create chart and timeline of Secretary of State filings and Trademark Filings to incorporate into motion for summary judgment. Compile additional documents to submit via discovery.	1.2	\$240.00
2/11/2019	SNP	T	Read through Motion to Compel, Memorandum, two declarations. Begin drafting response. Review meet and confer letters to determine if information sought was properly requested prior to filing motion.	1	\$200.00
2/12/2019	TRP	T	Review Plaintiff’s Amended Notice of Hearing re Motion to Compel and our Notice of Hearing for Motions for Summary Judgment.	0.2	\$54.00

2/14/2019	SNP	T	Email client regarding document production for Motion to Compel. Continue working on opposition to Motion to Compel. Review rules for 'meet and confer' requirements.	0.8	\$160.00
2/19/2019	SNP	T	Finalize Opposition to Motion to Compel. Begin work on opposition to Motion for Partial Summary Judgment.	1	\$200.00
3/04/2019	SNP	T	Finalize Motion for Summary Judgment and Response to Motion to Compel. Finalize discovery responses and prepare for serving on counsel. Review opposition to our MSJ, begin drafting Reply in Further Support of MSJ. Review and research MSJ standards regarding declarations, affidavits, statements to support contentions of client.	4	\$800.00
3/15/2019	TRP	T	Review Reply in Further Support of Motion to Compel.	0.3	\$81.00
3/19/2019	TRP	T	Plan and prepare for hearings on motion to compel and motions for summary judgment; Attend hearings.	2	\$540.00
3/20/2019	TRP	T	Review Proposed Order Granting P's Motion to Compel; Work with LL to get supplemental responses for service.	0.1	\$27.00
3/25/2019	TRP	T	Review signed Order Granting Motion to Compel; Email from client regarding the same.	0.2	\$54.00
4/02/2019	TRP	T	Emails with clerk and counsel McFarland regarding error in Gem State Roofing v. UCI regarding incorrect date no discovery order.	0.3	\$81.00
4/02/2019	SNP	T	Emails between counsel and court clerk regarding motion to compel order.	0.3	\$60.00
4/03/2019	TRP	T	Emails with clerk and counsel regarding actual deadline for filing discovery responses.	0.2	\$54.00
5/31/2019	TRP	T	Analyze and review Motion for Sanctions and Declarations of Ryan McFarland and Rick Silva in support; Begin drafting Objection to Motion for Sanctions and Declaration of Terri Pickens Manweiler in response.	0.6	\$162.00
6/05/2019	SNP	T	Review Motion for Sanctions, Affidavit of Rick, Affidavit of Ryan. Begin drafting objection and declaration of TPM. Review documents attached to McFarland Affidavit with documents produced in discovery. Research jobs in Blaine County per Building Permit registration, note no jobs for UCI, note jobs	0.9	\$180.00

6/05/2019			done by Gem State.		
6/11/2019	TRP	T	Review and finalize objection to motion for sanctions and Declaration of TPM.	0.3	\$81.00
6/17/2019	TRP	T	Emails with client regarding emails for document production; Review McFarland's corrected affidavit and reply in support of sanctions.	0.5	\$135.00
6/19/2019	SNP	T	Review McFarland Reply in Further Support of Sanctions and Amended Declaration. Brief review of argument in Defendants Brief in Opposition to Sanctions. Attend hearing on Motion for Sanctions.	2	\$400.00
6/20/2019	TRP	T	Draft Proposed Order Granting Plaintiff's Motion for Sanctions.	0.2	\$54.00
6/20/2019	SNP	T	Review Plaintiff's Proposed Order on Sanctions, edit, give to TPM. Submit TPM redlined version to court and counsel via iCourts and email. Compile notes from hearing and email TPM status of case. Review email from counsel with proposed order to court and argument in support. Emails from counsel requesting electronic information. Email from counsel regarding stipulation to vacate pre trial status conference, discuss with TPM, submit approval to counsel to file.	1.4	\$280.00
6/21/2019	SNP	T	Emails regarding proposed order for sanctions and request for account info.	0.2	\$40.00
6/24/2019	SNP	T	Review Order for Sanctions, draft Motion for Reconsideration, Memo in Support of Motion for Reconsideration, Declaration of Kerrie, Declaration of Terri, Notice of Hearing. File with court and serve on counsel.	2.5	\$500.00
6/24/2019	TRP	T	Analyze and review Order on sanctions; Telephone conference with Bar Counsel regarding the same; Revise and finalize Motion for Reconsideration and Motion for Protective Order.	0.5	\$135.00
6/27/2019	SNP	T	Meet with Kerrie and Jeff, email Kerrie with trial info. Review emails to and from Digital Analyst.	0	\$0.00
6/27/2019	TRP	T	Meet with clients to go over Order Granting Motion for Sanctions; Emails with McFarland and computer analyst to schedule email and site review.	1.1	\$297.00

06/28/2019	TPM	Emails with counsel and client regarding email and device review.	0.20	\$270.00	\$54.00
07/01/2019	TPM	Emails with computer analyst and client regarding email searches.	0.30	\$270.00	\$81.00
07/02/2019	TPM	Emails with client and third party computer analyst regarding status of access to email accounts; Review Objection to Motion for Protective Order and Affidavit of Ryan McFarland; Email to McFarland regarding lies in Affidavit and demand to clarify record; Response from McFarland refusing to clarify record.	0.60	\$270.00	\$162.00
07/03/2019	TPM	Emails with client and third party computer analyst regarding status of email download; Analyze and revise Notice Letter of Subpoenas to Google, AOL, and Verizon; Review Motion for Protective Order, Motion for Order Shortening Time, Proposed Order Shortening Time, Revise Memorandum in Support of Motion for Protective Order and Declaration of TPM in support; File all documents in iCourts.	1.00	\$270.00	\$270.00
07/03/2019	SNP	Review letter and subpoenas from opposing counsel, draft Motion for Protective Order, Memorandum, Declaration, Motion for Order Shortening Time and proposed order, redact emails, give to TPM for review.	1.80	\$200.00	\$360.00
07/08/2019	TPM	Review Order Shortening Time; Emails with client regarding the same.	0.30	\$270.00	\$81.00
07/08/2019	SNP	Review order shortening time, review opposition to Motion for Protective Order.	0.50	\$200.00	\$100.00
07/09/2019	TPM	Emails with client regarding motion hearing; Attend hearing on motions for protective order and reconsideration.	1.50	\$270.00	\$405.00
07/09/2019	TPM	Review Privilege Log of documents extracted from email collection from Streamline.	0.30	\$270.00	\$81.00
07/10/2019	TPM	Draft and revise Proposed Protective Order and Proposed Order on Reconsideration; Email drafts to counsel; File with court; Email Privilege Lot to court; Review final Subpoenas for Google and AOL.	0.70	\$270.00	\$189.00
07/15/2019	TPM	Review Orders and signed Subpoenas to AOL and Google.	0.20	\$270.00	\$54.00

The total fees that should be disallowed, as having been incurred on discovery battles that Defendant lost, is: \$6,652.00.

D. Under Rule 68, Defendant is Entitled to, at Most, Nominal Costs; Defendant is Not Entitled to Attorneys' Fees.

On July 10, 2019, Defendant made an offer of judgment. Gem State rejected the offer.

The ultimate award given to Gem State was less than Defendant's offer. According to Idaho Rule

of Civil Procedure 68(d)(1)(B)(i), Gem State “must pay those costs of the [Defendant] as allowed under Rule 54(d)(1), incurred after the making of the offer.” The only costs incurred and claimed by Defendant (see page 2 of Defendant’s Memorandum of Costs and Attorneys’ Fees, “Costs as a Matter of Right”) after July 10, 2019 are as follows:

- Service of Process: Tracy Felix – Trial Subpoena - \$58.00; and
- Trial Witness Fee: Tracy Felix - \$22.25.

All other costs set forth in Defendant’s Memorandum of Costs and Attorneys’ Fees, “Costs as a Matter of Right” were incurred prior to July 10, 2019.

Rule 68 does not give rise to a right to attorneys’ fees. The rule clearly applies only to “costs . . . as allowed under Rule 54(d)(1).” Attorneys’ fees are covered under Rule 54(e). And, as set forth above, this Court has determined that no attorneys’ fees are to be awarded in this case because there is no prevailing party.

CONCLUSION

For the reasons stated above, Gem State requests that this Court deny Defendant’s Motion for Costs and Attorneys’ Fees.

DATED THIS 24th day of September 2019.

By /s/Ryan T McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2019, I caused to be served a true copy of the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.

Terri Pickens Manweiler

Shannon Pearson

398 S. 9th Street, Suite 240

Boise, ID 83701

terri@pickenslawboise.com

shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland

Ryan T. McFarland

Terri Pickens Manweiler, ISB No. 5828
PICKENS LAW, P.A.
 398 S. 9th Street, Suite 240
 P.O. Box 915
 Boise, Idaho 83701
 Telephone: 208.954.5090
 Facsimile: 208.954.5099
terri@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
 INCORPORATED,
 Plaintiff,

v.

UNITED COMPONENTS,
 INCORPORATED, dba GEM STATE
 ROOFING,
 Defendant.

Case No. CV01-18-13437

**AFFIDAVIT OF TERRI PICKENS
 MANWEILER RE: DEFENDANT’S
 OBJECTION TO PLAINTIFF’S
 MOTION FOR ATTORNEYS’ FEES
 AND COSTS**

STATE OF IDAHO)
) ss.
 COUNTY OF ADA)

TERRI PICKENS MANWEILER, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record and represent Defendant United Components Incorporated (“UCI”) in the above-entitled matter.
2. I make this Affidavit based upon my own personal knowledge and I am competent to testify to the same.
3. This Affidavit is being filed in opposition to Gem State’s motion for costs and attorneys’ fees pursuant to I.R.C.P. 37.

4. I have had an opportunity to review Ryan T. McFarland's Affidavit, as well as the Exhibit A itemizing attorneys' fees for two motions totaling \$32,243.13.

5. The attorney fees listed in Exhibit A to the McFarland Affidavit are not in compliance with I.R.C.P. 54(e)(3).

6. Furthermore, the attorney fees allegedly incurred by Gem State were not reasonable, not necessary, and not commensurate with fees charged by other attorneys in this area for litigation of this type.

7. By way of example, the undersigned, an attorney with 21 years of experience in litigation, with associates, charged \$35,584.00 to UCI for the entire litigation, whereas McFarland, his associate Lori Hickman, and presumably a paralegal, Jayme, charged \$32,246.13 for two motions and discovery practice.

8. In addition, much of the charges seek duplicative entries, i.e. "Prepare Subpoenas" for 1 hour by Hickman and then "Proof read and edit Subpoenas" for 0.8 hour by Jayme.

9. Likewise, McFarland had five time entries for drafting, revising, editing, and finalizing his motion to compel for a total of 7 hours.

10. Meanwhile, all on January 12, 2019, a Saturday, Hickman allegedly spent 21.5 of the 24 hours that day doing "Research, review deposition transcripts and discovery pleadings; and draft Motion to Compel." This amount of time is absolutely not reasonable, and frankly not credible. If my associate spent one-fifth that amount of time on a motion to compel, I would find that unreasonable and decline to bill my client accordingly.

11. Furthermore, Hickman apparently spent 7 hours on July 1 and 2, 2019, "Research procedures/rules for third party foreign subpoenas; draft foreign subpoenas." Only two foreign subpoenas were prepared, Google and AOL. It is hardly credible that it took 7 hours over a two

day period to figure out how to serve them, or further still, that this could or should be charged to the client, Gem State.

12. Various other time entries mirror these charges pointed out to the Court, and many more still are duplicative between attorneys and should not be considered reasonable or necessary.

13. Unlike McFarland's Affidavit, the undersigned has taken into consideration the following factors pursuant to I.R.C.P. 54(e)(3): 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; and K) the reasonable costs of automatic legal research.

14. With regard to I.R.C.P. 54(e)(3)(A): McFarland, Hickman and their paralegal allegedly dedicated 133 hours to the two discovery motions. This litigation spanned over 13 months, and in that entire time, including every single time entry, the undersigned and our associate only spent 157 hours total for the entire litigation. It is out of proportion with McFarland's 133 hours for 2 discovery motions, clearly rendering that time unreasonable, especially considering the unfavorable outcome for Gem State in this matter.

15. With regard to I.R.C.P. 54(e)(3)(B): The novelty and difficulty of the questions involved in this litigation were facially relatively simple, the only issues in Gem State's motion were based on discovery practice and not the underlying issues in the lawsuit. Additionally, Gem State and its counsel contributed to the unusual discovery practice requiring the facilitation of

external hard drive and email searches, something that turned out to be completely unnecessary and rendered no additional information for Gem State.

16. With regard to I.R.C.P. 54(e)(3)(C) and (D): The undersigned is not challenging the hourly rates of McFarland, Hickman or Jayme, yet the amount of time taken to complete tasks draws into question their experience and abilities.

17. With regard to I.R.C.P. 54(e)(3)(E): As far as the undersigned knows, Gem State's fees in this matter were not contingent and therefore not relevant as a determining factor in the above-entitled case.

18. With regard to I.R.C.P. 54(e)(F): There were no unusual time constraints or circumstances imposed by UCI, to the contrary, the Plaintiff actually drove up the time and costs by engaging in a fishing expedition with 12 subpoenas and a request for unfettered access to UCI's Electronic Devices, none of which resulted in information not already obtained through normal discovery channels, accordingly, the amount of time actually spent by McFarland, Hickman and Jayme is unreasonable and not commensurate with the ultimate outcome of the case.

19. With regard to I.R.C.P. 54(e)(3)(G): The amount of time and money involved in the discovery practice in this matter was not justified by the result obtained by Gem State. UCI, from the beginning of this case, has claimed Gem State did not have a valid cause of action against UCI and that it could not establish damages. UCI further maintained that it was fully and faithfully complying with discovery requests, and their business practices were not such that old electronic files were retained. Nevertheless, Gem State pressed on and engaged in unreasonable discovery practices that resulted in tens of thousands of dollars in charges to Gem State.

20. With regard to I.R.C.P. 54(e)(3)(H), (I), and (J): Factors relating to the undesirability of the case, nature and length of professional relationship between counsel and client, and awards in similar cases, do not necessarily apply to this case.

21. With regard to I.R.C.P. 54(e)(3)(K): Automatic legal research was reported in McFarland's Exhibit A, but it is not clear if actual charges were incurred for the research through Westlaw. In any event, all licensed attorneys in Idaho are able to access all relevant legal research through Case-Maker, a legal research program offered to licensed attorneys in the state of Idaho, free of charge.

22. Gem State is not entitled to attorney fees sought pursuant to I.R.C.P. 37 because it was not the prevailing party in whole through the discovery process and Gem State was not the ultimate prevailing party in the case.

23. Considering all the above factors, the attorney fees totaling \$32,246.13 and costs in the amount of \$4,101.03 are wholly unreasonable and not commensurate with the standards in this legal community.

DATED: September 26, 2019.

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

SUBSCRIBED AND SWORN to before me on September 26, 2019.



/s/ Nicole Pickens
Notary Public for the State of Idaho
Residence: Boise, Idaho
Commission Expires: 12/15/2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2019, a true and correct copy of the foregoing document was served as follows:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler _____
Terri Pickens Manweiler

Terri Pickens Manweiler, ISB No. 5828

PICKENS LAW, P.A.

398 S. 9th Street, Suite 240

P.O. Box 915

Boise, Idaho 83701

Telephone: 208.954.5090

Facsimile: 208.954.5099

terri@pickenslaw.boise.com

Attorneys for Defendant

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

GEM STATE ROOFING, INCORPORATED

Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED dba GEM STATE
ROOFING

Defendant.

Case No. CV01-18-13437

**DEFENDANT'S REPLY IN
FURTHER SUPPORT OF MOTION
FOR COSTS AND ATTORNEYS'
FEES**

Defendant, United Components, Incorporated dba Gem State Roofing ("UCI"), by and through its attorney of record, Terri Pickens Manweiler of Pickens Law, P.A., hereby submits the foregoing Reply in Further Support of UCI's Motion for Costs and Attorneys' Fees.

INTRODUCTION

UCI is entitled to an award of costs attorneys' fees in this case because UCI was the clear prevailing party in the litigation. After this Court's reconsideration of all the factors and legal argument pertinent to the prevailing party analysis, UCI should be deemed the prevailing party, if not in whole at the very least in part. Alternatively, UCI would be entitled to attorney fees under Idaho Rule of Civil Procedure 68 because it submitted an Offer of Judgment to Plaintiff Gem State

Roofing, Inc. (“Gem State”) that was more favorable to them than the judgment ultimately rendered by this Court.

ARGUMENT

A. Plaintiff Failed to Show That Defendant is Not the Prevailing Party

Gem State, in its objection to UCI’s motion for costs and attorneys’ fees, failed to direct this Court to any precedent or facts that would support a finding that UCI was not the prevailing party. To the contrary, even the case law relied upon by Gem State supports a finding that UCI was, in fact, the prevailing party in this case.

1. The Single Case Cited by Plaintiff Does Not Support its Prevailing Party Argument

Despite Gem State’s confidence arguing that UCI is not the prevailing party, that confidence is misplaced. Gem State directs this Court to *Trilogy Network Systems, Inc v. Johnson* 144 Idaho 844, 172 P.3d 1119 (2007) as the seminal case on point. However, the applicability of *Trilogy* only extends to the breach of contract claim in this case, Gem State conveniently fails to address the fact that it lost outright on the other two causes of action against UCI (injunctive relief and trademark infringement).

This Court addressed *Trilogy* in its Findings of Facts & Conclusions of Law, concluding Gem State “failed to offer into evidence any proof” to substantiate damages. (*Findings of Fact & Conclusions of Law*, pg. 12). This Court then went on to find neither Gem State nor UCI were entitled to attorneys’ fees, presumably based upon the decision in *Trilogy*. Gem State relies solely on this finding to refute UCI’s argument that it is the prevailing party. Because Gem State failed to address the other two causes of action, its reliance on *Trilogy* makes sense, but it is misplaced. UCI asks this Court to reconsider its finding that UCI was not entitled to attorneys’ fees because

the overall applicability of *Trilogy* is limited to the breach of the contract (the Trademark Settlement Agreement) cause of action, not the remaining counts.

Applying the rationale in *Trilogy* to the case at hand, it can only be applied to the first cause of action, breach of contract. *Trilogy* simplifies the claim for contract breach into two factors: 1) breach and 2) damages. In the present case, like in *Trilogy*, each party prevailed on one but not the other factor. In order to succeed on a breach of contract claim the claiming party must have been damaged and prove the amount of those damages. 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. *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013); citing *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991). Like the plaintiff in *Trilogy*, Gem State failed to establish damages, thus Gem State did not prevail on that cause of action. Because there was only one cause of action in *Trilogy* the Supreme Court concluded that the trial court did not abuse its discretion by finding there was no prevailing party on that cause of action. In this case, the logic of *Trilogy* is inapplicable because breach of contract was only one of the three causes of action brought by Gem State, whereas in *Trilogy* that was the only count.

UCI submits that *Advanced Med. Diagnostics, LLC v. Imaging Ctr. of Idaho, LLC* 154 Idaho 812, 303 P.3d 171 (2013) is more on point. In *Advanced Med*, the plaintiff brought an action for breach of contract and unjust enrichment. The plaintiff prevailed on the establishing a contract and breach, but the trial court determined it was not entitled to recover damages on the claim. The trial court further dismissed its additional claim for unjust enrichment. Initially, the trial court determined there was no prevailing party, but the defendant filed a memorandum seeking costs and attorney fees in any event. After hearing argument on the motion, the trial court entered an

order finding that the defendant was the prevailing party in the litigation, awarding it \$6,970.67 in costs and \$125,942.50 in attorney fees. The trial court held “the Defendants prevailed on the primary issue in this litigation: Whether Defendant was liable to Plaintiff for damages for breach of the parties’ agreement.” *Id.* 174

Advanced Med strongly parallels the facts in this case, much more so than *Trilogy*. Both Gem State and *Advanced Med* were unable to recover damages for breach of contract, but also additional causes of action that were not successful. Consequently, UCI and the defendant in *Advanced Med* filed motions for attorneys’ fees, with Gem State and *Advanced Med* objecting. In both cases the original judgment stated there was no prevailing party. In both cases the primary issue was a finding of liability. In both cases defendants were not liable. Ultimately, *Advanced Med* was subsequently found to be the prevailing party. Likewise, this Court should make the same conclusion with regarding to UCI and determine that it, too, is the prevailing party.

For these reasons, UCI contends that *Trilogy* is inapplicable to its motion for attorneys’ fees and costs, and *Advanced Med* is much closer to the facts and circumstances in this case. UCI not only prevailed on the damages portion of the breach of contract count, UCI successfully defended both remaining causes of action for injunctive relief and trademark infringement. Consequently, UCI should ultimately be the prevailing party.

2. The Court Needs to Look at the Case as a Whole, Not the Elements of One Claim in the Prevailing Party Analysis.

Gem State inadequately addressed the relevant case law cited by UCI in support of its motion for costs and attorneys’ fees. Gem State blanketly disregards pertinent case law cited in support of UCI being the proper prevailing party.

For example, Gem State disregards the applicability of *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005), by suggesting that *Trilogy* is

more applicable. Nevertheless, Gem State correctly recognizes the general rule in *Eighteen Mile* that a court should not be assessing cases on a claim by claim basis, but rather looking at the case in whole in the prevailing party analysis. *Id.*, 141 Idaho at 719, 117 P.3d at 133; *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009). This Court should look to *Eight Mile* because the Supreme Court held that the prevailing party analysis must recognize whether a party successfully defended against the entire case, emphasizing that a defendant's non-liability was evidence that it was a factor in determining the overall prevailing party. *Id.*

This Court held that UCI failed to defend against two of the four elements of Gem State's breach of contract claim. Nevertheless, UCI successfully defended the cause of action for breach because Gem State was unable to establish the remaining two elements, that it suffered damages and the amount of those damages. In addition, UCI successfully defended against the other two causes of action, injunctive relief and trademark infringement, brought by Gem State. Consequently, UCI successfully defended against all causes of action in the lawsuit, not just one portion of one count. When looking at the case as a whole, and taking UCI's ultimate non-liability into consideration, it is clear that the proper outcome of the analysis should result in a finding that UCI is the prevailing party.

3. Offers of Judgment Are a Factor in the Prevailing Party Analysis.

In the case *Zenner v. Holcomb*, 147 Idaho 444, 447, 210 P.3d 552, 555 (2009), the Supreme Court articulates that offers of Judgment are a factor in prevailing party analysis. Gem State incorrectly assumes that the offer of judgment "need not and should not affect the courts no-prevailing party analysis." *See Opposition to Defendant's Motion for Attorneys' Fees and Costs*, p. 4. UCI is aware that offers of judgment are only one factor in the prevailing party analysis, but the fact of the matter is, following *Zenner*, offers of judgment must be considered as a factor. *Id.*

When it determined that UCI was not entitled to an award of attorneys' fees, it did not have the benefit of knowledge regarding the Offer of Judgment. Now that this Court has that knowledge, UCI submits that this Court should reverse that initial finding and ultimately determine that UCI is, in fact, the prevailing party. According to *Zenner*, it would be improper not to consider the Offer of Judgment in determining UCI's prevailing party status. Accordingly, UCI respectfully request that this Court reconsider its finding and go through the prevailing party analysis with this additional knowledge. In doing so, this Court should ultimately determine that UCI is the prevailing party.

B. Attorney Fees Are Taxed as Costs

Gem State incorrectly asserts that UCI is not entitled to attorneys' fees because Idaho Rule of Civil Procedure 68 "does not give rise to a right to attorneys' fees." *See Opposition*, p. 9. Gem State could not be more incorrect.

Offers of judgment made under Rule 68 include all costs pursuant to Idaho Rule of Civil Procedure 54(d), including attorneys' fees under Rule 54(e) if they are taxed as costs. Idaho Code Section 12-120(3) states in part that "in any civil action to recover on a contract relating to services in any commercial transaction, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court to be taxed and collected as costs." I.C. §12-120(3). The Idaho Supreme Court recently held that when the legislature dictates that that the term costs includes attorney fees, the courts must oblige. *Nye v. Katsilometes*, No. 45917, 2019 WL 4009517, at *5 (Idaho Aug. 26, 2019). This means UCI would be entitled to attorney fees under IRCP 54(d) if the court reconsidered and finds UCI the prevailing party, including pursuant to Rule 68. If this Court ultimately determines that UCI is not a prevailing party in the lawsuit as a whole, UCI is still entitled to recover all costs, including attorneys' fees taxes as costs, pursuant to Rule 68.

C. Apportionment of Attorneys' Fees

Ultimately Gem State should be ordered to reimburse all of UCI's costs, including attorneys' fees taxed as costs, as allowed under Rule 54(d). The only remaining questions for this Court should be (1) should the fees be apportioned with UCI's apportioned success as prevailing party, and (2) when do the costs and attorneys' fees start accruing. If UCI is determined to be the prevailing party, then UCI is entitled to reimbursement of all of costs and attorneys' fees as set forth in Exhibit A to its Memorandum of Costs and Attorneys' Fees. If the Court determines that UCI only prevailed in part, this Court could apportion those attorneys' fees accordingly. Finally, if the concept of Rule 68 is the only basis for recovery, then this Court could award only those costs and attorneys' fees set forth in Exhibit B to UCI's Memorandum of Costs and Attorneys' Fees.

1. Prevailing Party Apportionment

If this Court reconsiders the prevailing party analysis and finds that UCI only prevailed in part because Gem State established a contract and breach, but not damages, UCI should still be the prevailing party as to the other two claims. Accordingly, this Court may consider the apportionment rule as follows:

The trial court may determine that a party prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). There are three principal factors to consider when determining prevailing party: "(1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues." *Nguyen v. Bui*, 146 Idaho 187, 192, 191 P.3d 1107,

1112 (Ct. App. 2008) citing *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983). These are all factors discussed and expanded upon in UCI's previously filed Motion for Costs and Attorney fees, as well as this response brief.

Considering the causes of action alleged in Gem State's Complaint, UCI's Answer denying all of the allegations, a trial before this Court, the final judgment entered, and the extent UCI prevailed on each cause of action, there should be no question that UCI is the prevailing party, if not in whole, at least in part. Gem State alleged three causes of action (1) breach of contract, (2) injunctive relief, and (3) trademark infringement, all three were successfully defended against, resulting in non-liability for UCI. Gem State sought monetary damages in excess of \$220,000 and a permanent injunction against UCI, yet it did not receive either relief in the judgment. Gem State failed to prove a single claim, though they were able to establish two elements of their breach of contract claim (existence of a contract and breach). This breach of contract claim is what seemingly swayed the court originally to state there was not prevailing party overall. Nevertheless, considering all the factors set forth in the prevailing case law and Idaho rules, this Court conclude that UCI prevailed, if not completely then at least on two of the three claims.

2. Costs and Fees Apportionment

If a trial court determines that a party has prevailed only in part, it may apportion the costs and attorney fees in a fair and equitable manner after considering all of the issues and claims involved in the action and the judgment or judgments obtained. I.R.C.P. 54(d)(1)(B); *Nguyen*, 146 Idaho at 192, 191 P.3d at 1112. While the court has discretion to award costs and fees to prevailing parties, the court has a duty to apportion to each of the parties the attorney fees related to the claims upon which each party prevailed. *Advanced Med.*, 154 Idaho at 816, 303 P.3d at 175, citing *Schroeder v. Partin*, 151 Idaho 471, 259 P.3d 617 (2011).

Should this Court determine that UCI prevailed only in part, the Idaho Supreme Court has given guidance as to how costs and fees should be apportioned in *Burns v. Cty. of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), *affirmed*, 120 Idaho 614, 818 P.2d 318 (1991).

In *Burns*, the plaintiff (Burns) sought both monetary and injunctive relief. After a trial, the district court limited Burns' monetary damages award to \$45,000 of the \$1,000,000 sought but granted the injunctive relief. The district court determined that the nominal damage award warranted apportionment of attorneys' fees since Burns did not prevail on the damages claim. Burns was awarded apportioned attorneys' fees for the injunctive relief granted. Burns appealed. The Idaho Court Appeals upheld the trial court's apportionment and held as follows:

Here, the district court distinguished, not between two separate theories supporting a single claim for relief, but between two entirely separate claims--one seeking equitable injunctive relief and the other seeking damages in an action at law. Our rules of procedure envision that a district court may distinguish between separable claims in awarding costs, I.R.C.P. 54(d)(1)(B), and attorney fees, I.R.C.P. 54(e)(2). Under this procedure, we conclude that it was proper for the court to consider claims separately in awarding attorney fees.

Id., 120 Idaho at 626, 818 Idaho at 330.

By affirming the trial court in *Burns*, the Idaho appellate courts rightly recognize the need to apportion attorney fees in cases where parties prevailed in part. Accordingly, if this Court determines that UCI only prevailed in part, this Court should still award costs and attorneys' fees for that portion that UCI prevailed. UCI succeeded on two of the three claims against it. As in *Burns*, the claims were not separate theories supporting one single claim for relief, but rather three entirely separate claims. Gem State sought (1) \$220,000 for breach of the Trademark Settlement Agreement, (2) Injunctive Relief preventing UCI from using "Gem State" in Blaine County or doing work in Blaine County, and (3) \$220,000 in damages for trademark infringement under the federal Latham Act. UCI still maintains that it prevailed on each of the three, but if this Court

disagrees, it still must recognize that UCI completely prevailed on the remaining two causes of action. To do otherwise would be an abuse of discretion. In this case, UCI clearly prevailed on at least two of the three claims, and should at a minimum be awarded costs and fees for at least two-thirds of its attorneys' fees for successfully defending the lawsuit.

CONCLUSION

UCI maintains that it is entitled to an award of costs and attorneys' fees for all of the time and expenses incurred defending against Gem State's claims. Accordingly, UCI should be awarded \$35,584.00 in attorneys' fees and \$802.55 in costs as a matter of right. If this Court apportions this award, it should be no less than two-thirds of the amount sought, proportionate to UCI's having prevailed. If this Court deems only Rule 68 appropriate, then UCI is entitled to \$13,602.00 in attorneys' fees and \$802.55 in costs as a matter of right. UCI respectfully requests that this Court deem UCI the prevailing party and enter an award of attorneys' fees and costs in the total amount of \$36,386.55.

DATED: September 26, 2019.

PICKENS LAW, P.A.

By: /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2019, a true and correct copy of the foregoing document was served as follows:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

in Blaine County. When Gem State eventually brought suit to stop the breaches, Defendant spent the bulk of the litigation attempting to avoid its discovery obligations, even going so far as to admit that it had withheld documents¹ and deleted emails.² Defendant's avoidance tactics worked: no deleted emails were ever produced, and, ultimately, this Court found that Gem State was unable to summon evidence to prove damages – most of which evidence which was exclusively held by the Defendant, since it was Defendant that knew or had record of the work it did and communications it had with Blaine County customers and prospective customers.

Most of Gem State's costs and attorneys' fees in this case were incurred in trying to get the information that Defendant had an obligation to produce but withheld or destroyed. In fact, this Court granted the only two discovery motions Gem State filed – and the Idaho Rules of Civil Procedure mandate an award of expenses to Gem State because it prevailed. This Court has found that Gem State did not prove damages (ironically, since Defendant has withheld the documents that establish damages) and now Defendant would have this Court also deny Gem State the relief to which it is entitled by the Idaho Rules of Civil Procedure, resulting from Defendant's discovery abuses. Defendant has breached its contract, and by avoiding its discovery obligations have so far managed to avoid paying a price; instead, the entire cost of Defendant's conduct – pre- and during litigation – has been borne by Gem State. The Idaho Rules of Civil Procedure provide a remedy for that, and this Court should apply that remedy.

¹ e.g., documents regarding the Wood River Valley animal shelter, which were produced six months after they were requested, and just days prior to the hearing on Gem State's Motion to Compel.

² See Defendant's Fourth Supplemental Answers to Plaintiff Gem State Roofing Incorporated's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, Second Supplemental Answer to Interrogatory No. 3: "UCI did not maintain or keep many of the records that were provided through subpoena, and UCI does not have a method of recovery for deleted electronic files. All documents that could be recovered have now been produced ..."

ARGUMENT

A. The Idaho Rules of Civil Procedure Mandate an Award of Costs and Fees for Defendant's Violation of its Discovery Obligations.

As Gem State stated in its Motion, the basis for its request for attorneys' fees and costs is as follows:

- Under Idaho Rule of Civil Procedure 37(a)(5), this Court "must" award attorneys' fees and other expenses incurred on Gem State's Motion to Compel, because (i) Defendant produced approximately 90% of the documents they would ever produce after the Motion to Compel was filed, and (ii) the Court granted Gem State's Motion to Compel.

- Under Idaho Rule of Civil Procedure 37(b)(2)(C), this Court "must" award attorneys' fees and other reasonable expenses because this Court granted Gem State's Motion for Sanctions.

- Under Idaho Rule of Civil Procedure 37(c)(2), this Court should award attorneys' fees and costs for Gem State's having to prove – because Defendant denied without basis – that Defendant was conducting business under the name "Gem State Roofing;" that since 2016, Defendant has advertised, solicited, bid on, and performed roofing work in Blaine County under the name "Gem State Roofing;" and that despite Gem State's written demand, Defendant did not cease doing business in Blaine County under the name "Gem State Roofing."

B. Defendant has not Shown Any Legitimate Basis for Setting Aside the Idaho Rules of Civil Procedure.

1. The Issue of Whether Gem State is the Prevailing Party is Irrelevant to the Idaho Rules of Civil Procedure-Prescribed Penalties for Discovery Abuses.

Defendant's argument that it should not be accountable for its discovery abuses on the grounds that Gem State did not prevail is legally baseless. As the Idaho Court of Appeals said in 1992:

[A]s a sanction for a separate discovery abuse, the court ordered Jim to pay reasonable attorney fees incurred as a result of that abuse. . . .

Jim has made no cogent argument against either of these awards. The record and the law fully support the awards of fees in this instance as sanctions. *See, e.g., Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988). Moreover, the award of fees for this purpose is not dependent upon I.C. § 12–121, and thus these awards need not await the final outcome of the case.

DesFosses v. DesFosses, 836 P.2d 1095, 1100 (Idaho Ct. App. 1992). The Idaho Rules of Civil Procedure do not make discovery obligations a gamble, allowing a party to shirk and avoid those obligations in the hopes that the shirking may result in ultimate victory – or at least, escape from liability – as happened here.

Defendant’s argument that “none of the[] attempts by Gem Sate to prove UCI was hiding documents worked” (see Objection to Plaintiff’s Motion for Attorneys’ Fees and Costs, at 8) is proof not that there is no “there” there, but that Defendant’s avoidance of its discovery obligations paid off, and that this Court’s prior sanctions were not a sufficient deterrent. As set forth in the Affidavit of Ryan T. McFarland attached herewith, Verizon did not produce any documents and claimed that it could not match the name and telephone number to any Verizon account. Affidavit of Ryan T. McFarland, filed concurrently herewith (“McFarland Aff.”), ¶¶ 7, 10, 11, Exh. B. Both AOL and Google stated that the emails that Defendant deleted are permanently unrecoverable, and even if they were recoverable, neither AOL nor Google will produce them. McFarland Aff., ¶¶ 9, 12, 13, Exh. C, D.

Should the Court decline to follow the Idaho Rules of Civil Procedure and not award costs and fees against Defendant based on Defendant’s behavior, then the Court will be encouraging parties to avoid their discovery obligations and engage in litigation by duplicity, in

an effort to, by their duplicity, avoid liability. That result would be a complete perversion off the discovery rules.

2. Gem State’s Claimed Attorney’ Fees and Costs are Reasonable.

a. Service of Subpoenas on Third Parties.

There are two sets of third-party discovery costs that Defendant objects to. The first relates to the initial subpoenas served on customers of Defendant. Of the ten (10) subpoenas issued, nine (9) of them were served on customers or prospective customers of Defendant that Defendant had disclosed. *McFarland Aff.*, ¶¶ 3-6. The other one (1) was served on a suspected customer. This was not a fishing expedition; it was narrowly tailored to those customers and prospective customers disclosed by Defendant. The reason the subpoenas were served at all is because, despite multiple sets of discovery, Defendant had produced only 85 pages of documents – 85 pages of business records for a business’s activity over a nine year period – and not a single email or contract among them. That production was, on its face, farcical. And indeed, Gem State did recover emails and at least one significant contract. While it is true that not every customer produced documents:

(i) Gem State could not have predicted at the outset who would respond and so only serve those entities, and

(ii) Gem State could have, but did not, move for sanctions against the non-responding entities. The expenditures of costs had to stop somewhere, and once Gem State had proved that Defendant was withholding documents, the real burden to produce was not on the non-responding third parties, but on Defendant itself. As it turned out, the third-party responses were sufficient to force Gem State to produce over 1,000 additional pages of documents.

Defendant is simply inaccurate when it asserts that “once this Court determined UCI was a

successor in interest to GSRAM, UCI provided over 1000 pages” (Objection to Plaintiff’s Motion for Attorneys’ Fees and Costs, at 9): the “over 1,000 pages” was produced on March 4, 2019; the Court’s summary judgment decision finding that UCI was a successor to GSRAM was issued 8 weeks later, on April 26, 2019. Also, the argument that “no discovery requests sought by Gem State as to GSRAM was believed to be required by UCI until” the summary judgment decision finding that UCI is a successor to GSRAM (Objection to Plaintiff’s Motion for Attorneys’ Fees and Costs, at 5) is a canard: UCI – not GSRAM – contracted with McAlvain, and Defendant disclosed McAlvain as a customer in its initial discovery responses on October 4, 2018, it just withheld production of over 1,000 documents related to that customer until after the Motion to Compel was filed.

Secondly, Defendant argues that the \$2,438.10 spent on Streamline Imaging to copy UCI’s email account was wasted money because no additional emails relevant to the case were ever recovered. That argument is unavailing, as follows:

(i) The Court ordered this specific relief. In the Order Granting Plaintiff’s Motion for Sanctions, this Court ordered:

. . . Defendant must . . . make available to Plaintiff, or authorized representatives, for the purpose of allowing Plaintiff to . . . copy or make mirror image copies of, any and all communication data stored . . . by any of defendant’s personal or business-related electronic devices capable of creating or receiving electronic mail . . . and all login and password information necessary for Plaintiff to access Defendant’s email accounts . . .

pp. 1-2. That is not the sanction Gem State requested, but it is the sanction the Court granted.

(ii) The reason no additional emails were recovered was, by Defendant’s repeated representation in written filings and verbal representations, that email was deleted.

There is no justification for deleting those emails.

(iii) As set forth in the concurrently-filed McFarland Aff., neither AOL nor Google would produce the requested records, and so Defendant's avoidance of discovery obligations appears to have been successful.

b. Deposition Transcripts.

Defendant makes two arguments opposing payment for deposition transcripts. First, that the Court did not enter an order compelling further responses to request for admission." That "requirement" simply does not exist – not in the Idaho Rules of Civil Procedure, or elsewhere.

Secondly, Defendant argues that because it ultimately did "stipulate to [the facts] in a formal pleading filed with this Court prior to commencement of trial" (Objection to Plaintiff's Motion for Attorneys' Fees and Costs, at 10), no expenses should be awarded. The Requests for Admission were served in September 2018; Defendant denied them in October 2018; the deposition occurred in December 2018; the Stipulation which Defendant refers to did not happen until July 2019. The Idaho Court of Appeals has already addressed this argument:

Where, as here, one party fails to admit the truth of a matter as requested, and the opposing party subsequently proves the truth of the matter, the court "shall" award "the reasonable expenses" incurred. The rule is mandatory, subject only to the four exceptions set forth in the rule itself: (1) that the request was held objectionable pursuant to Rule 36(a); (2) that the admission sought was not "of substantial importance;" (3) that failure to admit was based upon a reasonable belief in prevailing on the issue; or (4) other good reason. However, as the trial judge's comments indicate, he did not explicitly link his analysis to any of these exceptions.

. . . . We reiterate, however, that the judge may not refuse to make an award solely because the expenses of proving the matter contained in the requests for admission might also have been incurred with respect to another issue.

Ruge v. Posey, 761 P.2d 1242, 1244 (Idaho Ct. App. 1988).

c. Attorneys' Fees.

Next, Defendant disputes the amount of time spent on certain tasks. As an initial matter, the fact that Gem State had to spend as much attorney time on discovery (and related motions) as Defendant spent on the case points to why the Rules of Civil Procedure require payment of those expenses: it takes only a fraction of time (and no attorney time at all) to delete or hide, or simply not produce, emails or other documents; it takes exponentially more time – attorney time – to unearth the information from third parties, if it can be unearthed at all. And of course, the motions themselves take work that the discovery-avoiding party never has to undertake. So yes, third-party discovery and motion practice takes much more work than avoiding discovery obligations, but that does not make Gem State's costs unreasonable; rather, it points to the unreasonableness of Defendant's discovery-avoiding conduct.

Secondly, Ms. Hickman's time is not unreasonable, as explained in her concurrently-filed Affidavit.

CONCLUSION

For the reasons stated above, and as supported by Gem State's moving documents and the Affidavits filed herewith, Gem State asks that this Court award it the amount of **\$36,347.16** in attorneys' fees and costs.

DATED THIS 2nd day of October 2019.

By /s/Ryan T. McFarland
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October 2019, I caused to be served a true copy of the foregoing REPLY IN SUPPORT PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland
Ryan T. McFarland

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff,)
vs.)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING,)
Defendants.)

Case No. CV01-18-13437

AFFIDAVIT OF RYAN MCFARLAND
IN FURTHER SUPPORT OF
MEMORANDUM OF COSTS AND
ATTORNEYS' FEES

I, Ryan McFarland declare as follows:

1. I am licensed to practice law in Idaho and before this Court. I am counsel for Plaintiff Gem State Roofing, Incorporated (“Gem State”) in the above-captioned action.
2. Attached hereto as Exhibit A is a true and correct copy of a portion (as required by Idaho Rule of Civil Procedure 32(c)(2)) of Defendant’s Answers and Responses to Plaintiff Gem State Roofing Incorporated’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission (herein “Defendant’s Responses to Discovery”).

3. Pursuant to the attached Responses to Discovery, on October 4, 2018, Defendant disclosed the following persons and entities as customers or potential customers of Defendant in Blaine County:

- Kerry Armstrong;
- McAlvain Construction;
- Standard Plumbing Supply.

4. On or about November 19, 2018, Defendant produced additional documents, in connection with Defendant's Answers and Responses to Plaintiff Gem State Roofing Incorporated's Second Set of Interrogatories and request for Production, evidencing that it provided estimates to the following:

- Brashears & Sons (DEFENDANT00086-87);
- Larry Isham (DEFENDANT00088);
- Shay Construction (DEFENDANT00089-91);
- Snow Mountain Apartments (DEFENDANT00098-100, 102-103);
- ESI Construction (DEFENDANT00104-5); and
- Bruce Bothwell (DEFENDANT00110-111).

5. On or about November 26 and 28, 2018, I caused subpoenas for records to be delivered to Tri-County process serving, for service on the above-named customers or prospective customers of Defendant:

- Casino, Inc. (Kerry Armstrong);
- McAlvain Construction;
- Standard Plumbing Supply;

- Brashears & Sons;
- Larry Isham;
- Shay Construction;
- Snow Mountain Apartments;
- ESI Construction; and
- Bruce Bothwell.

6. On or about November 26, 2018, I also caused subpoenas for records to be delivered to Tri-County process serving, for service on Pioneer Property Management because my client had reason to believe that Pioneer Property Management may have been a customer of Defendant's.

7. On or about July 3, 2019, I caused a subpoena duces tecum to be faxed to Verizon, requesting text messages data connected to the phone numbers disclosed by Defendants to be produced.

8. On or about July 9, 2019, this Court heard oral argument on Defendant's Motion for Reconsideration and Motion for Protective Order with respect to third-party discovery on email servers that the Court had ordered in the Court's Order Granting Plaintiff's Motion for Sanctions.

9. The next day, July 10, 2019, and in accordance with the Court's verbal ruling granting Defendant's Motion for Protective Order, Gem State sent subpoenas to Google and Oath, Inc. (the successor to AOL) out for service.

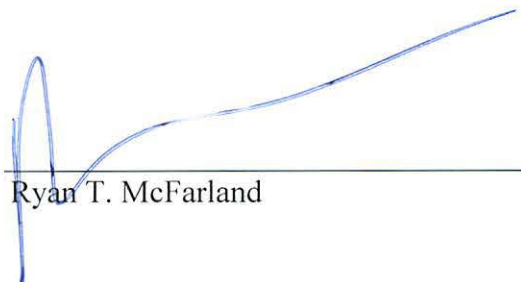
10. Attached hereto as Exhibit B is a true and correct copy of a letter I received from Verizon stating that the names and phone numbers disclosed by Defendants did not match Verizon records.

11. On or about July 17, 2019, I caused a revised subpoena to be faxed to Verizon. Verizon has never responded to the revised subpoena and has never produced any responsive documents.

12. Attached hereto as Exhibit C is a true and correct copy of a letter I received from Oath Inc., successor to AOL Inc., dated July 30, 2019, in which Oath Inc. states that it “will not provide content in response to a subpoena as it would be illegal to do so.” In any event, it “does not archive or keep records of deleted AOL email.”

13. Attached hereto as Exhibit D is a true and correct copy of a letter I received from Google, dated August 27, 2019 (after the trial had taken place), in which Google objected to the subpoena and refused to produce any responsive documents.

Further your affiant sayeth naught.

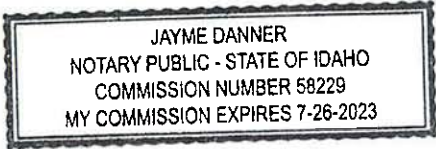


Ryan T. McFarland

STATE OF IDAHO)
) ss.
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 2nd day of October 2019, personally appeared before me Ryan T. McFarland who, being by me first duly sworn, declared that he is an attorney for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that he signed the foregoing document as the attorney for Gem State Roofing, Incorporated, and that the statements therein contained are true.

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



Jayme Danner
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN FURTHER SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland
Ryan T. McFarland

EXHIBIT A

Terri Pickens Manweiler, ISB No. 5828
Shannon Pearson, ISB No. 10027
PICKENS COZAKOS, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
shannon@pickenslawboise.com

Attorneys for Defendant

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff,

v.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant.

Case No. CV01-18-13437

**DEFENDANT’S ANSWERS AND
RESPONSES TO PLAINTIFF GEM
STATE ROOFING
INCORPORATED’S FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION OF
DOCUMENTS, AND REQUESTS FOR
ADMISSION**

Defendant United Components, Incorporated, dba Gem State Roofing, by and through its attorney of record, Terri Pickens Manweiler of the firm Pickens Cozakos, P.A., answers and responds to *Plaintiff Gem State Roofing Incorporated’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admission*, dated September 4, 2018, pursuant to Rules 26, 33, 34 and 36 of the Idaho Rules of Civil Procedure. Defendant reserves the right to supplement each and every answer as discovery is undertaken during the course of this case.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admission (hereafter, the “Discovery Requests”), to the extent

- i. Any exhibits to be used as a summary of or support for the opinions;
- j. A list of all publications authored by the witness within the preceding ten years;
- k. The compensation to be paid for the testimony; and
- l. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

ANSWER TO INTERROGATORY NO. 16: Defendant has not retained any experts for this matter.

INTERROGATORY NO. 17: Please identify each exhibit You intend to utilize at the trial of this matter.

ANSWER TO INTERROGATORY NO. 17: Defendant has not determined which exhibits will be used at trial in this matter, Defendant reserves the right to proffer as exhibits any documents produced in discovery. Defendant reserves the right to supplement this Answer in accordance with the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

INTERROGATORY NO. 18: Please identify each and every roofing project You have bid on, solicited, or performed work on in Blaine County since 2016 by stating:

- a. The address where of the roofing project;
- b. The customer(s) of each roofing project;
- c. The date(s) You made such bid or solicitation, or performed such work;
- d. All costs You incurred related to such project;
- e. All revenue You generated from such project.

ANSWER TO INTERROGATORY NO. 18:

1. (a) 230 N. Main Street, Ketchum Idaho 83340, (b) Kerry Armstrong, (c) Kerry called on November 22, 2017, job was performed on November 24, 2017, (d) \$199.03, (e) \$750.00.

2. (a) 125 Howard, Ketchum Idaho 83340, (b) Pioneer West Property Management, (c) roof repair done on August 19, 2017 and was a roof repair originally done by Defendant, but roof was out of warranty, (d) \$459.68, (e) \$1950.00.
3. (a) 101 Croy Creek Road Hailey, Hailey Idaho, (b) Mc Alvain Construction Inc., (c) Mc Alvain called January 22, 2018 and job commenced February 7, 2018, Defendant is currently still working on job, (d) as of September 24, 2018, \$245,401.08, (e) as of September 24, 2018, \$261,824.00.
4. (a) 4319 Glenbrook Drive, Hailey Idaho, (b) Standard Plumbing Supply, (c) job was to seal coating and was completed August 17, 2016, (d) unknown at this time, (e) \$2481.00.

INTERROGATORY NO. 19: If Your answers to any of the following Requests for Admission are not answered in the affirmative, i.e. "Admit":

- a. Describe in detail each and every fact upon which You base Your denial(s);
- b. Specify all documentation which supports or relates in any manner to said denial(s);

and

- c. Identify each person who has or You believe may have knowledge of the facts which support or relate in any manner to said denial(s).

ANSWER TO INTERROGATORY NO. 19: See answers below.

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce any and all documents identified in Your responses to any of the Interrogatories and Requests for Admission propounded by Gem State.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Please see documents produced herewith bates stamped as DEFENDANT0001-0027.

REQUEST FOR PRODUCTION NO. 2: Please produce all documents which support or relate in any way to the claims set forth in Your Answer.

DATED: October 4, 2018.

PICKENS COZAKOS, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 4, 2018, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

/s/ Terri Pickens Manweiler
Terri Pickens Manweiler

EXHIBIT B



Verizon Security Subpoena Compliance
180 Washington Valley Road
Bedminster, NJ 07921
PHONE: 800-451-5242 FAX: 888-667-0028

VERIZON CONFIDENTIAL

July 17, 2019

McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

Verizon Case #: 190174558
Docket/ File #: CV01-18-13437
Target: 208-941-4579 208-941-7456 208-941-8317

To: Ryan McFarland:

Please note: The attached request is being returned for the following reason(s):

(X) The name and telephone number provided does not match the Verizon Wireless account holder. Please review the number and if accurate provide a revised subpoena requesting records by telephone number only, omitting name.

*Please note there is an associated processing fee of \$75 per hour, plus shipping.

Sincerely,

Maci K.
Verizon Subpoena Compliance Coordinator

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff

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

GEM STATE ROOFING, INCORPORATED,)	Case No. <u>CV01-18-13437</u>
Plaintiff,)	
vs.)	SUBPOENA
UNITED COMPONENTS,)	
INCORPORATED, dba GEM STATE)	
ROOFING,)	
Defendant.)	

The State of Idaho to: Verizon

YOU ARE COMMANDED to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below: all text messages sent or received from the following persons' mobile telephone numbers between October 1, 2005 and June 30, 2019: Kerrie Kuhn: 208-941-4579; Jeffery Flynn 208-941-7456; Robert Hayden 208-941-8317; Andrew Hayden 208-901-0039.

PLACE, DATE, TIME: On or before July 31, 2019 produce electronic or hard copies of the above-requested information to Plaintiff's counsel at the email or mailing address set forth above.

SUBPOENA - 1

You are further notified that if you fail to produce or permit copying or inspection as specified above, you may be held in contempt of court and the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 3^d day of July, 2019.

By Order of the Court.

By: 

Ryan McFarland, ISB No. 7347
Attorneys for Plaintiff

Verizon Wireless Workflow Manager**FAX COVER PAGE**

To	ryan mcfarland
To Fax Number	2088951270
From Analyst	Maci K
From Phone Number	8004515242
From Fax Number	8886670028
Case ID	190174558

Comments :

Please note, VZW fax numbers have changed to:

Subpoenas : 888-667-0028
Court Orders : 888-667-0026
Surveillance : 800-267-9129
Exigent : 800-345-6720

Please note that the time reflected on any call detail report or bill copy is reflective of the switch that processed the call, which may not be the same as the clock time at the cell site where the call was initiated.

The information contained in this message and any attachment may be proprietary, confidential and privileged or subject to the work product doctrine and thus protected from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify me immediately by replying to this message and deleting it and all copies and backups thereof. Thank you.

EXHIBIT C



July 30, 2019

Via Electronic Mail

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680
ryan@mcfarlandritter.com
alane@adacounty.id.gov

Re: Subpoena to Oath Inc. re Gem State Roofing Incorporated v
United Components Incorporated, dba Gem State Roofing
District Court, 4th Judicial District of the State of Idaho, County of Ada
Case No.: CV01-18-13437
Oath Legal File - 421050

Dear Mr. McFarland,

Oath Inc., successor to AOL Inc. ("Oath"), is in receipt of a subpoena for the above referenced matter. Pursuant to the Stored Wire and Electronic Communications Act ("SCA"), 18U.S.C. §2701 et seq., Oath objects to releasing email communications. Oath is prohibited by the SCA from disclosing the contents of email communications "to any person or entity" (18 USC. § 2702(a)(1),(2)) except as expressly authorized in 2702(b)- and none of those exceptions permits disclosure pursuant to a subpoena issued on behalf of a litigant in a civil case seeking the communications of a subscriber of the email provider. Precisely such a subpoena was held to be unenforceable under the SCA in *O'Grady v Superior Court of Santa Clara County*, 139 Cal App 4th 1423, 44 Cal Rptr 3d 72, 2006 Cal App LEXIS 802 (Ct App Cal 2006). See also, *In re Subpoena Duces Tecum to AOL, LLC*, 550 F Supp 2d 606 (ED Va 2008) (A civil discovery subpoena is not an exception to the provisions of the Privacy Act that would allow an Internet service provider to disclose an account holder's email. The exception for production pursuant to court order does not apply to civil discovery matters.); *Flagg v City of Detroit*, 2008 WL 3895470 (ED Mich 2008)("[The Stored Communications Act] lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to subpoena or court order."). Therefore, Oath will not provide content in response to a subpoena as it would be illegal to do so and any order purporting to require it is invalid.

In the normal course of business Oath does not maintain AOL email on its servers that is not directly accessible to an active user of an email address. If a current active user cannot access any given email message, then it doesn't exist on Oath's AOL email servers. Oath does not archive or keep records of deleted AOL email.

If you have any questions please let us know.

Best Regards,

A handwritten signature in blue ink, appearing to read "Greg Phillips".

Greg Phillips
Senior Legal Services Specialist
Oath Inc. Legal
703-265-4428

EXHIBIT D

Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043



google-legal-support@google.com
www.google.com

August 27, 2019

Via Email and Express Courier
ryan@mcfarlandritter.com

Ryan McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, Idaho 83680
208-895-1291

Re: *Gem State Roofing, Incorporated v. United Components, Incorporated, dba Gem State Roofing*, Superior Court of California, County of Santa Clara, 19CV352128 (Internal Ref. No. 2703908)

Dear Ryan McFarland:

Google LLC (“Google”), a non-party to your litigation, has received your subpoena, dated July 10, 2019, in the above-referenced matter (the “Subpoena”). Your Subpoena states that you are requesting “copies of all emails deleted” from the Gmail accounts associated with GEMSTATEROOFING@GMAIL.COM, ASPHALTMAINTENANCEPAVING@GMAIL.COM, UNITEDCOMPONENTSINC@GMAIL.COM “between October 1, 2005 and June 30, 2019.”

At this point, however, as set forth more fully in the objections below, Google will not produce documents in response to the Subpoena because the requests are objectionable. Google further hereby makes the following objections to the Subpoena.

Google objects to the subpoena on the grounds that the date for compliance pre-dates the service date and it is therefore legally impossible to comply with.

User Notification

Google objects to the Subpoena to the extent it fails to allow sufficient time for Google to notify the affected user and for the user to assert his or her rights in response. Google provides its users at least 21 days to object to your request or to inform Google of their intent to file a motion to quash. If your subpoena sufficiently identifies a Google account, Google intends to forward notice of this matter, including your name and contact information, to the user at the email address provided by the user.

Violation of Federal Law

As written, the Subpoena can be construed to include information we are prohibited from disclosing. Google objects on the grounds that Section 2702(a) of the federal Stored Communications Act (“SCA”) prohibits Google from disclosing the content of electronic

000770



communications or content stored on behalf of the user, pursuant to a subpoena. 18 U.S.C. § 2702(a) *see e.g.*, *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011); *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004); *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp. 2d 987, 993-94 (C.D. Cal. 2012); *In re Subpoena Duces Tecum to AOL, LLC.*, 550 F.Supp.2d 606, 611 (E.D. Va. 2008); *Flagg v. City of Detroit*, 252 F.R.D. 346, 366 (E.D. Mich. 2008); *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008); *O'Grady v. Superior Court of Santa Clara*, 139 Cal. App. 4th 1423, 1441-43 (2006).

Instead, the appropriate way to seek such content is to direct your request to the account holder who has custody and control of the data in the account, is not bound by the SCA, and is the party to whom discovery requests should be directed. *Suzlon*, 671 F.3d 726, 730-31; *Mintz*, 885 F. Supp. 2d at 993-94; *O'Grady*, 139 Cal. App. 4th at 1446-47. If the account holder is a party to the underlying litigation, you may serve a document request on the account holder for the content sought. *See Mintz*, 885 F. Supp. 2d at 993-94; *O'Grady*, 13 Cal. App. 4th at 1446-67; *see also Flagg*, 252 F.R.D. at 348, 366-67. Google users can obtain and produce their account content themselves, or by using Google Takeout, available at www.google.com/takeout/.

To the extent you are seeking the production of content based on a signed consent form, Google objects to the request because Google is unable to verify that the person signing the form is the account owner. If you are interested in going through our verified consent disclosure process, please contact me.

Additional Objections

1. Google objects to the Subpoena to the extent it seeks to impose an undue burden on a disinterested non-party. Google further objects to the Subpoena to the extent it seeks information already in a party's possession or available to a party from some other source (including public sources) that is more convenient, less burdensome or less expensive. Google objects to the Subpoena to the extent it seeks electronically stored information that is not reasonably accessible to Google.
2. Google objects to the Subpoena to the extent it seeks information that is not proportionate to the needs of the case, not relevant to any party's claims or defenses, or not reasonably calculated to lead to the discovery of admissible evidence.
3. Google objects to the Subpoena to the extent it specifies a date of production that is unreasonable and unduly burdensome, including because it may not afford Google time to provide sufficient notice to the user.
4. Google objects to the Subpoena to the extent that it is vague, ambiguous, unlimited in time or scope, or fails to identify the information sought with reasonable particularity. Accordingly, Google further objects to the Subpoena to the extent it purports to require Google to preserve the requested information. Therefore you should not assume that Google will undertake steps to preserve any information in response to your Subpoena. Google is willing to meet and confer to discuss any preservation request.
5. Google objects to the Subpoena to the extent it seeks to impose obligations on Google beyond what is permissible under applicable law.

Google reserves the right to further object to the Subpoena in any additional response.

Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043



google-legal-support@google.com
www.google.com

If you have any questions, please feel free to contact the undersigned at the Legal Support Department alias at GOOGLE-LEGAL-SUPPORT@GOOGLE.COM. Additionally, should you wish to seek any judicial relief in connection with this matter, Google requests the opportunity to meet and confer in advance of any such filing. Thank you.

Very truly yours,
/s/ Molly O'Neil
Legal Investigations Support

3. I have personal knowledge of the costs, expenses and attorneys' fees reasonably and necessarily incurred by Gem State in this matter as they relate to my work, and, if called upon, could and would testify competently and truthfully to the facts and matters set forth herein.

4. Attached hereto as Exhibit A is a true and correct copy of my invoice to the McFarland Ritter firm for work done in January 2019. Nowhere on the January 2019 invoice that describes the 21.5 hours of disputed work I performed on this matter does it indicate that all of the time was billed on a single Saturday – January 12, 2019. Instead, my invoice included the cumulative time I billed to Gem State in January for the work described. Per Mr. McFarland's request, on subsequent invoices I included the specific days and the amount billed on each day for better record keeping purposes. According to my own time records, however, I billed the disputed 21.5 hours over the course of four days: 2 hours on Friday, January 4, 1 hour on Monday, January 7, 5.75 hours on Tuesday, January 8, and 12.75 hours on Wednesday, January 9, 2019. This work involved conducting legal research, reviewing 158 pages of Jeff Flynn's deposition transcript and some of the accompanying 74 exhibits, reviewing 41 pages of Michelle Flynn's deposition transcript, reviewing the relevant discovery pleadings in this matter, and then drafting all of the motion to compel pleadings, including a 19 page draft of the Memorandum in Support of Motion to Compel and two accompanying affidavits, all with multiple references to the record, the deposition transcripts and supporting case law, statutes and rules.

5. In Paragraph 11 of the Manweiler Affidavit, Ms. Manweiler challenges the 7 hours I billed on July 1 and 2, 2019, to "research procedure/rules for 3rd party foreign subpoenas, draft foreign subpoena docs." In the Order Granting Plaintiff's Motion for Sanctions, this Court permitted Plaintiff to "issue third party subpoenas to relevant Email Service Providers (ESP), or

Internet Services Providers (ISP) as needed.” Order Granting Pl. Motion for Sanctions, ¶3. Accordingly, Mr. McFarland asked me to prepare foreign subpoenas to serve on Google, AOL, and Verizon. Neither Mr. McFarland nor myself were familiar with the three different entities’ procedures for properly serving subpoenas upon them, or the corresponding jurisdictions’ applicable statutes, rules and procedures. My 7 hours of billable time included identifying the particular entity/department and contact information to properly serve a subpoena upon Google, AOL and Verizon, as well as researching the applicable state statutes and local court procedures to comply with foreign subpoena practice in the pertinent courts of California (for Google) and Virginia (for AOL), (Verizon did not require service of a foreign subpoena), and then preparing drafts of the two foreign subpoenas for Mr. McFarland’s review.

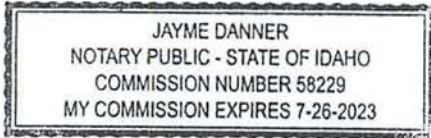
6. In my experience, and in my opinion, the hours reflected above are reasonable given my experience, skills and reputation, and the nature of the legal, procedural and factual issues pertinent to this case.


Lori Hickman

STATE OF IDAHO)
) ss.
County of Ada)

I, Jayme Danner, a Notary Public, do hereby certify that on this 2nd day of October, 2019, personally appeared before me Lori Hickman who, being by me first duly sworn, declared that she is an attorney for Plaintiff Gem State Roofing, Incorporated in the foregoing action, that she signed the foregoing document as the attorney for Gem State Roofing, Incorporated, and that the statements therein contained are true.

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



Jayme Danner
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires July 26, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October 2019, I caused to be served a true copy of the foregoing AFFIDAVIT OF LORI HICKMAN IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF COSTS AND ATTORNEYS' FEES by the method indicated below, and addressed to each of the following:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

iCourt electronic filing

/s/Ryan T. McFarland
Ryan T. McFarland

EXHIBIT A

LORI HICKMAN, INDEPENDENT CONTRACTOR

INVOICE

lori@mcfarlandritter.com

2800 Raindrop Drive
Boise, Idaho
83706

Attention: Ryan McFarland
Legal Counsel
McFarland Ritter
P.O. Box 1335
Meridian, ID 83642
Date: 2/1/19

Project Description: Legal Work for January 2019

Description of Work	Hours	Rate	Total
Gem State Roofing – research, review depo transcripts and discovery pleadings, draft motion to compel pleadings (21.5); conduct SJ research and draft motion for summary judgment pleadings (20.25); review ESI subpoena document production (1.5)	43.25	\$110	\$4757.50
		Total	\$4757.50

Thank you for the work. I look forward to receiving additional assignments.

Lori

OCT 07 2019

PHIL McGRANE, Clerk
By JOLENE MILLS
DEPUTY

McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff-Appellant

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

GEM STATE ROOFING, INCORPORATED,)
Plaintiff-Appellant,)
vs.)
UNITED COMPONENTS,)
INCORPORATED dba GEM STATE)
ROOFING,)
Defendant-Respondent.)

Case No. CV01-18-13437

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT United Components, Incorporated dba Gem State Roofing, AND THE PARTY'S ATTORNEYS, Pickens Cozacos, P.A., 398 S. 9th Street, Suite 240, Boise, Idaho 83701 AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant Gem State Roofing, Incorporated ("Plaintiff") appeals against the above named respondent to the Idaho Supreme Court from the Judgment (herein, the "Judgment") entered in the above entitled action on the 17th day of September, 2019, the Honorable Judge Samuel A. Hoagland presiding. A copy of the Judgment being appealed is

attached to this notice, along with the Findings of Fact & Conclusions of Law on which the Judgment is based.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph 1 above is appealable pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal is as follows:

- Did the District Court's decision to not grant injunctive relief to Plaintiff for Defendant's contract breach, thereby nullifying the non-compete agreement, constitute an abuse of discretion?
- Did the District Court err in finding that the injury-causing behavior has been discontinued, and on that basis refusing to enter injunctive relief?
- Should the Court enjoin "minimal" contract-breaching, injury-causing behavior?
- Is Plaintiff's profit margin irrelevant to the question of whether Plaintiff has lost profits?
- Is Defendant's violation of the contractual obligation to refer work to Plaintiff sufficient evidence that Plaintiff "would have gotten the . . . work" that Defendant did to justify an award of damages to Plaintiff?
- Can Plaintiff prove a right to money damages without producing the testimony of customers allegedly lost as a result of Defendant's wrongful conduct?
- Are money damages recoverable from "minimal," contract-breaching, injury-causing behavior?
- Is Plaintiff entitled to recover damages, even though it cannot prove what its costs and profits would have been had Defendant not breached the non-compete agreement?
- Can Plaintiff acquire a protectable common law trademark in Blaine County for the GEM STATE ROOFING mark that is prior in right to any claim of Defendant, despite the geographically descriptive "Gem State"?
- Did the District Court err under Idaho Rule of Civil Procedure 37(a)(5) in denying Plaintiff's request for attorneys' fees and costs, while otherwise granting Plaintiff's Motion to Compel?
- Should the District Court have sanctioned Defendant for discovery violations by the relatively light and efficient sanction of making an inference that Plaintiff would have obtained the Blaine County work that Defendant wrongfully obtained, instead of requiring Plaintiff to incur the cost and time of copying Defendant's email accounts and issuing subpoenas to third parties for deleted emails?

- Did the District Court err under Idaho Rule of Civil Procedure 37(b)(2)(C) in denying Plaintiff's request for attorneys' fees and costs, while otherwise granting Plaintiff's Motion for Sanctions?
- Did the District Court err under Idaho Rule of Civil Procedure 37(c)(2) in denying Plaintiff's request for attorneys' fees and costs incurred on proving matters that Defendant should have admitted?

4. No order sealing all or any portion of the record has been entered.

5. The appellant requests the preparation of the following portion of the reporter's transcript in both hard copy and electronic format: the entirety of the court trial, which took place on August 5, 2019.

6. The appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.:

- Affidavit of Ryan T. McFarland in Support of Motion to Compel, filed January 28, 2019.
- Affidavit of Rick Silvia in Support of Plaintiff's Memorandum in Opposition to Defendant's Cross Motion for Summary Judgment, filed February 28, 2019.
- Affidavit of Ryan T. McFarland in Support of Reply in Support of Plaintiff's Motion to Compel, filed March 13, 2019.
- Order Granting Plaintiff's Motion to Compel, entered by the Court on March 25, 2019.
- Amended Order Granting Plaintiff's Motion to Compel, entered by the Court on April 3, 2019.
- Memorandum Decision and Order, entered by the Court on April 26, 2019.
- The Affidavit of Rick Silvia in Support of Plaintiff's Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed on May 30, 2019.
- Reply in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed on June 17, 2019.
- Corrected Affidavit of Ryan T. McFarland in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed June 17, 2019.
- Order Granting Plaintiff's Motion for Sanctions, entered by the Court on June 24, 2019.
- The Court's Order, entered July 11, 2019.
- The Stipulation Re: Undisputed Facts, filed on July 19, 2019.

- Findings of Fact & Conclusions of Law filed by the Court on September 17, 2019
- The Judgment entered by the Court on September 17, 2019.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
Trademark Settlement Agreement	J. Flynn Dep. Exh. 13		1
Gem State-Boise Estimate for roofing job in Blaine County dated 9/30/10	DEF 00086		7
Gem State-Boise Estimate for roofing job in Blaine County dated 9/30/10	DEF 00087		8
Gem State-Boise Estimate for roofing job in Blaine County dated 6/20/11	DEF 00088		9
Gem State-Boise Estimate for roofing job in Blaine County dated 7/12/11	DEF 00089		10
Gem State-Boise Estimate for roofing job in Blaine County dated 7/12/11	DEF 00090		11
Gem State-Boise Invoice for roofing job in Blaine County dated 8/30/11	J. Flynn Dep. Exh. 18		12
UCI Cancellation or Amendment of Certificate of Assumed Business Name for "Gem State Roofing" dated 10/26/11	J. Flynn Dep. Exh. 24		14
Application for Registration of Assignment of Trademark-Service Mark of "Gem State Roofing" Trademark from Gem State-Boise to UCI dated 12/1/14	J. Flynn Dep. Exh. 30		15
Certificate of Assignment Registration of Trademark-Service Mark from Gem State-Boise to UCI dated 12/1/14	DEF 000074		16
UCI Estimate for asphalt job in Blaine County dated 5/5/16	DEF 00092-00093		17
UCI Estimate for roofing job in Blaine County dated 6/13/16	DEF 00094-00095		18
UCI Invoice for roofing job in Blaine County dated 7/29/16	J. Flynn Dep. Exh. 34		19
UCI Estimate for roofing job in Blaine County dated 8/17/16	DEF 00098-00100		21

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
UCI Invoice for asphalt job in Blaine County dated 8/17/16	DEF 0005		22
UCI Estimate for asphalt job in Blaine County dated 8/17/16	DEF 00102-00103		23
UCI Estimate for roofing job in Blaine County dated 2/15/17	DEF 00104-00105		24
UCI Estimate for roofing job in Blaine County dated 12/5/17	DEF 00107		25
UCI Invoice for roofing job in Blaine County dated 12/5/17	J. Flynn Dep. Exh. 44		26
McAlvain email to UCI inquiring about "Hailey Idaho Roofing Work?" dated 1/17/18	DEF 000714		28
UCI Estimate for roofing job in Blaine County dated 5/25/18	DEF 00110-00111		29
Email from Tracey Felix to Kerrie Kuhn requesting bid to do roofing job for Wood River Valley Animal Shelter	J. Flynn Dep. Exh. 49		30
McAlvain Construction Subcontract Agreement with UCI for roofing job for Wood River Valley Animal Shelter dated 2/16/18	J. Flynn Dep. Exh. 51		31
UCI Invoice dated 3/7/18 outlining work to be performed for Wood River Valley Animal Shelter roofing job	J. Flynn Dep. Exh. 53		32
UCI Transactions Detail Report for McAlvain Construction (Blaine County customer)	DEF 00113		33
Change Order #1 for McAlvain/UCI Subcontract Agreement	J. Flynn Dep. Exh. 56		34
UCI Invoice dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #1	J. Flynn Dep. Exh. 55		35
Email from Kerrie Kuhn regarding McAlvain roofing project confusion between Gem State-Blaine and UCI	J. Flynn Dep. Exh. 66		36
UCI Invoice dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #1	DEF 000660		37
Change Order #2 for McAlvain/UCI Subcontract Agreement dated 4/17/18	DEF 000588		38
UCI Invoice for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #2 dated 4/11/18	J. Flynn Dep. Exh. 57		39
Change Order #4 for McAlvain/UCI Subcontract Agreement dated 6/25/18	J. Flynn Dep. Exh. 61		40

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
Change Order #5 for McAlvain/UCI Subcontract Agreement dated 8/22/18	DEF 001039		41
Change Order #6 for McAlvain/UCI Subcontract Agreement dated 9/4/18	DEF 000132		42
UCI Invoice for additional roofing work performed on Wood River Valley Animal Shelter dated 9/27/18	DEF 00112		45
UCI Estimate for additional roofing work performed on Wood River Valley Animal Shelter dated 11/19/18	DEF 000727		46
UCI Subcontractor Application for Payment to McAlvain dated 1/28/19	DEF 000133-000134		47
Affidavit of Rick Silvia in Support of Plaintiff's Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b) filed 5/30/19	n/a	104	
Affidavit of Rick Silvia in Support of Reply in Support of Plaintiff's Motion for Partial Summary Judgment filed 3/11/19	n/a	105	
Affidavit of Rick Silvia in Support of Plaintiff's Motion for Partial Summary Judgment filed 2/6/19	n/a	106	
Specimens of Gem State-Blaine "Gem State Roofing" trademark	n/a	107	
Specimens of Gem State-Blaine "Gem State Roofing" general use of mark.	n/a	108	
Google search results for "United Components Inc. Idaho" performed 7/12/19	n/a	109	
Transcript of Deposition of Jeffery Flynn taken December 19, 2018.	n/a	110	
Transcript of Deposition of Michelle Flynn taken December 20, 2018.	n/a	111	

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom

a transcript has been requested as named below at the address set out below:

Christy Olesek
7581 W. Hathaway Lane
Garden City, Idaho 83714

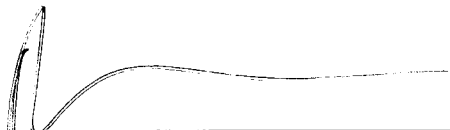
(b) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 4th day of October 2019.

By 

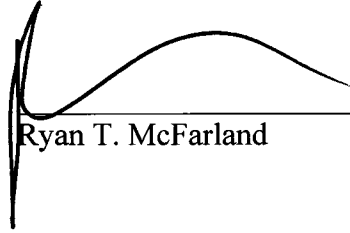
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October 2019, 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:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

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Ryan T. McFarland

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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

Case No. CV01-18-13437

vs.

JUDGMENT

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

JUDGMENT IS ENTERED AS FOLLOWS:

Defendant United Components, Inc., dba Gem State Roofing, breached the Trademark Settlement Agreement. However, Plaintiff Gem State Roofing, Inc. has failed to prove its damages and is thus not entitled to collect any damages. Neither party is entitled to attorney fees.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

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vs.

UNITED COMPONENTS,
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ROOFING,
Defendant.

FINDINGS OF FACT & CONCLUSIONS OF
LAW

THIS MATTER came before the Court on a court trial held on August 5, 2019. For the reasons contained herein, the Court finds that although Defendant United Components, Inc. breached the Trademark Settlement Agreement, Plaintiff Gem State Roofing, Inc. has failed to prove damages, and is thus not entitled to damages or attorney fees.

FINDINGS OF FACT

1. Jeffrey Flynn (“Flynn”) started a roofing company in the early 1980s in Nampa, Idaho, which he called Gem State Roofing. Flynn moved to Boise in 1987 and added asphalt maintenance to his roofing business.
2. In 1995, Flynn and his then-wife Michelle Flynn (“Michelle”), acting as directors, created Flynn, Inc. and filed a Certificate of Incorporation with the Idaho Secretary of State.
3. In 1997, Rick Silvia (“Silvia”) filed a Certificate of Assumed Business Name with the Idaho Secretary of State for his roofing construction business, which declared that his company was operating under the name “Gem State Roofing.”

4. In 1998, Flynn filed an Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance, Inc.
5. In 1999, Michelle filed a Certificate of Assumed Business Name stating that Gem State Roofing & Asphalt Maintenance, Inc. would do business under the name “Gem State Roofing.”
6. In 2000, Silvia filed Articles of Incorporation for Gem State Roofing, Inc.
7. Since 2000, Gem State Roofing, Inc. has primarily conducted business in Blaine County, Idaho under the name “Gem State Roofing.”
8. On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Blaine stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. There is no evidence that the trademark has been renewed since 2012.
9. The Certificate of Registration shows the trademark assigned to Gem State Blaine is as follows:



10. On December 29, 2004, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Boise stating that the first use of the trademark was in 1985 and that the trademark would expire on December 29, 2014.
11. The Certificate of Registration showed that the Trademark assigned to Gem State Boise is as follows:



12. On December 1, 2014, the above trademark was assigned to UCI and renewed until December 29, 2024.
13. There is no evidence that either party has ever obtained a registered trademark for the name “Gem State Roofing.”
14. There are 387 businesses in Idaho using or that have used the name “Gem State.”
15. The “Gem State” is a well-known nickname for the State of Idaho.¹
16. In 2005, following the realization that their roofing companies were operating under the same name, the owners of Gem State Roofing, Inc. (“Gem State Blaine”) and Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State Boise”) entered into a Trademark Settlement Agreement (“TSA”) delineating boundaries for where each company could solicit and do business.
17. The Recitals of the Agreement state that the “parties’ names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services” and that the parties “wish to resolve this matter without litigation by agreeing not to do business or advertise in the other’s primary market.”
18. Under the TSA the parties agreed (in part) that:
 - a. Gem State Boise would not “advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County;”

¹ The Court takes judicial notice of this fact. *See* I.R.E. 201(b)(1) (“The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction.”).

- b. Gem State Boise would not “perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a),² and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors;”
- c. “If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.”

19. Gem State Blaine made the same agreements above, except that they were with respect to Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.

20. In 2010, Flynn and Michelle’s marriage dissolved, and at the same time, Gem State Boise had incurred significant tax liability.

21. In order to resolve Gem State Boise’s tax liability, the IRS directed Flynn to dissolve Gem State Boise and start a new company with a new name.

22. In 2012, Gem State Boise was thus dissolved and Flynn created United Components Incorporated (“UCI”), which continued to operate under the same business name, “Gem State Roofing.”

23. Michelle has no ownership interest in UCI.

24. Since the TSA was signed, UCI (operating as Gem State Roofing) has done four roofing projects in Blaine County, which are as follows:

- a. **Brashears & Sons/Shay Construction** – UCI submitted multiple bids on a project for Brashears & Sons and Shay Construction to perform roofing services for Terry

² The customers listed in Section 3(a) include: Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.

and Mike Higgs. UCI performed roofing services on the project and, on October 13, 2011, was paid \$17,424 for its work.

- i. The client on this job specifically reached out to UCI, because they had a positive experience working with UCI on a project located in Twin Falls, Idaho.
- b. **Pioneer West Property Management** – UCI was paid \$1,950 on July 29, 2016 for work done in Ketchum, Idaho.
 - i. Pioneer West Property Management is the successor to Advance Maintenance Services, to which (under the TSA) Gem State Blaine was allowed to provide roofing services.
 - ii. Silvia testified that Gem State Blaine also did work for Pioneer West Property Management. He testified based on a hearsay statement that UCI had performed “shoddy work” on this project.
- c. **Kerry Armstrong** – UCI was paid \$750 for work done in Ketchum, Idaho in 2017.
- d. **Animal Shelter of the Wood River Valley** – UCI bid on and was awarded a contract with McAlvain Construction, Inc. (“McAlvain”) to perform over \$200,000 in roofing work on the Wood River Animal Shelter.
 - i. As of October 2018, McAlvain has paid UCI a total of \$279,540.
 - ii. Flynn and Kerrie Kuhn (UCI’s Corporate Secretary) testified that UCI has sustained at least \$12,000 in losses on this project.
 - iii. Tracey Felix, a project manager for McAlvain, testified that McAlvain specifically solicited and wanted UCI to do the roofing work on this project, because it had a positive experience working with UCI on Shore Lodge in McCall, Idaho.

25. Since the TSA was signed, UCI (operating as Gem State Roofing) bid on at least four jobs in Blaine County for working totaling over \$100,000. However, it did not win those bids and consequently did not receive any income or profit as a result of those bids.
26. UCI did not believe it was bound by the TSA because Gem State Boise was shut down as part of the deal with the IRS.
27. Silvia testified that for all of the projects described in Sections 22 and 23, UCI did not refer any of the work to him, and Gem State Blaine was qualified to do the work.
28. Silvia testified as to his gross revenue and profit from the years 2000 to 2018.
29. Silvia experienced a drop in business in 2008 and for a few years thereafter. Silvia testified that this drop was likely due to the economic crash and to the fact that UCI was doing business under the same name as his company in Blaine County.
30. However, the exhibit prepared by Silvia setting forth his gross revenue, profit, and profit margin shows that his profit margin has increased overall in 18 years. In fact, in 2018, he had the highest profit margin ever for his business at over 56%.
31. On July 20, 2018, Gem State Blaine filed the instant action against UCI alleging (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) trademark infringement, (4) unjust enrichment,³ (5) preliminary injunction, and (6) permanent injunction.
32. This Court previously determined that UCI is a successor corporation to Gem State Boise, is liable under the terms of the TSA, and breached the TSA by performing work in Blaine County for clients that were not specifically excluded in the TSA. However, the Court held that there were genuine issues of material fact as to whether Gem State Blaine has incurred damages and as to Gem State Blaine's claims regarding trademark infringement and injunctive relief. *See* Memorandum Decision and Order (filed April 26, 2019).

³ This claim has been dismissed. *See* Memorandum Decision and Order pp. 20—21 (filed April 26, 2019).

STANDARD OF REVIEW

It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006); I.R.C.P. 52(a). If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Id.* However, the trial court's conclusions of law are freely reviewed to determine whether the applicable law was correctly stated and whether the legal conclusions are sustained by the facts found. *Id.*

ANALYSIS & CONCLUSIONS OF LAW

The primary issues before the Court are whether Gem State Blaine has presented sufficient evidence regarding injunctive relief and money damages, and whether it is entitled to relief on its claim for trademark infringement.

a. Damages

Gem State Blaine asserts that it is entitled to injunctive relief as well as \$220,000 in money damages for UCI's breach of the TSA. Gem State Blaine asserts that its calculation of damages is based on the law regarding non-competition agreements as the TSA is essentially an agreement not to compete in the parties' respective geographical territories.

i. Injunction

The decision of whether to impose injunctive relief is within the discretion of the district court. *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). “The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion.” *Id.* “It is true that injunctions should issue only where irreparable injury is actually threatened.” *O’Boskey v. First Fed. Sav. & Loan Ass’n of Boise*, 112 Idaho 1002, 1007, 739 P.2d 301, 306 (1987). Where the conduct causing injury has been discontinued, the dispute is moot and the injunction should be denied. *Id.* However, as the United States Supreme Court observed, the trial court must be convinced that “there is no reasonable expectation that the wrong will be repeated.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted). Further, the burden on the defendant to make this showing “is a heavy one.” *Id.* “It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.” *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

Here, Gem State Blaine has not demonstrated that it has suffered irreparable injury by UCI’s conduct. Instead, the evidence demonstrates that Gem State Blaine’s profit margin has overall been increasing for the past 18 years, with a dip that coincided with the so-called “great recession.” Gem State Blaine failed to present any evidence regarding UCI’s profits and its corresponding losses (other than a speculative statement by Silvia that his company likely experienced a dip due to the economy as well as UCI’s presence in Blaine County).

Gem State Blaine experienced its highest profit margin just last year at over 56%. While it is true that UCI breached the TSA by doing work for three clients that were not specifically excluded in the TSA,⁴ and by bidding on certain other projects, there is no evidence that Gem State Blaine would have gotten the same work or what its profits would have been had it been awarded that work. Silvia testified that his company was equipped to perform the same services on these projects. However, there is no evidence or testimony from any of these clients (potential or otherwise) that they would have hired Gem State Blaine had UCI referred these clients to Gem State Blaine. There is also no evidence as to what Gem State Blaine's profit on these projects would have been had it done the work.

There is no evidence that UCI performed shoddy work that has harmed Gem State Blaine's reputation. Instead, Silvia testified (based on hearsay) that UCI performed "shoddy work" for Prior West Property Management, which was a successor to a client to whom UCI was specifically allowed to provide services under the TSA. The Court cannot find that UCI was performing "shoddy work" that harmed Gem State Blaine based on this hearsay statement.

Finally, there was no evidence that UCI has done work in Blaine County recently (other than on the animal shelter, upon which it has sustained a loss). The evidence of work performed in Blaine County is minimal. In over 14 years (from 2005 to 2019), UCI has worked on three jobs that are in violation of the TSA, all of which stemmed from UCI's existing client relations. Accordingly, the Court does not find that Gem State Blaine is actually threatened by irreparable

⁴ The Court finds that the work for Pioneer West Property Management was permissible under the TSA, because it was a successor to Advanced Maintenance Services.

injury. Therefore, a permanent injunction will not be issued as Gem State Blaine has failed to prove any actual damages from UCI's conduct.

ii. Money Damages

Gem State Blaine asserts that it is entitled to damages under the damages calculation for a violation of a non-competition agreement, and that it need only show it has lost profits and UCI has had corresponding gains. UCI disputes that it actually breached the TSA and argues that Gem State Blaine has not shown that it has suffered any damages as a result of its breach of the TSA.

“A trial court’s award of general damages is reviewed under the deferential standard of clear error.” *Moeller v. Harshbarger*, 118 Idaho 92, 93, 794 P.2d 1148, 1149 (Ct. App. 1990). The findings of the trial court on the question of damages will not be set aside when based on substantial and competent evidence. *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983).

Here, the Court finds that the TSA is essentially an anti-competition agreement and that UCI (as the successor to Gem State Boise) breached the TSA by performing services for customers in Blaine County that were not exceptions set forth in the TSA (*see* TSA ¶ 3). Therefore, the Court will apply the law regarding damages for anti-competition agreements in this case.

The measure of damages for the breach of an anti-competition clause is the amount that the plaintiff lost by reason of the breach, not the amount of profits made by the defendant. *Dunn v. Ward*, 105 Idaho 354, 356, 670 P.2d 59, 61 (Ct. App. 1983). The measure of damages for loss of profits is “rarely susceptible of accurate proof” *Ryska v. Anderson*, 70 Idaho 207, 213, 214 P.2d 874, 876 (1950). Therefore, the law does not require “accurate proof with any degree of mathematical certainty” *Vancil v. Anderson*, 71 Idaho 95, 105, 227 P.2d 74, 80 (1951). Damages need be proved only with a “reasonable certainty[.]” and this means “that [the] existence of damages must be taken out of the realm of speculation.” *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 182–83, 595 P.2d 709, 716–17 (1979) (citations omitted). “The mere fact that it is difficult to arrive at [an] exact amount of damages, where it is shown that damages resulted, does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount.” *Bumgarner v. Bumgarner*, 124 Idaho 629, 640, 862 P.2d 321, 332 (Ct.App.1993) (citation omitted). The profits realized by the defendant may be considered by the trier-of-fact, if shown to correspond with the loss of the plaintiff. *Dunn*, 105 Idaho at 356, 670 P.2d at 61.

The facts in this case are akin to *Trilogy Network Systems v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007). In that case, Johnson was employed by Trilogy Network Systems, Inc. (“Trilogy”). Johnson terminated his employment with Trilogy. The parties subsequently entered into an agreement that (in part) forbade Johnson for one year from doing business with Seastrom Manufacturing, Inc. (“Seastrom”). Johnson and Trilogy subsequently both submitted bids to Seastrom during that one year period. Seastrom awarded the contract to Johnson. Trilogy then sued Johnson for breach of the non-competition agreement. A court trial was held, and the trial

court determined that although Johnson had breached the agreement, Trilogy had failed to prove its damages with reasonable certainty. The trial court entered a judgment in favor of Trilogy, but did not award it damages or attorney fees, and Trilogy appealed.

On appeal, the Supreme Court affirmed the trial court's decision. The Supreme Court found that the trial court's determination was supported by the record that Trilogy had failed to prove its damages because it had failed to offer into evidence its original bid to Seastrom or any comparison between its costs and the costs to Johnson. During the court trial, the president of Trilogy testified that Trilogy and Johnson's profit margins were similar. He also stated that Trilogy would have made a comparable profit to Johnson's profit on the Seastrom project. Trilogy argued that stating a conclusion regarding its profit margin, without any factual support, is enough to take the issue of damages out of the realm of speculation. The Supreme Court disagreed and noted that the law requires more:

Trilogy failed to offer into evidence any proof of what its costs and profits would have been had Seastrom awarded it the contract. Its only proof was conclusory statements that Johnson and Trilogy would have made similar profits. Trilogy failed to offer into evidence its bid to Seastrom for the software portion of the project, which would have shown its costs and the profit margin it expected for that portion of the bid. Although Trilogy had a list of the software Johnson supplied Seastrom, there was no showing as to what the costs to Trilogy would have been for the software ultimately used by Johnson to complete the project. As such, Trilogy failed to persuade the district court of any correspondence between what its profit would have been and Johnson's actual profit, and thus failed to take the measure of its damages out of the realm of speculation. Therefore, the district court did not err when it declined to award damages.

Id. at 847, 172 P.3d at 1122.

Similarly, here, Gem State Blaine failed to offer into evidence any proof as to what its costs and profits would have been had it been awarded the contracts for the work for Brashears &

Sons/Shay Construction, Kerry Armstrong, or the Animal Shelter. In addition, there is no evidence before the Court as to what UCI's profits were on these projects, other than it sustained a \$12,000 loss. There is no evidence that had Gem State Blaine been awarded the Animal Shelter contract that it would have not sustained the same loss. Moreover, there is insufficient proof that Gem State Blaine has lost profits during the years that UCI performed services in Blaine County. While Gem State Blaine's business did take a downturn during the recession, it has since recovered and has had its highest profit margin to date in 2018. Gem State Blaine has failed to show any correspondence between what its profits would have been and UCI's actual profit, and thus has failed to take the measure of its damages out of the realm of speculation. *See id.* Accordingly, the Court finds that Gem State Blaine has failed to prove its damages with reasonable certainty.

b. Trademark Infringement

Gem State Blaine claims that UCI has violated its trademark rights to the name "Gem State Roofing." UCI spent much briefing and argument claiming that the logo is the trademark at issue;⁵ however, Gem State Blaine has made clear that it is not alleging trademark infringement on its logo, but rather on its use of the name, "Gem State Roofing." Accordingly, the Court will determine whether Gem State Blaine has a protectable trademark in the name "Gem State Roofing," and whether it has sustained damages from any alleged trademark infringement.

⁵ UCI also claimed that a name cannot be trademarked; however, that argument fails as trademarks are specifically defined as "any **word, name**, symbol, or device." I.C. § 48-501(11).

i. Protectable Trademark

Trademarks are “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish the goods of such person . . . from those manufactured or sold by others.” I.C. § 48-501(11); *see also* 15 U.S.C. § 1127. Trademarks may be registered both federally and with a state government.⁶ The federal trademark system is governed by the Lanham Act, while Idaho provides a simpler but similar statutory scheme at Idaho Code § 48-501, *et. seq.*⁷

Registration of a trademark is not required in order to have a valid and enforceable trademark, and an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. *Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“The Lanham Act protects both registered and unregistered trademarks.”). Under both state and federal law, a trademark must be first used in connection with the sale of goods or services in order to gain legal protection. *See e.g. King’s of Boise, Inc. v. M. H. King Co.*, 88 Idaho 267, 274, 398 P.2d 942, 945 (1965); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 979 (9th Cir. 2006) (“Registration does not create a mark or confer ownership; only use in the marketplace can establish a mark.”); *See Cal. Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1454 (9th Cir.1985) (“[A] trademark is a common law property right that exists independently of statutory provisions for registration.”).

⁶ The evidence shows that both parties have registered only their logos. There is no evidence before the Court that either party has registered the name “Gem State Roofing.” However, the Court notes that registration is not required to have a protectable trademark.

⁷ “The intent of this act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the trademark act of 1946, as amended. To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing this act.” I.C. § 48-518.

Thus, in order to obtain a registered trademark, an applicant must certify that his mark is “in use.” I.C. § 48-503(4). “Use” is defined as

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this act, a mark shall be deemed to be in use: (a) on goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

Here, the un rebutted evidence is that Flynn used the name “Gem State Roofing” as early as the 1980s. There is insufficient evidence regarding the exact areas he did business in at that time. Silvia did not start using the name “Gem State Roofing” in Blaine County until the late 1990s. There is insufficient evidence regarding the first use of the name “Gem State Roofing” in the Blaine County area. However, even if Gem State Blaine was the first to use the name, the Court finds that the name “Gem State Roofing” is not a protectable trademark as it is primarily geographically descriptive.

Idaho Code § 48-502(2)(e) provides:

A mark⁸ by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

...

Consists of a mark which: (i) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or (ii) **when used on or in connection with the goods or services of the applicant is primarily geographically descriptive** or deceptively misdescriptive of them; or (iii) is primarily merely a surname, provided however, that nothing in this subsection shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as used on

⁸ “Mark” is defined as “any trademark, service mark, collective mark or certification mark entitled to registration under this act whether registered or not.” I.C. § 48-501(7).

or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five (5) years before the date on which the claim of distinctiveness is made[.]

(Emphasis added). Neither generic nor descriptive terms are protectable without establishing secondary meaning. *20th Century Wear, Inc. v. Sanmark-Stardust Inc.*, 747 F.2d 81, 87 (2nd Cir.1984). "A mark is descriptive if it describes: the intended purpose, function or use of the goods; the size of the goods; the class of users of the goods; a desirable characteristic of the goods; or the end effect upon the user." *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1190 (6th Cir. 1988). If the mark "imparts information directly, it is descriptive." *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 587 F.Supp. 330, 335 (E.D.Mo.1984); affirmed 750 F.2d 631 (8th Cir.1984).

The Lanham Act does not protect primarily geographically descriptive marks.

"It is plain that the congressionally established prohibition against registration of geographical names or terms basically stems from the realization that most terms in the vocabulary of this science are generic or descriptive. Thus, Congress has expressly left accessible to all potential users those names of subdivisions of the earth—regions, nations, counties, town, rivers, lakes, and other natural and artificial geographical units—which could be employed to draw public attention to the origin of a product or the situs of a business. It would obviously promote unfair competition to proscribe for all save a single producer the name of a region and thereby preclude other producers of the same product in the same region from indicating their product's origin."

Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc., 871 F.2d 590, 594 (6th Cir. 1989) (citing *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 485 (5th Cir.1971)).

Where it is determined that the mark as perceived by potential purchasers describes the geographic origin of the goods the mark is primarily geographically descriptive. *Id.* (citation omitted). If there is a possibility that the geographic term is "minor, obscure, remote or

unconnected with the goods,” then the mark may be protectable and not precluded under the primarily geographically descriptive category. See *Nat’l Lead Co. v. Wolfe*, 223 F.2d 195 (9th Cir. 1955) (use of word “Dutch” to describe paint was not geographical or descriptive); *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 486 (5th Cir. 1971) (use of word “world” to describe carpets was too broad to suggest any identifiable unit or place of origin, and was thus not geographically descriptive).

The Legislative History of the Lanham Act points out that where a logical connection can be made between the product and the geographical term, the term is geographically descriptive. “To illustrate, the word ‘Alaska’ would probably have no descriptive or geographical meaning applied to bananas, but applied to canned salmon would unquestionably have a descriptive as well as geographical meaning.” *In re Nantucket, Inc.*, 677 F.2d 95, 107 (C.C.P.A. 1982).

Though more than a geographic name is required in order to meet the “primarily geographically descriptive” category, there is no requirement that the challenger to a trademark demonstrate that the area is noted for the goods in question. The proper inquiry is “What meaning, if any, does the term convey to the public with respect to the goods on which the name is used?” When a geographic name is used on goods, it does not represent a single source but refers to the area in which the goods originated. A “goods/place association” by the public is therefore presumed.

Burke-Parsons-Bowlby Corp., 871 F.2d at 595 (citations omitted).

A trademark that is primarily geographically descriptive must have acquired secondary meaning to invoke the protection of the Lanham Act. *Id.* The purpose of requiring the establishment of secondary meaning is to give effect to those geographic marks which no longer cause the public to associate the goods with a particular place but to associate the goods with a particular source.

American Footwear Corp. v. General Footwear Co. Ltd., 609 F.2d 655 (2nd Cir.1979). The geographical term no longer primarily denotes the geographic area, but with secondary meaning it primarily denotes a single source for the product. *Id.*

Secondary meaning is proved when by a preponderance of the evidence it can be determined that the attitude of the consuming public toward the mark denotes “a single thing coming from a single source.” *Aloe Cream Laboratories v. Milsan, Inc.*, 423 F.2d 845, 849 (5th Cir. 1970) (citation omitted). Direct proof of secondary meaning is difficult to obtain. *Id.* Absent direct proof, the Court must draw reasonable inferences from evidence of long-term usage, from considerable effort and expenditure of money toward developing a reputation and good will for the trademark. *WLWC Centers, Inc. v. Winners Corp.*, 563 F. Supp. 717, 723 (M.D. Tenn. 1983). Sales volume, though relevant, is not necessarily sufficient to indicate recognition of the mark by purchasers as an indication of the source. *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1345 (U.S.C.C.P.A.1977). Advertising expense also is relevant but will not, standing alone, establish secondary meaning. *Scientific Applications v. Energy Conservation Corp.*, 436 F.Supp. 354, 361 (N.D.Ga.1977). Where advertising expenditures are required to “merely survive” in the competitive market, advertising expenditures cannot be used to prove secondary meaning. *WLWC Centers*, 563 F.Supp. at 724. However, extensive advertising which results in consumer association with a single source can establish secondary meaning. *Scott Paper Co. v. Scott’s Liquid Gold Inc.*, 589 F.2d 1225, 1228 (3rd Cir.1978). The duration of use of the mark can establish secondary meaning where the duration is more than a relatively short period. In *WLWC Centers*, the Court determined that three years was insufficient to prove that the mark had acquired secondary meaning. *WLWC Centers*, 563 F.Supp. at 723.

In *Burke-Parsons-Bowlby v. Appalachian Log Homes*, 871 F.2d 590 (6th Cir. 1989), the holder of the registered trademark, “Appalachian Log Structures,” sought to enjoin a competitor’s use of the mark, “Appalachian Log Homes.” The Sixth Circuit Court of Appeals held that the mark was not a protectable trademark, because it was primarily geographically descriptive. The court noted that the Appalachian region is publicly acknowledged as a distinct, identifiable region, and the regionally descriptive term “Appalachian” is used in 132 businesses located in the Appalachian region. *Id.* at 594. Appalachian Log Structures was located in Virginia, one of the “Appalachian” states. *Id.* at 595. The court also held that there was insufficient evidence that “Appalachian Log Structures” had acquired secondary meaning even though the company had achieved \$2 million in gross sales in about three years and had expended approximately \$100,000 in advertising the mark over the course of one year. The court noted that no consumer evidence was submitted and that the evidentiary burden necessary to establish secondary meaning is substantial. *Id.* at 596. Although the advertising expenditures for the mark were relevant, there was no evidence to establish the amount as extensive or to distinguish it as beyond that necessary to survive in the market. *Id.*

Here, UCI provided evidence that there are 387 currently active businesses using the words “Gem State” in their business names. It is commonly known that “Gem State” is the nickname for the State of Idaho. It is undisputed that Gem State Blaine provides roofing services in the State of Idaho, or rather, the “Gem State.” There is no evidence that Gem State Blaine’s use of the name “Gem State Roofing” has acquired secondary meaning. Accordingly, the Court concludes that Gem State Roofing is geographically descriptive, and as such, is not a protectable trademark.

ii. Damages

Even if Gem State Roofing was a protectable trademark, and Gem State Blaine had a protectable interest in it, Gem State Blaine has failed to show it is entitled to damages under trademark law.

In a trademark infringement case, a plaintiff must prove both the fact and the amount of damage. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 511 (2d ed. 1984). Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement. *Id.* at 509. Because proof of actual damage is often difficult, a court may award damages based on defendant's profits on the theory of unjust enrichment. *Id.* at 511; *see also Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 918 (Fed. Cir. 1984). "To establish damages under the lost profits method, a plaintiff must make a "prima facie showing of reasonably forecast profits." *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).

Trademark remedies are guided by tort law principles. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 509 (2d ed. 1984). ("Plaintiff's damages should be measured by the tort standard under which the infringer-tortfeasor is liable for all injuries caused to plaintiff by the wrongful act . . ."). As a general rule, damages which result from a tort must be established with reasonable certainty. Dan B. Dobbs, *Remedies* § 3.3, at 151 (1973). The Supreme Court has held that "[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness," yet, a reasonable basis for computation must exist. *Eastman Kodak Co. v.*

Southern Photo Materials Co., 273 U.S. 359, 379, 47 (1927). Many courts have denied a monetary award in infringement cases when damages are remote and speculative. *See generally Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 642 (D.C.Cir.1982) (“any award based on plaintiff’s damages requires some showing of actual loss”); *Burndy Corp. v. Teledyne Industries, Inc.*, 584 F.Supp. 656, 664 (D.C.Conn.) (“no assessment of damages is authorized if it is not based on actually proven damages.”), *aff’d* 748 F.2d 767 (2d Cir.1984); *Invicta Plastics (USA) Ltd. v. Mego Corp.*, 523 F.Supp. 619, 624 (S.D.N.Y.1981) (“damages will not be awarded in the absence of credible evidence demonstrating injury to the plaintiff from defendant’s sales.”); *Vuitton et Fils, S.A. v. Crown Handbags*, 492 F.Supp. 1071, 1077 (S.D.N.Y.1979) (“The discretionary award of either damages or profits assumes an evidentiary basis on which to rest such an award. Without such a basis there can be no recovery.”), *aff’d mem.*, 622 F.2d 577 (2d Cir.1980).

For the reasons set forth in Section (a)(ii) above, the Court concludes that Gem State Blaine has failed to demonstrate injury as a result of UCI’s work in Blaine County. Gem State Blaine failed to provide any evidence as to UCI’s profits and its corresponding losses. Instead, the only evidence was that UCI sustained a \$12,000 loss on the Animal Shelter project and that Gem State Blaine experienced a dip in business that coincided with the economic crash. There is no evidence as to what Gem State Blaine’s profits would have been had it been awarded the jobs UCI completed. As such, the Court finds that any damages are remote and speculative. Accordingly, Gem State Blaine is not entitled to damages on its trademark infringement claim.

CONCLUSION

For the reasons set forth herein, the Court concludes that although UCI breached the TSA, Gem State Blaine has failed to show damages for its breach of contract and trademark infringement claims. The Court finds that neither party prevailed, and thus, neither party is entitled to attorney fees. Accordingly, the Court will enter a declaratory judgment that UCI breached the TSA, but Gem State Blaine is not entitled to collect damages or attorney fees.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



Terri Pickens Manweiler, ISB No. 5828
Abigail McCleery, ISB No. 11000
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701-0915
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
abigail@pickenslawboise.com

Attorneys for Defendant-Respondent

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

GEM STATE ROOFING,
INCORPORATED

Plaintiff-Appellant,

vs.

UNITED COMPONENTS,
INCORPORATED dba GEM STATE
ROOFING

Defendant – Respondent.

Case No. CV01-18-13437

**DEFENDANT-RESPONDENT'S
REQUEST TO INCLUDE
ADDITIONAL DOCUMENTS ON
APPEAL**

TO: THE ABOVE-NAMED APPELLANT, Gem State Roofing Incorporated, AND ITS ATTORNEY, McFarland Ritter PLLC., P.O. Box 1335 Meridian, ID 83683, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT United Components Incorporated dba Gem State Roofing (“Respondent”) by and through its counsel of record, hereby requests pursuant to Rule 19 of the Idaho Appellate Rules, the inclusion of the following material in the clerk’s record in addition to that required to be included by the Idaho Appellate Rules and the Notice of Appeal and Notice of Cross-Appeal.

1. Respondent requests the following documents be included in the clerk’s record

in addition to those requested by Plaintiff- Appellant:

	DATE	DOCUMENT
1.	02/13/2019	Motion for Summary Judgment
2.	02/13/2019	Memorandum in Support of Motion for Summary Judgment
3.	02/13/2019	Declaration of Jeffrey Flynn in Support of Defendant's Cross Motion for Summary Judgment
4.	02/13/2019	Declaration of Terri Pickens Manweiler in Support of Defendant's Cross Motion for Summary Judgment
5.	03/05/2019	Defendant's Objection to Plaintiff's Motion to Compel
6.	03/05/2019	Declaration of Terri Pickens Manweiler in Support of Defendant's Objection to Plaintiff's Motion to Compel
7.	03/05/2019	Opposition to Plaintiff's Motion for Partial Summary Judgment
8.	03/05/2019	Supplemental Declaration of Jeffery Flynn
9.	03/05/2019	Supplemental Declaration of Terri Pickens Manweiler
10.	03/11/2019	Reply in Further Support of Defendant's Cross Motion for Summary Judgment
11.	03/12/2019	Motion to Strike Affidavit of Rick Silvia in Support of Reply in Support of Plaintiff's Motion for Partial Summary Judgment
12.	05/30/2019	Motion for Sanctions – Gem State
13.	05/30/2019	Memorandum In Support of Motions for Sanctions – Gem State
14.	05/30/2019	Affidavit in Support of Motion of Ryan T. McFarland
15.	06/11/2019	Objection to Motion for Sanctions
16.	06/24/2019	Motion for Reconsideration and Protective Order
17.	06/24/2019	Memorandum In Support of Motion for Reconsideration
18.	06/24/2019	Declaration of Terri Pickens Manweiler in Support of Motion
19.	06/24/2019	Declaration of Kerrie Kuhn in Support of Motion
20.	07/01/2019	Order Resetting Defendant's Motion for Reconsideration
21.	07/02/2019	Plaintiff's Memorandum in Opposition to Motion to Reconsider
22.	07/02/2019	Affidavit of Ryan T. McFarland in Support of Opposition
23.	07/03/2019	Motion for Protective Order
24.	07/03/2019	Memorandum In Support of Motion for Protective Order
25.	07/03/2019	Declaration of Terri Pickens Manweiler in Support of Motion for Protective Order
26.	07/08/2019	Plaintiffs Memorandum in Opposition to Defendant's Motion for Protective Order Regarding Third Party Subpoenas
27.	07/08/2019	Affidavit of Ryan McFarland in Support of Gem State Roofing, Inc.'s Opposition to Defendant's Motion for Protective Order Regarding Third Party Subpoenas
28.	07/11/2019	Protective Order
29.	07/16/2019	Plaintiff's Trial Brief
30.	07/16/2019	Defendant's Trial Brief
31.	07/16/2019	Request for Judicial Notice
32.	09/19/2019	Motion for Costs and Attorneys' Fees

33.	09/19/2019	Memorandum in Support of Motion for Costs and Attorney Fees
34.	09/09/2019	Affidavit of Terri Pickens In Support of Memorandum
35.	09/24/2019	Motion for Attorneys' Fees and Costs
36.	09/24/2019	Memorandum in Support of Motion for Costs and Attorney Fees
37.	09/24/2019	Affidavit of Ryan McFarland in Support of Memorandum
38.	09/24/2019	Plaintiff's Opposition to Defendant's Motion for Attorney's Fees and Costs
39.	09/26/2019	Affidavit of Terri Pickens Manweiler re: Objection to Plaintiff's Motion for Attorneys' Fees and Costs
40.	09/26/2019	Reply in Further Support of Defendant's Motion for Costs and Attorneys' Fees
41.	10/02/2019	Reply in Support of Plaintiff's Motion for Attorneys' Fees
42.	10/02/2019	Affidavit of Ryan McFarland in Further Support of Memo
43.	10/02/2019	Affidavit of Lori Hickman in Support of Memo

2. Respondent requests the following documents, charts, or pictures admitted as exhibits be copied and sent to the Supreme Court:

Description	Bates Number/ Deposition Exhibit Number	Stipulated Trial Exhibit Number
Gem State-Blaine Certificate of Assumed Business Name for "Gem State Roofing" dated 8/12/97	DEF 000029	2
Gem State-Boise Certificate of Assumed Business Name for "Gem State Roofing" dated 7/19/99	DEF 000030	3
Gem State-Blaine Corrected Application for Registration of Trademark-Service mark dated 4/8/02 for "Gem State Roofing" Trademark	DEF 0022-0023	4
Gem State-Blaine Certificate Registration of Trademark-Service mark dated 5/2/02 for "Gem State Roofing" Trademark	DEF0021	5
Gem State-Boise Certificate Registration of Trademark-Service mark dated 12/29/04 for "Gem State Roofing" Trademark	DEF0018	6
Articles of Incorporation of United Components, Incorporated dated 10/25/11	J. Flynn Dep. Exh. 20	13
UCI Transactions Detail Report for Pioneer West Property Management (Blaine County customer)	DEF 00097	20
UCI Transaction Details Report for Kerry Armstrong (Blaine County customer)	DEF 00109	27
Cease and Desist Letter from McFarland Ritter to UCI dates 6/22/18	DEF 00010-00011	43
Certificate of Incorporated of Flynn Inc.	DEF 0032-34	48

Articles of Amendment changing Flynn Inc. to Gem State Roofing and Asphalt Maintenance	DEF 0036	49
Articles of Incorporation of Gem State Roofing Inc.	DEF00040	50
Application for Registration of Trademark Service Mark	DEF 00026-27	51
Certificate Registration of Trademark service Mark	DEF 00025	52
Application for Renewal Registration of Trademark Service Mark	DEF 00081	53
Certificate Renewal Registration of Trademark Service Mark	DEF 00080	54
Estimate – Kerry Armstrong	DEF 00107-108	55

3. Respondent requests that all other documents, charts or pictures that were admitted as exhibits during trial not yet listed be copied and sent to the Supreme Court.
4. Respondent further requests that additional transcripts be produced with the Clerk’s Record on appeal as follows:

03/19/2019	Transcripts from the Motion to Compel Hearing
06/09/2019	Transcripts from the Motion for Sanctions Hearing
07/09/2019	Transcripts for Motion for Reconsideration Hearing

5. Respondent objects to Appellant’s requests that the “Plaintiff’s Proposed Exhibit Numbers 104-111” be sent to the Supreme Court to be included in the appeal record, as they were not admitted into evidence and thus are inappropriate to include.

Those documents 104-111 objected to are entitled as follows:

- 104: Affidavit of Rick Silvia in Support of Plaintiff’s Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b) filed 5/30/19
- 105: Affidavit of Rick Silvia in Support of Plaintiff’s Motion for Partial Summary Judgment filed 2/6/19
- 106: Affidavit of Rick Silvia in Support of Plaintiff’s Motion for Partial Summary Judgment filed 2/6/2019
- 107: Specimens of Gem State- Blaine “Gem State Roofing” Trademark
- 108 Specimens of Gem State-Blain “Gem State Roofing” general use of mark

- 109: Google search results for “United Components Inc. Idaho” performed 7/12/19
- Transcript of Deposition of Jeffery Flynn taken December 12/19/2018
- Transcript of Deposition of Jeffery Flynn taken 12/20/2018

6. I certify that a copy of this request was served upon the Clerk of the District Court and upon all parties required to be served.

DATED: October 15, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
 Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant-Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2019, a true and correct copy of the foregoing document was served as follows:

Ryan T. McFarland
 McFarland Ritter PLLC
 P.O. Box 1335
 Meridian, Idaho 83680
Attorneys for Plaintiff-Appellant

- First Class Mail
- Facsimile 208.895.1270
- Hand delivery
- Email/iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
 Terri Pickens Manweiler

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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

ORDER RE: ATTORNEY FEES AND
COSTS

THIS MATTER comes before the Court on the Defendant's Motion for Costs and Attorney Fees, filed through counsel on September 19, 2019, and the Plaintiff's Motion for Attorney Fees and Costs, filed through counsel on September 24, 2019. A hearing was held on November 12, 2019, and the matter was taken under advisement. For the reasons set forth herein, both Motions are DENIED.

BACKGROUND

Plaintiff filed this action against Defendant to enforce a Trademark Settlement Agreement ("TSA"). One of the most vigorously disputed issues was whether the Defendant was bound by the TSA as a successor to the company that entered into the TSA.

Both parties filed cross Motions for Summary Judgment, and on April 26, 2019, the Court entered a *Memorandum Decision and Order*, in which both parties prevailed in part and did not prevail in part. The Court held that United Components Incorporated ("UCI" or "Defendant")

was a successor corporation to Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State Boise”) and was liable under the terms of the TSA. The Court further held that UCI breached the TSA by performing work in Blaine County for clients that were not specifically excluded in the TSA. However, the Court held that there were genuine issues of material fact as to whether Gem State Roofing, Incorporated (“Gem State Blaine” or “Plaintiff”) had incurred damages and as to Gem State Blaine’s claims regarding trademark infringement and injunctive relief.

Following a court trial, this Court held that Gem State Blaine proved that UCI breached the TSA, but failed to prove its damages. *See Findings of Fact and Conclusions of Law* (filed Sept. 17, 2019). On September 17, 2019, the Court entered a Judgment, which also provided that neither party is entitled to attorney fees.

Both parties timely filed Motions for Costs and Attorney Fees. UCI contends it is the prevailing party because it avoided liability, Gem State Blaine claimed over \$200,000 in damages and was awarded nothing, and finally, it made an offer of judgment to Gem State Blaine that was rejected.

Gem State Blaine concedes that there was no prevailing party in this case; however, it asserts it is entitled to costs and attorney fees under Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2), for having to file a Motion to Compel discovery, UCI’s failure to comply with the Order to Compel, and UCI’s failure to admit certain requests for admissions that were later stipulated to and found as facts in this Court’s *Findings and Conclusions of Law*.

ANALYSIS

1. Prevailing Parties

Costs and attorney fees are only awardable to the prevailing party or parties in an action. Idaho Rule of Civil Procedure 54(d)(1)(A) provides that “costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.” “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.” I.R.C.P. 54(e)(1).

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). It is within the trial court’s discretion to determine which party to the action is the prevailing party. *See id.*; *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010). In making the determination, the Court considers, “(a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims.” *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983). “[O]ffers of settlement, including offers of judgment, should be considered in determining the final judgment or result of the action in relation to the relief sought.” *Zenner v. Holcomb*, 147 Idaho 444, 449, 210 P.3d 552, 557 (2009). However, the

Supreme Court has “cautioned that they should not be the only, or even most significant, factor in the trial court’s prevailing party analysis.” *Id.*

“[T]he prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.” *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 203, 321 P.3d 739, 753 (2014) (citation omitted). The party moving for attorney fees bears the burden of showing that the standards for such an award have been met. *Cunningham v. Waford*, 131 Idaho 841, 844, 965 P.2d 201, 204 (Ct. App. 1998).

A defendant’s dismissal with prejudice from an action is “the most favorable outcome that could possibly be achieved.” *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000) *abrogated on other grounds by BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216 (2010). In *Daisy Manufacturing Company*, the Court specifically noted the plaintiff did not obtain any benefit from the litigation in finding that the defendant was the prevailing party. *Id.*

Here, UCI was not dismissed from the action. Rather, the Court found that Gem State Blaine proved that UCI was liable under the TSA and breached the TSA, but that it failed to prove its damages. UCI vigorously contested both whether it was bound by the TSA and whether it breached the TSA. UCI continued to contest adverse findings against it at the court trial even after the Court held that it was liable and breached the TSA on summary judgment. *See Memorandum Decision and Order* (filed April 26, 2019). UCI ultimately avoided a monetary

judgment only because Gem State Blaine could not show its damages to a degree of reasonable certainty.

As set forth in this Court's *Findings of Fact and Conclusions of Law*, the facts in this case were akin to *Trilogy Network Systems v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007). In that case, following a court trial, the trial court determined that the plaintiff proved that the defendant breached the non-compete agreement, but had failed to prove its damages. The trial court held that there was no prevailing party, and the Supreme Court affirmed,

Here, the district court correctly perceived the issue as one of discretion (it cited to I.R.C.P. 54(d)(1)(B)). It also acted consistently with the legal standards. Rule 54 directs courts to consider who the prevailing party is in relation to the relief sought by each party. Here, Trilogy sought as damages the profits Johnson obtained, and Johnson sought to have his breach excused because of a unilateral mistake. The court noted this and considered the relief sought when determining whether to award attorney fees. Finally, it reached its decision through the exercise of reason. Therefore, we affirm the decision to have each party bear its own costs and fees.

Id. at 847–48, 172 P.3d at 1122–23. Similarly, here, UCI consistently maintained and argued that it did not breach the TSA. UCI failed at that argument. Gem State Blaine prevailed in proving that UCI breached the TSA, but UCI prevailed in avoiding a monetary judgment. Accordingly, both parties prevailed and did not prevail in certain respects.

In *Mountain Rest. Corp. v. ParkCenter Mall Assocs.*, 122 Idaho 261, 269, 833 P.2d 119, 127 (Ct. App. 1992), the Court of Appeals upheld a trial court's determination that no party prevailed where the plaintiff succeeded in establishing a breach of contract, but did not prove that the breach was material and thus was not granted rescission. In addition, the defendant sought damages for breach of a lease agreement, and the district court granted the defendant partial

relief as to rental payments for when the plaintiff occupied the space. The trial court denied prospective relief, because it found the defendant failed to mitigate damages. In addition, the Court of Appeals upheld the trial court's refusal to award the defendant costs under Idaho Rule of Civil Procedure 68, pertaining to offers of judgment. Prior to trial, the defendant offered to allow judgment to be taken against it in the amount of \$10,000. "The district court ruled that because of the difficulty in comparing the offer of judgment with the judgment finally rendered in the case that Rule 68 did not mandate an award of costs." *Id.*

The issue presented is whether the district court correctly concluded that because of the structure of the offer it was not possible to ascertain whether the offer is more favorable than the judgment. We believe that the district court's order denying costs was correct. There was extensive testimony and exhibits at trial concerning the value of various trade fixtures owned by Mountain Restaurant, and their value was at least \$20,000, with evidence in the record of values in excess of that amount. The offer of judgment might have actually resulted in a net loss to Mountain of over \$10,000. The judgment required Mountain Restaurant to pay \$12,023.00 in back rent, but given the difficulty of evaluating the trade fixtures, we cannot determine whether the award of back rent actually exceeds the net monetary loss from the offer of judgment. Accordingly, the district court's order denying ParkCenter its claimed Rule 68 costs is affirmed.

Id.

Similarly, here, UCI urges the Court to consider the \$5,000 offer of judgment pursuant to Rule 68 that it made to Gem State Blaine prior to trial. Rule 68 provides in relevant part as follows:

(1) Claims for Monetary Damages. In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the "adjusted award."

(A) Adjusted Award Definition. The adjusted award is defined as:

- (i) the verdict in addition to,
- (ii) the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment and,
- (iii) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment. Provided, in contingent fee cases where attorney fees are awardable under Rule 54(e)(1), the court will pro

rate the offeree's attorney fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

(B) Adjusted Award Less than Offer. If the adjusted award obtained by the offeree is less than the offer, then:

(i) the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;

(ii) the offeror must pay those costs of the offeree, as allowed under Rule 54(d)(1), incurred before the making of the offer; and

(iii) the offeror is not be liable for costs and attorney fees of the offeree awardable under Rules 54(d)(1) and 54(e)(1) incurred after the making of the offer.

(C) Adjusted Award More than Offer. If the adjusted award obtained by the offeree is more than the offer, the offeror must pay those costs, as allowed under Rule 54(d)(1), incurred by the offeree both before and after the making of the offer.

(D) Judgment to be Entered. After a comparison of the offer and the adjusted award, in appropriate cases, the district court must order an amount which either the offeror or the offeree must ultimately pay separate and apart from the amount owed under the verdict. A total judgment must be entered taking into account both the verdict and the involved costs.

Rule 54(d)(1) specifies that costs are allowed as a matter of right to the prevailing party or parties. Here, the Court concludes that neither party prevailed, or at least, that each party prevailed and did not prevail in part. Because Gem State Blaine did not prevail on its claim for damages, Rule 68 does not apply. However, *Zenner v. Holcomb* instructs that even if Rule 68 does not apply, the Court must consider an offer of judgment in its prevailing party analysis.¹

1

An offer of judgment is defined generally as “[a] settlement offer by one party to allow a specified judgment to be taken against the party.” Black’s Law Dictionary 1114 (8th ed.2004). In *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981), the United States Supreme Court held “the plain language of Rule 68 confines its effect [to cases] in which the plaintiff has obtained a judgment for an amount less favorable than the defendant’s settlement offer.” This Court has also held that “[Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff.” *Jones v. Berezay*, 120 Idaho 332, 334, 815 P.2d 1072, 1074 (1991). Thus, Rule 68 is a rule of procedure that places a special burden on prevailing plaintiffs to whom a settlement offer is made to show that they are entitled to costs. *Ireland*, 123 Idaho at 961, 855 P.2d at 46. Rule 68 does not govern an offer of judgment if it is not made by a defendant and if the offer is not more favorable than the judgment obtained by the plaintiff. Even though Milton made an offer of judgment in *Ireland*, Rule 68 was inapplicable since Marlene did not prevail. Accordingly, the trial court was not prohibited from considering Milton’s offer of judgment as a factor in its prevailing party analysis for an award of attorney fees. In fact, the trial court was required to

Even considering the offer of judgment in the prevailing party analysis, the Court still finds that UCI is not the prevailing party. In viewing the case as a whole, both parties prevailed in part and did not prevail in part. Accordingly, even though the UCI made an offer of judgment prior to trial, the Court finds that neither party prevailed.

2. Discovery Sanctions

Gem State Blaine seeks an award of attorney fees and costs under Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2). Early in the litigation, Gem State Blaine served UCI with discovery requests regarding its business dealings in Blaine County for nine years. UCI produced about a hundred pages of discovery. Gem State Blaine believed that the response appeared deficient on its face, given the dearth of emails produced. Accordingly, it served third party subpoenas on various clients with whom UCI had done business. Although only a few responded, Gem State Blaine received many documents that were not previously produced by UCI (apparently a good portion of the documents were also from Valley County work that was not relevant to this suit). Gem State Blaine then deposed Jeffrey Flynn who made reference to documents that were not previously produced. Thereafter, Gem State Blaine filed a Motion to Compel. A few days before the hearing, UCI produced over one thousand documents. UCI maintained that although it produced a lot of documents, the vast majority was not relevant to the instant suit and it had no other responsive documents. UCI also maintained that various items of

consider the offer of judgment under Rule 54(d)(1)(B) since Rule 68 was inapplicable. Therefore, we overrule the Court's holding in *Ireland* in so far as it holds that an offer of judgment may not be used to support a trial court's determination of prevailing party status for the purpose of awarding attorney fees.

Zenner, 147 Idaho at 450, 210 P.3d at 558.

discovery were not relevant because it was not bound by the TSA. At the hearing on the Motion to Compel, the Court granted the Motion and advised that UCI was ordered to respond to the extent it had not already done so. The Court advised that if UCI maintained the position that there was nothing relevant left to produce and Gem State Blaine ultimately was able to prove otherwise, then the Court would be more inclined to award fees and sanctions to Gem State Blaine.

About two months later, Gem State Blaine filed a Motion for Sanctions pursuant to Idaho Rule of Civil Procedure 37(b). It asserted that UCI failed to comply with the Court's previous order granting the motion to compel. Gem State Blaine conceded that it appeared UCI produced all of the invoices and estimates that were produced by third parties in response to subpoenas; however, it argued that UCI produced no email communications, except as concerning the Animal Shelter Project. UCI argued that it produced everything it had to Gem State Blaine. It maintained that its business practice was to delete emails after a job was complete and that the Animal Shelter Project was the only ongoing project. The Court initially granted the motion for sanctions, but then it later granted UCI's motion for reconsideration on the issue. Ultimately, the Court ordered that Gem State Blaine could submit third party subpoenas to relevant email service providers (Google and AOL) to attempt to uncover any relevant emails that UCI may have in connection to the instant litigation. No such documents were uncovered, because Google and AOL refused to comply with the subpoenas.

At trial, Kerrie Kuhn, who testified on behalf of UCI, stated under oath that nothing was deleted after the instant litigation commenced and that the only reason that the emails relating to the

Animal Shelter were produced is because it is an ongoing project. She testified that UCI's practice is to delete emails once a job is complete.

Idaho Rule of Civil Procedure 37(a)(5) provides that attorney fees and reasonable expenses must be paid by the party whose conduct necessitated the motion to compel, under the following circumstances:

(A) If the Motion Is Granted (or Discovery Is Provided After Filing). If the motion [to compel discovery] is granted, or if the requested discovery is provided after the motion was filed, the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

Idaho Rule of Civil Procedure Rule 37(b)(2)(C) provides for the payment of expenses when a party fails to comply with a court order:

Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

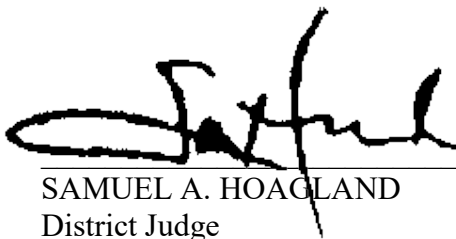
Here, the Court concludes that UCI's objections and failure to produce documents were substantially justified and other circumstances make an award of expenses unjust. In viewing the litigation as a whole, UCI consistently maintained it had nothing more to produce. Gem State Blaine was not able to uncover any additional documents pertinent to its claims. There is no evidence that UCI deleted emails or hid any relevant documents or other evidence of foul play.

Instead, Kuhn's unrebutted testimony was that it was UCI's business practice to delete emails once a job is complete. In addition, to the extent that UCI initially withheld documents in relation to its argument that it was not bound by the TSA, UCI was substantially justified in that regard. UCI vigorously (and in good faith) disputed its liability under the TSA. It was not until the Court issued its *Memorandum Decision and Order* on April 26, 2019 finding that UCI was bound by the TSA that such fact became the law of the case. Likewise, UCI did not admit to various Rule 36 requests for admission based on its contention that it was not bound by the TSA. The Court finds that UCI had a good reason for its failure to admit based on its defense strategy. Accordingly, the Court will not award sanctions.

CONCLUSION

For the reasons contained herein, both parties' Motions for attorney fees and costs are DENIED.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 12/13/2019 11:23 AM

Date

CERTIFICATE OF MAILING

Signed: 12/13/2019 12:53 PM

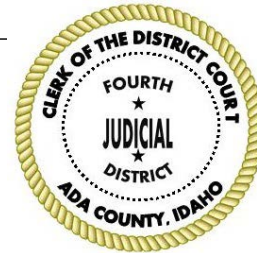
I hereby certify that on _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
terri@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By 
Deputy Court Clerk



McFarland Ritter PLLC
Ryan T. McFarland, ISB No. 7347
P.O. Box 1335
Meridian, ID 83680
Telephone: 208.895.1291
Facsimile: 208.895.1270
Email: ryan@mcfarlandritter.com

Attorneys for Plaintiff-Appellant

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

GEM STATE ROOFING, INCORPORATED, )	)	Case No. <u>CV01-18-13437</u>
Plaintiff-Appellant, )	)	AMENDED NOTICE OF APPEAL
vs.))	
UNITED COMPONENTS,))	
INCORPORATED dba GEM STATE))	
ROOFING,))	
Defendant-Respondent.))	

TO: THE ABOVE NAMED RESPONDENT United Components, Incorporated dba Gem State Roofing, AND THE PARTY'S ATTORNEYS, Pickens Cozacos, P.A., 398 S. 9th Street, Suite 240, Boise, Idaho 83701 AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant Gem State Roofing, Incorporated (“Plaintiff”) appeals against the above named respondent to the Idaho Supreme Court from the Judgment (herein, the “Judgment”) entered in the above entitled action on the 17th day of September, 2019, the Honorable Judge Samuel A. Hoagland presiding. A copy of the Judgment being appealed is

attached to this notice, along with the Findings of Fact & Conclusions of Law on which the Judgment is based.

This Amended Notice is filed to make clear that Plaintiff-Appellant is also appealing the District Court's Order Re: Attorney Fees and Costs, entered December 13, 2019, which date was more than two months after Plaintiff's-Appellant's Notice of Appeal was initially filed. A copy of the Order Re: Attorney Fees and Costs is attached hereto, and additional documents to be included in the clerk's record, necessitated by the appeal of the Order Re: Attorney Fees and Costs, are highlighted below. No additional transcript, beyond the transcript requested in the initial Notice of Appeal, is requested.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph 1 above is appealable pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal is as follows:

- Did the District Court's decision to not grant injunctive relief to Plaintiff for Defendant's contract breach, thereby nullifying the non-compete agreement, constitute an abuse of discretion?
- Did the District Court err in finding that the injury-causing behavior has been discontinued, and on that basis refusing to enter injunctive relief?
- Should the Court enjoin "minimal" contract-breaching, injury-causing behavior?
- Is Plaintiff's profit margin irrelevant to the question of whether Plaintiff has lost profits?
- Is Defendant's violation of the contractual obligation to refer work to Plaintiff sufficient evidence that Plaintiff "would have gotten the . . . work" that Defendant did to justify an award of damages to Plaintiff?
- Can Plaintiff prove a right to money damages without producing the testimony of customers allegedly lost as a result of Defendant's wrongful conduct?
- Are money damages recoverable from "minimal," contract-breaching, injury-causing behavior?

- Is Plaintiff entitled to recover damages, even though it cannot prove what its costs and profits would have been had Defendant not breached the non-compete agreement?
- Can Plaintiff acquire a protectable common law trademark in Blaine County for the GEM STATE ROOFING mark that is prior in right to any claim of Defendant, despite the geographically descriptive “Gem State”?
- Did the District Court err under Idaho Rule of Civil Procedure 37(a)(5) in denying Plaintiff’s request for attorneys’ fees and costs, while otherwise granting Plaintiff’s Motion to Compel?
- Should the District Court have sanctioned Defendant for discovery violations by the relatively light and efficient sanction of making an inference that Plaintiff would have obtained the Blaine County work that Defendant wrongfully obtained, instead of requiring Plaintiff to incur the cost and time of copying Defendant’s email accounts and issuing subpoenas to third parties for deleted emails?
- Did the District Court err under Idaho Rule of Civil Procedure 37(b)(2)(C) in denying Plaintiff’s request for attorneys’ fees and costs, while otherwise granting Plaintiff’s Motion for Sanctions?
- Did the District Court err under Idaho Rule of Civil Procedure 37(c)(2) in denying Plaintiff’s request for attorneys’ fees and costs incurred on proving matters that Defendant should have admitted?

4. No order sealing all or any portion of the record has been entered.

5. The appellant requests the preparation of the following portion of the reporter’s transcript in both hard copy and electronic format: the entirety of the court trial, which took place on August 5, 2019.

6. The appellant requests the following documents to be included in the clerk’s (agency’s) record in addition to those automatically included under Rule 28, I.A.R.:

- Affidavit of Ryan T. McFarland in Support of Motion to Compel, filed January 28, 2019.
- Affidavit of Rick Silvia in Support of Plaintiff’s Memorandum in Opposition to Defendant’s Cross Motion for Summary Judgment, filed February 28, 2019.
- Affidavit of Ryan T. McFarland in Support of Reply in Support of Plaintiff’s Motion to Compel, filed March 13, 2019.
- Order Granting Plaintiff’s Motion to Compel, entered by the Court on March 25, 2019.
- Amended Order Granting Plaintiff’s Motion to Compel, entered by the Court on April 3, 2019.

- Memorandum Decision and Order, entered by the Court on April 26, 2019.
- The Affidavit of Rick Silvia in Support of Plaintiff's Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed on May 30, 2019.
- Reply in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed on June 17, 2019.
- Corrected Affidavit of Ryan T. McFarland in Support of Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b), filed June 17, 2019.
- Order Granting Plaintiff's Motion for Sanctions, entered by the Court on June 24, 2019.
- The Court's Order, entered July 11, 2019.
- The Stipulation Re: Undisputed Facts, filed on July 19, 2019.
- Findings of Fact & Conclusions of Law filed by the Court on September 17, 2019.
- The Judgment entered by the Court on September 17, 2019.
- Affidavit of Ryan T. McFarland in Support of Memorandum of Costs and Attorneys' Fees, filed on September 24, 2019.
- Memorandum of Costs and Attorneys' Fees, filed on September 24, 2019.
- Affidavit of Ryan McFarland in Further Support of Memorandum of Costs and Attorneys' Fees, filed on October 2, 2019.
- Affidavit of Lori Hickman in Support of Plaintiff's Memorandum of Costs and Attorneys' Fees, filed on October 2, 2019.
- Order Re: Attorney Fees and Costs entered by the Court on December 13, 2019.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
Trademark Settlement Agreement	J. Flynn Dep. Exh. 13		1
Gem State-Boise Estimate for roofing job in Blaine County dated 9/30/10	DEF 00086		7
Gem State-Boise Estimate for roofing job in Blaine County dated 9/30/10	DEF 00087		8
Gem State-Boise Estimate for roofing job in Blaine County dated 6/20/11	DEF 00088		9

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
Gem State-Boise Estimate for roofing job in Blaine County dated 7/12/11	DEF 00089		10
Gem State-Boise Estimate for roofing job in Blaine County dated 7/12/11	DEF 00090		11
Gem State-Boise Invoice for roofing job in Blaine County dated 8/30/11	J. Flynn Dep. Exh. 18		12
UCI Cancellation or Amendment of Certificate of Assumed Business Name for "Gem State Roofing" dated 10/26/11	J. Flynn Dep. Exh. 24		14
Application for Registration of Assignment of Trademark-Service Mark of "Gem State Roofing" Trademark from Gem State-Boise to UCI dated 12/1/14	J. Flynn Dep. Exh. 30		15
Certificate of Assignment Registration of Trademark-Service Mark from Gem State-Boise to UCI dated 12/1/14	DEF 000074		16
UCI Estimate for asphalt job in Blaine County dated 5/5/16	DEF 00092-00093		17
UCI Estimate for roofing job in Blaine County dated 6/13/16	DEF 00094-00095		18
UCI Invoice for roofing job in Blaine County dated 7/29/16	J. Flynn Dep. Exh. 34		19
UCI Estimate for roofing job in Blaine County dated 8/17/16	DEF 00098-00100		21
UCI Invoice for asphalt job in Blaine County dated 8/17/16	DEF 0005		22
UCI Estimate for asphalt job in Blaine County dated 8/17/16	DEF 00102-00103		23
UCI Estimate for roofing job in Blaine County dated 2/15/17	DEF 00104-00105		24
UCI Estimate for roofing job in Blaine County dated 12/5/17	DEF 00107		25
UCI Invoice for roofing job in Blaine County dated 12/5/17	J. Flynn Dep. Exh. 44		26
McAlvain email to UCI inquiring about "Hailey Idaho Roofing Work?" dated 1/17/18	DEF 000714		28
UCI Estimate for roofing job in Blaine County dated 5/25/18	DEF 00110-00111		29
Email from Tracey Felix to Kerrie Kuhn requesting bid to do roofing job for Wood River Valley Animal Shelter	J. Flynn Dep. Exh. 49		30

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
McAlvain Construction Subcontract Agreement with UCI for roofing job for Wood River Valley Animal Shelter dated 2/16/18	J. Flynn Dep. Exh. 51		31
UCI Invoice dated 3/7/18 outlining work to be performed for Wood River Valley Animal Shelter roofing job	J. Flynn Dep. Exh. 53		32
UCI Transactions Detail Report for McAlvain Construction (Blaine County customer)	DEF 00113		33
Change Order #1 for McAlvain/UCI Subcontract Agreement	J. Flynn Dep. Exh. 56		34
UCI Invoice dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #1	J. Flynn Dep. Exh. 55		35
Email from Kerrie Kuhn regarding McAlvain roofing project confusion between Gem State-Blaine and UCI	J. Flynn Dep. Exh. 66		36
UCI Invoice dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #1	DEF 000660		37
Change Order #2 for McAlvain/UCI Subcontract Agreement dated 4/17/18	DEF 000588		38
UCI Invoice for additional roofing work performed on Wood River Valley Animal Shelter per Change Order #2 dated 4/11/18	J. Flynn Dep. Exh. 57		39
Change Order #4 for McAlvain/UCI Subcontract Agreement dated 6/25/18	J. Flynn Dep. Exh. 61		40
Change Order #5 for McAlvain/UCI Subcontract Agreement dated 8/22/18	DEF 001039		41
Change Order #6 for McAlvain/UCI Subcontract Agreement dated 9/4/18	DEF 000132		42
UCI Invoice for additional roofing work performed on Wood River Valley Animal Shelter dated 9/27/18	DEF 00112		45
UCI Estimate for additional roofing work performed on Wood River Valley Animal Shelter dated 11/19/18	DEF 000727		46
UCI Subcontractor Application for Payment to McAlvain dated 1/28/19	DEF 000133- 000134		47
Affidavit of Rick Silvia in Support of Plaintiff's Motion for Sanctions Under Idaho Rule of Civil Procedure 37(b) filed 5/30/19	n/a	104	
Affidavit of Rick Silvia in Support of Reply in Support of Plaintiff's Motion for Partial Summary Judgment filed 3/11/19	n/a	105	

Description	Bates Number/ Deposition Exhibit Number	Plaintiff's Proposed Exhibit Number	Stipulated Trial Exhibit Number
Affidavit of Rick Silvia in Support of Plaintiff's Motion for Partial Summary Judgment filed 2/6/19	n/a	106	
Specimens of Gem State-Blaine "Gem State Roofing" trademark	n/a	107	
Specimens of Gem State-Blaine "Gem State Roofing" general use of mark.	n/a	108	
Google search results for "United Components Inc. Idaho" performed 7/12/19	n/a	109	
Transcript of Deposition of Jeffery Flynn taken December 19, 2018.	n/a	110	
Transcript of Deposition of Michelle Flynn taken December 20, 2018.	n/a	111	

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Christy Olesek
7581 W. Hathaway Lane
Garden City, Idaho 83714

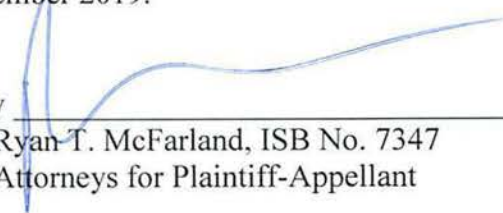
(b) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 17th day of December 2019.

By 

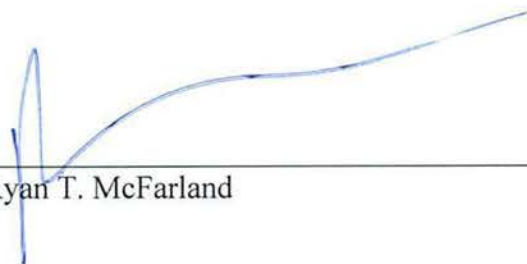
Ryan T. McFarland, ISB No. 7347
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2019, 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:

PICKENS COZAKOS, P.A.
Terri Pickens Manweiler
Shannon Pearson
398 S. 9th Street, Suite 240
Boise, ID 83701
terri@pickenslawboise.com
shannon@pickenslawboise.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Telecopy:
- iCourt



Ryan T. McFarland

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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

Case No. CV01-18-13437

vs.

JUDGMENT

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

JUDGMENT IS ENTERED AS FOLLOWS:

Defendant United Components, Inc., dba Gem State Roofing, breached the Trademark Settlement Agreement. However, Plaintiff Gem State Roofing, Inc. has failed to prove its damages and is thus not entitled to collect any damages. Neither party is entitled to attorney fees.

IT IS SO ORDERED.


SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

Case No. CV01-18-13437

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

FINDINGS OF FACT & CONCLUSIONS OF
LAW

THIS MATTER came before the Court on a court trial held on August 5, 2019. For the reasons contained herein, the Court finds that although Defendant United Components, Inc. breached the Trademark Settlement Agreement, Plaintiff Gem State Roofing, Inc. has failed to prove damages, and is thus not entitled to damages or attorney fees.

FINDINGS OF FACT

1. Jeffrey Flynn (“Flynn”) started a roofing company in the early 1980s in Nampa, Idaho, which he called Gem State Roofing. Flynn moved to Boise in 1987 and added asphalt maintenance to his roofing business.
2. In 1995, Flynn and his then-wife Michelle Flynn (“Michelle”), acting as directors, created Flynn, Inc. and filed a Certificate of Incorporation with the Idaho Secretary of State.
3. In 1997, Rick Silvia (“Silvia”) filed a Certificate of Assumed Business Name with the Idaho Secretary of State for his roofing construction business, which declared that his company was operating under the name “Gem State Roofing.”

4. In 1998, Flynn filed an Articles of Amendment to change Flynn, Inc. to Gem State Roofing & Asphalt Maintenance, Inc.
5. In 1999, Michelle filed a Certificate of Assumed Business Name stating that Gem State Roofing & Asphalt Maintenance, Inc. would do business under the name “Gem State Roofing.”
6. In 2000, Silvia filed Articles of Incorporation for Gem State Roofing, Inc.
7. Since 2000, Gem State Roofing, Inc. has primarily conducted business in Blaine County, Idaho under the name “Gem State Roofing.”
8. On May 2, 2002, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Blaine stating the first use was November 1997 and the expiration of the trademark was May 2, 2012. There is no evidence that the trademark has been renewed since 2012.
9. The Certificate of Registration shows the trademark assigned to Gem State Blaine is as follows:



10. On December 29, 2004, the State of Idaho issued a Certificate of Registration of Trademark Service Mark to Gem State Boise stating that the first use of the trademark was in 1985 and that the trademark would expire on December 29, 2014.
11. The Certificate of Registration showed that the Trademark assigned to Gem State Boise is as follows:



12. On December 1, 2014, the above trademark was assigned to UCI and renewed until December 29, 2024.
13. There is no evidence that either party has ever obtained a registered trademark for the name “Gem State Roofing.”
14. There are 387 businesses in Idaho using or that have used the name “Gem State.”
15. The “Gem State” is a well-known nickname for the State of Idaho.¹
16. In 2005, following the realization that their roofing companies were operating under the same name, the owners of Gem State Roofing, Inc. (“Gem State Blaine”) and Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State Boise”) entered into a Trademark Settlement Agreement (“TSA”) delineating boundaries for where each company could solicit and do business.
17. The Recitals of the Agreement state that the “parties’ names are confusingly similar to each other and the parties provide similar services, leading to a likelihood of confusion as to source, origin, and sponsorship of the services” and that the parties “wish to resolve this matter without litigation by agreeing not to do business or advertise in the other’s primary market.”
18. Under the TSA the parties agreed (in part) that:
 - a. Gem State Boise would not “advertise or solicit business in Blaine County, including but not limited to by, as a non-exhaustive list of examples, telephone directory advertising, radio or television advertising, billboards, flyers, signs, or by making any indication, express or implied, that it performs services in Blaine County;”

¹ The Court takes judicial notice of this fact. *See* I.R.E. 201(b)(1) (“The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction.”).

- b. Gem State Boise would not “perform any services in Blaine County except (i) warranty and maintenance work and repeat customer business for the former customers listed in paragraph 3(a),² and (ii) work for a public entity in Idaho that is put out for bid among qualified contractors;”
- c. “If either party receives a request for work that it is prohibited from performing under this Agreement, it will direct the person or entity requesting the work to the other party.”

19. Gem State Blaine made the same agreements above, except that they were with respect to Ada County, Boise County, Canyon County, Elmore County, Gem County, Gooding County, Jerome County, Twin Falls County, and Valley County.

20. In 2010, Flynn and Michelle’s marriage dissolved, and at the same time, Gem State Boise had incurred significant tax liability.

21. In order to resolve Gem State Boise’s tax liability, the IRS directed Flynn to dissolve Gem State Boise and start a new company with a new name.

22. In 2012, Gem State Boise was thus dissolved and Flynn created United Components Incorporated (“UCI”), which continued to operate under the same business name, “Gem State Roofing.”

23. Michelle has no ownership interest in UCI.

24. Since the TSA was signed, UCI (operating as Gem State Roofing) has done four roofing projects in Blaine County, which are as follows:

- a. **Brashears & Sons/Shay Construction** – UCI submitted multiple bids on a project for Brashears & Sons and Shay Construction to perform roofing services for Terry

² The customers listed in Section 3(a) include: Kelly Herara, Mrs. Lipton, and Advanced Maintenance Services.

and Mike Higgs. UCI performed roofing services on the project and, on October 13, 2011, was paid \$17,424 for its work.

- i. The client on this job specifically reached out to UCI, because they had a positive experience working with UCI on a project located in Twin Falls, Idaho.
- b. **Pioneer West Property Management** – UCI was paid \$1,950 on July 29, 2016 for work done in Ketchum, Idaho.
 - i. Pioneer West Property Management is the successor to Advance Maintenance Services, to which (under the TSA) Gem State Blaine was allowed to provide roofing services.
 - ii. Silvia testified that Gem State Blaine also did work for Pioneer West Property Management. He testified based on a hearsay statement that UCI had performed “shoddy work” on this project.
- c. **Kerry Armstrong** – UCI was paid \$750 for work done in Ketchum, Idaho in 2017.
- d. **Animal Shelter of the Wood River Valley** – UCI bid on and was awarded a contract with McAlvain Construction, Inc. (“McAlvain”) to perform over \$200,000 in roofing work on the Wood River Animal Shelter.
 - i. As of October 2018, McAlvain has paid UCI a total of \$279,540.
 - ii. Flynn and Kerrie Kuhn (UCI’s Corporate Secretary) testified that UCI has sustained at least \$12,000 in losses on this project.
 - iii. Tracey Felix, a project manager for McAlvain, testified that McAlvain specifically solicited and wanted UCI to do the roofing work on this project, because it had a positive experience working with UCI on Shore Lodge in McCall, Idaho.

25. Since the TSA was signed, UCI (operating as Gem State Roofing) bid on at least four jobs in Blaine County for working totaling over \$100,000. However, it did not win those bids and consequently did not receive any income or profit as a result of those bids.
26. UCI did not believe it was bound by the TSA because Gem State Boise was shut down as part of the deal with the IRS.
27. Silvia testified that for all of the projects described in Sections 22 and 23, UCI did not refer any of the work to him, and Gem State Blaine was qualified to do the work.
28. Silvia testified as to his gross revenue and profit from the years 2000 to 2018.
29. Silvia experienced a drop in business in 2008 and for a few years thereafter. Silvia testified that this drop was likely due to the economic crash and to the fact that UCI was doing business under the same name as his company in Blaine County.
30. However, the exhibit prepared by Silvia setting forth his gross revenue, profit, and profit margin shows that his profit margin has increased overall in 18 years. In fact, in 2018, he had the highest profit margin ever for his business at over 56%.
31. On July 20, 2018, Gem State Blaine filed the instant action against UCI alleging (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) trademark infringement, (4) unjust enrichment,³ (5) preliminary injunction, and (6) permanent injunction.
32. This Court previously determined that UCI is a successor corporation to Gem State Boise, is liable under the terms of the TSA, and breached the TSA by performing work in Blaine County for clients that were not specifically excluded in the TSA. However, the Court held that there were genuine issues of material fact as whether Gem State Blaine has incurred damages and as to Gem State Blaine's claims regarding trademark infringement and injunctive relief. *See* Memorandum Decision and Order (filed April 26, 2019).

³ This claim has been dismissed. *See* Memorandum Decision and Order pp. 20—21 (filed April 26, 2019).

STANDARD OF REVIEW

It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006); I.R.C.P. 52(a). If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Id.* However, the trial court's conclusions of law are freely reviewed to determine whether the applicable law was correctly stated and whether the legal conclusions are sustained by the facts found. *Id.*

ANALYSIS & CONCLUSIONS OF LAW

The primary issues before the Court are whether Gem State Blaine has presented sufficient evidence regarding injunctive relief and money damages, and whether it is entitled to relief on its claim for trademark infringement.

a. Damages

Gem State Blaine asserts that it is entitled to injunctive relief as well as \$220,000 in money damages for UCI's breach of the TSA. Gem State Blaine asserts that its calculation of damages is based on the law regarding non-competition agreements as the TSA is essentially an agreement not to compete in the parties' respective geographical territories.

i. Injunction

The decision of whether to impose injunctive relief is within the discretion of the district court. *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). “The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion.” *Id.* “It is true that injunctions should issue only where irreparable injury is actually threatened.” *O’Boskey v. First Fed. Sav. & Loan Ass’n of Boise*, 112 Idaho 1002, 1007, 739 P.2d 301, 306 (1987). Where the conduct causing injury has been discontinued, the dispute is moot and the injunction should be denied. *Id.* However, as the United States Supreme Court observed, the trial court must be convinced that “there is no reasonable expectation that the wrong will be repeated.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted). Further, the burden on the defendant to make this showing “is a heavy one.” *Id.* “It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.” *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

Here, Gem State Blaine has not demonstrated that it has suffered irreparable injury by UCI’s conduct. Instead, the evidence demonstrates that Gem State Blaine’s profit margin has overall been increasing for the past 18 years, with a dip that coincided with the so-called “great recession.” Gem State Blaine failed to present any evidence regarding UCI’s profits and its corresponding losses (other than a speculative statement by Silvia that his company likely experienced a dip due to the economy as well as UCI’s presence in Blaine County).

Gem State Blaine experienced its highest profit margin just last year at over 56%. While it is true that UCI breached the TSA by doing work for three clients that were not specifically excluded in the TSA,⁴ and by bidding on certain other projects, there is no evidence that Gem State Blaine would have gotten the same work or what its profits would have been had it been awarded that work. Silvia testified that his company was equipped to perform the same services on these projects. However, there is no evidence or testimony from any of these clients (potential or otherwise) that they would have hired Gem State Blaine had UCI referred these clients to Gem State Blaine. There is also no evidence as to what Gem State Blaine's profit on these projects would have been had it done the work.

There is no evidence that UCI performed shoddy work that has harmed Gem State Blaine's reputation. Instead, Silvia testified (based on hearsay) that UCI performed "shoddy work" for Prior West Property Management, which was a successor to a client to whom UCI was specifically allowed to provide services under the TSA. The Court cannot find that UCI was performing "shoddy work" that harmed Gem State Blaine based on this hearsay statement.

Finally, there was no evidence that UCI has done work in Blaine County recently (other than on the animal shelter, upon which it has sustained a loss). The evidence of work performed in Blaine County is minimal. In over 14 years (from 2005 to 2019), UCI has worked on three jobs that are in violation of the TSA, all of which stemmed from UCI's existing client relations. Accordingly, the Court does not find that Gem State Blaine is actually threatened by irreparable

⁴ The Court finds that the work for Pioneer West Property Management was permissible under the TSA, because it was a successor to Advanced Maintenance Services.

injury. Therefore, a permanent injunction will not be issued as Gem State Blaine has failed to prove any actual damages from UCI's conduct.

ii. Money Damages

Gem State Blaine asserts that it is entitled to damages under the damages calculation for a violation of a non-competition agreement, and that it need only show it has lost profits and UCI has had corresponding gains. UCI disputes that it actually breached the TSA and argues that Gem State Blaine has not shown that it has suffered any damages as a result of its breach of the TSA.

“A trial court’s award of general damages is reviewed under the deferential standard of clear error.” *Moeller v. Harshbarger*, 118 Idaho 92, 93, 794 P.2d 1148, 1149 (Ct. App. 1990). The findings of the trial court on the question of damages will not be set aside when based on substantial and competent evidence. *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983).

Here, the Court finds that the TSA is essentially an anti-competition agreement and that UCI (as the successor to Gem State Boise) breached the TSA by performing services for customers in Blaine County that were not exceptions set forth in the TSA (*see* TSA ¶ 3). Therefore, the Court will apply the law regarding damages for anti-competition agreements in this case.

The measure of damages for the breach of an anti-competition clause is the amount that the plaintiff lost by reason of the breach, not the amount of profits made by the defendant. *Dunn v. Ward*, 105 Idaho 354, 356, 670 P.2d 59, 61 (Ct. App. 1983). The measure of damages for loss of profits is “rarely susceptible of accurate proof” *Ryska v. Anderson*, 70 Idaho 207, 213, 214 P.2d 874, 876 (1950). Therefore, the law does not require “accurate proof with any degree of mathematical certainty” *Vancil v. Anderson*, 71 Idaho 95, 105, 227 P.2d 74, 80 (1951). Damages need be proved only with a “reasonable certainty[,]” and this means “that [the] existence of damages must be taken out of the realm of speculation.” *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 182–83, 595 P.2d 709, 716–17 (1979) (citations omitted). “The mere fact that it is difficult to arrive at [an] exact amount of damages, where it is shown that damages resulted, does not mean that damages may not be awarded; it is for the trier-of-fact to fix the amount.” *Bumgarner v. Bumgarner*, 124 Idaho 629, 640, 862 P.2d 321, 332 (Ct.App.1993) (citation omitted). The profits realized by the defendant may be considered by the trier-of-fact, if shown to correspond with the loss of the plaintiff. *Dunn*, 105 Idaho at 356, 670 P.2d at 61.

The facts in this case are akin to *Trilogy Network Systems v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007). In that case, Johnson was employed by Trilogy Network Systems, Inc. (“Trilogy”). Johnson terminated his employment with Trilogy. The parties subsequently entered into an agreement that (in part) forbade Johnson for one year from doing business with Seastrom Manufacturing, Inc. (“Seastrom”). Johnson and Trilogy subsequently both submitted bids to Seastrom during that one year period. Seastrom awarded the contract to Johnson. Trilogy then sued Johnson for breach of the non-competition agreement. A court trial was held, and the trial

court determined that although Johnson had breached the agreement, Trilogy had failed to prove its damages with reasonable certainty. The trial court entered a judgment in favor of Trilogy, but did not award it damages or attorney fees, and Trilogy appealed.

On appeal, the Supreme Court affirmed the trial court's decision. The Supreme Court found that the trial court's determination was supported by the record that Trilogy had failed to prove its damages because it had failed to offer into evidence its original bid to Seastrom or any comparison between its costs and the costs to Johnson. During the court trial, the president of Trilogy testified that Trilogy and Johnson's profit margins were similar. He also stated that Trilogy would have made a comparable profit to Johnson's profit on the Seastrom project. Trilogy argued that stating a conclusion regarding its profit margin, without any factual support, is enough to take the issue of damages out of the realm of speculation. The Supreme Court disagreed and noted that the law requires more:

Trilogy failed to offer into evidence any proof of what its costs and profits would have been had Seastrom awarded it the contract. Its only proof was conclusory statements that Johnson and Trilogy would have made similar profits. Trilogy failed to offer into evidence its bid to Seastrom for the software portion of the project, which would have shown its costs and the profit margin it expected for that portion of the bid. Although Trilogy had a list of the software Johnson supplied Seastrom, there was no showing as to what the costs to Trilogy would have been for the software ultimately used by Johnson to complete the project. As such, Trilogy failed to persuade the district court of any correspondence between what its profit would have been and Johnson's actual profit, and thus failed to take the measure of its damages out of the realm of speculation. Therefore, the district court did not err when it declined to award damages.

Id. at 847, 172 P.3d at 1122.

Similarly, here, Gem State Blaine failed to offer into evidence any proof as to what its costs and profits would have been had it been awarded the contracts for the work for Brashears &

Sons/Shay Construction, Kerry Armstrong, or the Animal Shelter. In addition, there is no evidence before the Court as to what UCI's profits were on these projects, other than it sustained a \$12,000 loss. There is no evidence that had Gem State Blaine been awarded the Animal Shelter contract that it would have not sustained the same loss. Moreover, there is insufficient proof that Gem State Blaine has lost profits during the years that UCI performed services in Blaine County. While Gem State Blaine's business did take a downturn during the recession, it has since recovered and has had its highest profit margin to date in 2018. Gem State Blaine has failed to show any correspondence between what its profits would have been and UCI's actual profit, and thus has failed to take the measure of its damages out of the realm of speculation. *See id.* Accordingly, the Court finds that Gem State Blaine has failed to prove its damages with reasonable certainty.

b. Trademark Infringement

Gem State Blaine claims that UCI has violated its trademark rights to the name "Gem State Roofing." UCI spent much briefing and argument claiming that the logo is the trademark at issue;⁵ however, Gem State Blaine has made clear that it is not alleging trademark infringement on its logo, but rather on its use of the name, "Gem State Roofing." Accordingly, the Court will determine whether Gem State Blaine has a protectable trademark in the name "Gem State Roofing," and whether it has sustained damages from any alleged trademark infringement.

⁵ UCI also claimed that a name cannot be trademarked; however, that argument fails as trademarks are specifically defined as "any word, name, symbol, or device." I.C. § 48-501(11).

i. Protectable Trademark

Trademarks are “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish the goods of such person . . . from those manufactured or sold by others.” I.C. § 48-501(11); *see also* 15 U.S.C. § 1127. Trademarks may be registered both federally and with a state government.⁶ The federal trademark system is governed by the Lanham Act, while Idaho provides a simpler but similar statutory scheme at Idaho Code § 48-501, *et. seq.*⁷

Registration of a trademark is not required in order to have a valid and enforceable trademark, and an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. *Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017); *ZW USA, Inc. v. PWD Sys., LLC*, 889 F.3d 441, 449 (8th Cir. 2018) (“The Lanham Act protects both registered and unregistered trademarks.”). Under both state and federal law, a trademark must be first used in connection with the sale of goods or services in order to gain legal protection. *See e.g. King’s of Boise, Inc. v. M. H. King Co.*, 88 Idaho 267, 274, 398 P.2d 942, 945 (1965); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 979 (9th Cir. 2006) (“Registration does not create a mark or confer ownership; only use in the marketplace can establish a mark.”); *See Cal. Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1454 (9th Cir.1985) (“[A] trademark is a common law property right that exists independently of statutory provisions for registration.”).

⁶ The evidence shows that both parties have registered only their logos. There is no evidence before the Court that either party has registered the name “Gem State Roofing.” However, the Court notes that registration is not required to have a protectable trademark.

⁷ “The intent of this act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the trademark act of 1946, as amended. To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing this act.” I.C. § 48-518.

Thus, in order to obtain a registered trademark, an applicant must certify that his mark is “in use.” I.C. § 48-503(4). “Use” is defined as

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this act, a mark shall be deemed to be in use: (a) on goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

Here, the un rebutted evidence is that Flynn used the name “Gem State Roofing” as early as the 1980s. There is insufficient evidence regarding the exact areas he did business in at that time. Silvia did not start using the name “Gem State Roofing” in Blaine County until the late 1990s. There is insufficient evidence regarding the first use of the name “Gem State Roofing” in the Blaine County area. However, even if Gem State Blaine was the first to use the name, the Court finds that the name “Gem State Roofing” is not a protectable trademark as it is primarily geographically descriptive.

Idaho Code § 48-502(2)(e) provides:

A mark⁸ by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

...
Consists of a mark which: (i) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or (ii) **when used on or in connection with the goods or services of the applicant is primarily geographically descriptive** or deceptively misdescriptive of them; or (iii) is primarily merely a surname, provided however, that nothing in this subsection shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as used on

⁸ “Mark” is defined as “any trademark, service mark, collective mark or certification mark entitled to registration under this act whether registered or not.” I.C. § 48-501(7).

or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five (5) years before the date on which the claim of distinctiveness is made[.]

(Emphasis added). Neither generic nor descriptive terms are protectable without establishing secondary meaning. *20th Century Wear, Inc. v. Sanmark-Stardust Inc.*, 747 F.2d 81, 87 (2nd Cir.1984). "A mark is descriptive if it describes: the intended purpose, function or use of the goods; the size of the goods; the class of users of the goods; a desirable characteristic of the goods; or the end effect upon the user." *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1190 (6th Cir. 1988). If the mark "imparts information directly, it is descriptive." *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 587 F.Supp. 330, 335 (E.D.Mo.1984); affirmed 750 F.2d 631 (8th Cir.1984).

The Lanham Act does not protect primarily geographically descriptive marks.

"It is plain that the congressionally established prohibition against registration of geographical names or terms basically stems from the realization that most terms in the vocabulary of this science are generic or descriptive. Thus, Congress has expressly left accessible to all potential users those names of subdivisions of the earth—regions, nations, counties, town, rivers, lakes, and other natural and artificial geographical units—which could be employed to draw public attention to the origin of a product or the situs of a business. It would obviously promote unfair competition to proscribe for all save a single producer the name of a region and thereby preclude other producers of the same product in the same region from indicating their product's origin."

Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc., 871 F.2d 590, 594 (6th Cir. 1989) (citing *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 485 (5th Cir.1971)).

Where it is determined that the mark as perceived by potential purchasers describes the geographic origin of the goods the mark is primarily geographically descriptive. *Id.* (citation omitted). If there is a possibility that the geographic term is "minor, obscure, remote or

unconnected with the goods,” then the mark may be protectable and not precluded under the primarily geographically descriptive category. *See Nat’l Lead Co. v. Wolfe*, 223 F.2d 195 (9th Cir. 1955) (use of word “Dutch” to describe paint was not geographical or descriptive); *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 486 (5th Cir. 1971) (use of word “world” to describe carpets was too broad to suggest any identifiable unit or place of origin, and was thus not geographically descriptive).

The Legislative History of the Lanham Act points out that where a logical connection can be made between the product and the geographical term, the term is geographically descriptive. “To illustrate, the word ‘Alaska’ would probably have no descriptive or geographical meaning applied to bananas, but applied to canned salmon would unquestionably have a descriptive as well as geographical meaning.” *In re Nantucket, Inc.*, 677 F.2d 95, 107 (C.C.P.A. 1982).

Though more than a geographic name is required in order to meet the “primarily geographically descriptive” category, there is no requirement that the challenger to a trademark demonstrate that the area is noted for the goods in question. The proper inquiry is “What meaning, if any, does the term convey to the public with respect to the goods on which the name is used?” When a geographic name is used on goods, it does not represent a single source but refers to the area in which the goods originated. A “goods/place association” by the public is therefore presumed.

Burke-Parsons-Bowlby Corp., 871 F.2d at 595 (citations omitted).

A trademark that is primarily geographically descriptive must have acquired secondary meaning to invoke the protection of the Lanham Act. *Id.* The purpose of requiring the establishment of secondary meaning is to give effect to those geographic marks which no longer cause the public to associate the goods with a particular place but to associate the goods with a particular source.

American Footwear Corp. v. General Footwear Co. Ltd., 609 F.2d 655 (2nd Cir.1979). The geographical term no longer primarily denotes the geographic area, but with secondary meaning it primarily denotes a single source for the product. *Id.*

Secondary meaning is proved when by a preponderance of the evidence it can be determined that the attitude of the consuming public toward the mark denotes “a single thing coming from a single source.” *Aloe Cream Laboratories v. Milsan, Inc.*, 423 F.2d 845, 849 (5th Cir. 1970) (citation omitted). Direct proof of secondary meaning is difficult to obtain. *Id.* Absent direct proof, the Court must draw reasonable inferences from evidence of long-term usage, from considerable effort and expenditure of money toward developing a reputation and good will for the trademark. *WLWC Centers, Inc. v. Winners Corp.*, 563 F. Supp. 717, 723 (M.D. Tenn. 1983). Sales volume, though relevant, is not necessarily sufficient to indicate recognition of the mark by purchasers as an indication of the source. *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1345 (U.S.C.C.P.A.1977). Advertising expense also is relevant but will not, standing alone, establish secondary meaning. *Scientific Applications v. Energy Conservation Corp.*, 436 F.Supp. 354, 361 (N.D.Ga.1977). Where advertising expenditures are required to “merely survive” in the competitive market, advertising expenditures cannot be used to prove secondary meaning. *WLWC Centers*, 563 F.Supp. at 724. However, extensive advertising which results in consumer association with a single source can establish secondary meaning. *Scott Paper Co. v. Scott’s Liquid Gold Inc.*, 589 F.2d 1225, 1228 (3rd Cir.1978). The duration of use of the mark can establish secondary meaning where the duration is more than a relatively short period. In *WLWC Centers*, the Court determined that three years was insufficient to prove that the mark had acquired secondary meaning. *WLWC Centers*, 563 F.Supp. at 723.

In *Burke-Parsons-Bowlby v. Appalachian Log Homes*, 871 F.2d 590 (6th Cir. 1989), the holder of the registered trademark, “Appalachian Log Structures,” sought to enjoin a competitor’s use of the mark, “Appalachian Log Homes.” The Sixth Circuit Court of Appeals held that the mark was not a protectable trademark, because it was primarily geographically descriptive. The court noted that the Appalachian region is publicly acknowledged as a distinct, identifiable region, and the regionally descriptive term “Appalachian” is used in 132 businesses located in the Appalachian region. *Id.* at 594. Appalachian Log Structures was located in Virginia, one of the “Appalachian” states. *Id.* at 595. The court also held that there was insufficient evidence that “Appalachian Log Structures” had acquired secondary meaning even though the company had achieved \$2 million in gross sales in about three years and had expended approximately \$100,000 in advertising the mark over the course of one year. The court noted that no consumer evidence was submitted and that the evidentiary burden necessary to establish secondary meaning is substantial. *Id.* at 596. Although the advertising expenditures for the mark were relevant, there was no evidence to establish the amount as extensive or to distinguish it as beyond that necessary to survive in the market. *Id.*

Here, UCI provided evidence that there are 387 currently active businesses using the words “Gem State” in their business names. It is commonly known that “Gem State” is the nickname for the State of Idaho. It is undisputed that Gem State Blaine provides roofing services in the State of Idaho, or rather, the “Gem State.” There is no evidence that Gem State Blaine’s use of the name “Gem State Roofing” has acquired secondary meaning. Accordingly, the Court concludes that Gem State Roofing is geographically descriptive, and as such, is not a protectable trademark.

ii. Damages

Even if Gem State Roofing was a protectable trademark, and Gem State Blaine had a protectable interest in it, Gem State Blaine has failed to show it is entitled to damages under trademark law.

In a trademark infringement case, a plaintiff must prove both the fact and the amount of damage. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 511 (2d ed. 1984). Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement. *Id.* at 509. Because proof of actual damage is often difficult, a court may award damages based on defendant's profits on the theory of unjust enrichment. *Id.* at 511; *see also Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 918 (Fed. Cir. 1984). "To establish damages under the lost profits method, a plaintiff must make a "prima facie showing of reasonably forecast profits." *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).

Trademark remedies are guided by tort law principles. 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 30:27, at 509 (2d ed. 1984). ("Plaintiff's damages should be measured by the tort standard under which the infringer-tortfeasor is liable for all injuries caused to plaintiff by the wrongful act . . ."). As a general rule, damages which result from a tort must be established with reasonable certainty. Dan B. Dobbs, *Remedies* § 3.3, at 151 (1973). The Supreme Court has held that "[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness," yet, a reasonable basis for computation must exist. *Eastman Kodak Co. v.*

Southern Photo Materials Co., 273 U.S. 359, 379, 47 (1927). Many courts have denied a monetary award in infringement cases when damages are remote and speculative. *See generally Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 642 (D.C.Cir.1982) (“any award based on plaintiff’s damages requires some showing of actual loss”); *Burndy Corp. v. Teledyne Industries, Inc.*, 584 F.Supp. 656, 664 (D.C.Conn.) (“no assessment of damages is authorized if it is not based on actually proven damages.”), *aff’d* 748 F.2d 767 (2d Cir.1984); *Invicta Plastics (USA) Ltd. v. Mego Corp.*, 523 F.Supp. 619, 624 (S.D.N.Y.1981) (“damages will not be awarded in the absence of credible evidence demonstrating injury to the plaintiff from defendant’s sales.”); *Vuitton et Fils, S.A. v. Crown Handbags*, 492 F.Supp. 1071, 1077 (S.D.N.Y.1979) (“The discretionary award of either damages or profits assumes an evidentiary basis on which to rest such an award. Without such a basis there can be no recovery.”), *aff’d mem.*, 622 F.2d 577 (2d Cir.1980).

For the reasons set forth in Section (a)(ii) above, the Court concludes that Gem State Blaine has failed to demonstrate injury as a result of UCI’s work in Blaine County. Gem State Blaine failed to provide any evidence as to UCI’s profits and its corresponding losses. Instead, the only evidence was that UCI sustained a \$12,000 loss on the Animal Shelter project and that Gem State Blaine experienced a dip in business that coincided with the economic crash. There is no evidence as to what Gem State Blaine’s profits would have been had it been awarded the jobs UCI completed. As such, the Court finds that any damages are remote and speculative. Accordingly, Gem State Blaine is not entitled to damages on its trademark infringement claim.

CONCLUSION

For the reasons set forth herein, the Court concludes that although UCI breached the TSA, Gem State Blaine has failed to show damages for its breach of contract and trademark infringement claims. The Court finds that neither party prevailed, and thus, neither party is entitled to attorney fees. Accordingly, the Court will enter a declaratory judgment that UCI breached the TSA, but Gem State Blaine is not entitled to collect damages or attorney fees.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 9/17/2019 04:29 PM

Date

CERTIFICATE OF MAILING

I hereby certify that on Signed: 9/17/2019 04:50 PM _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
Ms. Shannon Pearson, *Esq.*
terri@pickenslawboise.com
shannon@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By  _____
Deputy Court Clerk



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

GEM STATE ROOFING, INCORPORATED,
Plaintiff,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant.

Case No. CV01-18-13437

ORDER RE: ATTORNEY FEES AND
COSTS

THIS MATTER comes before the Court on the Defendant's Motion for Costs and Attorney Fees, filed through counsel on September 19, 2019, and the Plaintiff's Motion for Attorney Fees and Costs, filed through counsel on September 24, 2019. A hearing was held on November 12, 2019, and the matter was taken under advisement. For the reasons set forth herein, both Motions are DENIED.

BACKGROUND

Plaintiff filed this action against Defendant to enforce a Trademark Settlement Agreement ("TSA"). One of the most vigorously disputed issues was whether the Defendant was bound by the TSA as a successor to the company that entered into the TSA.

Both parties filed cross Motions for Summary Judgment, and on April 26, 2019, the Court entered a *Memorandum Decision and Order*, in which both parties prevailed in part and did not prevail in part. The Court held that United Components Incorporated ("UCI" or "Defendant")

was a successor corporation to Gem State Roofing & Asphalt Maintenance, Inc. (“Gem State Boise”) and was liable under the terms of the TSA. The Court further held that UCI breached the TSA by performing work in Blaine County for clients that were not specifically excluded in the TSA. However, the Court held that there were genuine issues of material fact as to whether Gem State Roofing, Incorporated (“Gem State Blaine” or “Plaintiff”) had incurred damages and as to Gem State Blaine’s claims regarding trademark infringement and injunctive relief.

Following a court trial, this Court held that Gem State Blaine proved that UCI breached the TSA, but failed to prove its damages. *See Findings of Fact and Conclusions of Law* (filed Sept. 17, 2019). On September 17, 2019, the Court entered a Judgment, which also provided that neither party is entitled to attorney fees.

Both parties timely filed Motions for Costs and Attorney Fees. UCI contends it is the prevailing party because it avoided liability, Gem State Blaine claimed over \$200,000 in damages and was awarded nothing, and finally, it made an offer of judgment to Gem State Blaine that was rejected.

Gem State Blaine concedes that there was no prevailing party in this case; however, it asserts it is entitled to costs and attorney fees under Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2), for having to file a Motion to Compel discovery, UCI’s failure to comply with the Order to Compel, and UCI’s failure to admit certain requests for admissions that were later stipulated to and found as facts in this Court’s *Findings and Conclusions of Law*.

ANALYSIS

1. Prevailing Parties

Costs and attorney fees are only awardable to the prevailing party or parties in an action. Idaho Rule of Civil Procedure 54(d)(1)(A) provides that “costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.” “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.” I.R.C.P. 54(e)(1).

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). It is within the trial court’s discretion to determine which party to the action is the prevailing party. *See id.*; *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010). In making the determination, the Court considers, “(a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims.” *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983). “[O]ffers of settlement, including offers of judgment, should be considered in determining the final judgment or result of the action in relation to the relief sought.” *Zenner v. Holcomb*, 147 Idaho 444, 449, 210 P.3d 552, 557 (2009). However, the

Supreme Court has “cautioned that they should not be the only, or even most significant, factor in the trial court’s prevailing party analysis.” *Id.*

“[T]he prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.” *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 203, 321 P.3d 739, 753 (2014) (citation omitted). The party moving for attorney fees bears the burden of showing that the standards for such an award have been met. *Cunningham v. Waford*, 131 Idaho 841, 844, 965 P.2d 201, 204 (Ct. App. 1998).

A defendant’s dismissal with prejudice from an action is “the most favorable outcome that could possibly be achieved.” *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000) *abrogated on other grounds by BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216 (2010). In *Daisy Manufacturing Company*, the Court specifically noted the plaintiff did not obtain any benefit from the litigation in finding that the defendant was the prevailing party. *Id.*

Here, UCI was not dismissed from the action. Rather, the Court found that Gem State Blaine proved that UCI was liable under the TSA and breached the TSA, but that it failed to prove its damages. UCI vigorously contested both whether it was bound by the TSA and whether it breached the TSA. UCI continued to contest adverse findings against it at the court trial even after the Court held that it was liable and breached the TSA on summary judgment. *See Memorandum Decision and Order* (filed April 26, 2019). UCI ultimately avoided a monetary

judgment only because Gem State Blaine could not show its damages to a degree of reasonable certainty.

As set forth in this Court's *Findings of Fact and Conclusions of Law*, the facts in this case were akin to *Trilogy Network Systems v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007). In that case, following a court trial, the trial court determined that the plaintiff proved that the defendant breached the non-compete agreement, but had failed to prove its damages. The trial court held that there was no prevailing party, and the Supreme Court affirmed,

Here, the district court correctly perceived the issue as one of discretion (it cited to I.R.C.P. 54(d)(1)(B)). It also acted consistently with the legal standards. Rule 54 directs courts to consider who the prevailing party is in relation to the relief sought by each party. Here, Trilogy sought as damages the profits Johnson obtained, and Johnson sought to have his breach excused because of a unilateral mistake. The court noted this and considered the relief sought when determining whether to award attorney fees. Finally, it reached its decision through the exercise of reason. Therefore, we affirm the decision to have each party bear its own costs and fees.

Id. at 847–48, 172 P.3d at 1122–23. Similarly, here, UCI consistently maintained and argued that it did not breach the TSA. UCI failed at that argument. Gem State Blaine prevailed in proving that UCI breached the TSA, but UCI prevailed in avoiding a monetary judgment. Accordingly, both parties prevailed and did not prevail in certain respects.

In *Mountain Rest. Corp. v. ParkCenter Mall Assocs.*, 122 Idaho 261, 269, 833 P.2d 119, 127 (Ct. App. 1992), the Court of Appeals upheld a trial court's determination that no party prevailed where the plaintiff succeeded in establishing a breach of contract, but did not prove that the breach was material and thus was not granted rescission. In addition, the defendant sought damages for breach of a lease agreement, and the district court granted the defendant partial

relief as to rental payments for when the plaintiff occupied the space. The trial court denied prospective relief, because it found the defendant failed to mitigate damages. In addition, the Court of Appeals upheld the trial court's refusal to award the defendant costs under Idaho Rule of Civil Procedure 68, pertaining to offers of judgment. Prior to trial, the defendant offered to allow judgment to be taken against it in the amount of \$10,000. "The district court ruled that because of the difficulty in comparing the offer of judgment with the judgment finally rendered in the case that Rule 68 did not mandate an award of costs." *Id.*

The issue presented is whether the district court correctly concluded that because of the structure of the offer it was not possible to ascertain whether the offer is more favorable than the judgment. We believe that the district court's order denying costs was correct. There was extensive testimony and exhibits at trial concerning the value of various trade fixtures owned by Mountain Restaurant, and their value was at least \$20,000, with evidence in the record of values in excess of that amount. The offer of judgment might have actually resulted in a net loss to Mountain of over \$10,000. The judgment required Mountain Restaurant to pay \$12,023.00 in back rent, but given the difficulty of evaluating the trade fixtures, we cannot determine whether the award of back rent actually exceeds the net monetary loss from the offer of judgment. Accordingly, the district court's order denying ParkCenter its claimed Rule 68 costs is affirmed.

Id.

Similarly, here, UCI urges the Court to consider the \$5,000 offer of judgment pursuant to Rule 68 that it made to Gem State Blaine prior to trial. Rule 68 provides in relevant part as follows:

(1) Claims for Monetary Damages. In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the "adjusted award."

(A) Adjusted Award Definition. The adjusted award is defined as:

- (i) the verdict in addition to,
- (ii) the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment and,
- (iii) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment. Provided, in contingent fee cases where attorney fees are awardable under Rule 54(e)(1), the court will pro

rate the offeree's attorney fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

(B) Adjusted Award Less than Offer. If the adjusted award obtained by the offeree is less than the offer, then:

(i) the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;

(ii) the offeror must pay those costs of the offeree, as allowed under Rule 54(d)(1), incurred before the making of the offer; and

(iii) the offeror is not be liable for costs and attorney fees of the offeree awardable under Rules 54(d)(1) and 54(e)(1) incurred after the making of the offer.

(C) Adjusted Award More than Offer. If the adjusted award obtained by the offeree is more than the offer, the offeror must pay those costs, as allowed under Rule 54(d)(1), incurred by the offeree both before and after the making of the offer.

(D) Judgment to be Entered. After a comparison of the offer and the adjusted award, in appropriate cases, the district court must order an amount which either the offeror or the offeree must ultimately pay separate and apart from the amount owed under the verdict. A total judgment must be entered taking into account both the verdict and the involved costs.

Rule 54(d)(1) specifies that costs are allowed as a matter of right to the prevailing party or parties. Here, the Court concludes that neither party prevailed, or at least, that each party prevailed and did not prevail in part. Because Gem State Blaine did not prevail on its claim for damages, Rule 68 does not apply. However, *Zenner v. Holcomb* instructs that even if Rule 68 does not apply, the Court must consider an offer of judgment in its prevailing party analysis.¹

1

An offer of judgment is defined generally as “[a] settlement offer by one party to allow a specified judgment to be taken against the party.” Black’s Law Dictionary 1114 (8th ed.2004). In *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981), the United States Supreme Court held “the plain language of Rule 68 confines its effect [to cases] in which the plaintiff has obtained a judgment for an amount less favorable than the defendant’s settlement offer.” This Court has also held that “[Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff.” *Jones v. Berezay*, 120 Idaho 332, 334, 815 P.2d 1072, 1074 (1991). Thus, Rule 68 is a rule of procedure that places a special burden on prevailing plaintiffs to whom a settlement offer is made to show that they are entitled to costs. *Ireland*, 123 Idaho at 961, 855 P.2d at 46. Rule 68 does not govern an offer of judgment if it is not made by a defendant and if the offer is not more favorable than the judgment obtained by the plaintiff. Even though Milton made an offer of judgment in *Ireland*, Rule 68 was inapplicable since Marlene did not prevail. Accordingly, the trial court was not prohibited from considering Milton’s offer of judgment as a factor in its prevailing party analysis for an award of attorney fees. In fact, the trial court was required to

Even considering the offer of judgment in the prevailing party analysis, the Court still finds that UCI is not the prevailing party. In viewing the case as a whole, both parties prevailed in part and did not prevail in part. Accordingly, even though the UCI made an offer of judgment prior to trial, the Court finds that neither party prevailed.

2. Discovery Sanctions

Gem State Blaine seeks an award of attorney fees and costs under Idaho Rules of Civil Procedure 37(a)(5), 37(b)(2)(C), and 37(c)(2). Early in the litigation, Gem State Blaine served UCI with discovery requests regarding its business dealings in Blaine County for nine years. UCI produced about a hundred pages of discovery. Gem State Blaine believed that the response appeared deficient on its face, given the dearth of emails produced. Accordingly, it served third party subpoenas on various clients with whom UCI had done business. Although only a few responded, Gem State Blaine received many documents that were not previously produced by UCI (apparently a good portion of the documents were also from Valley County work that was not relevant to this suit). Gem State Blaine then deposed Jeffrey Flynn who made reference to documents that were not previously produced. Thereafter, Gem State Blaine filed a Motion to Compel. A few days before the hearing, UCI produced over one thousand documents. UCI maintained that although it produced a lot of documents, the vast majority was not relevant to the instant suit and it had no other responsive documents. UCI also maintained that various items of

consider the offer of judgment under Rule 54(d)(1)(B) since Rule 68 was inapplicable. Therefore, we overrule the Court's holding in *Ireland* in so far as it holds that an offer of judgment may not be used to support a trial court's determination of prevailing party status for the purpose of awarding attorney fees.

Zenner, 147 Idaho at 450, 210 P.3d at 558.

discovery were not relevant because it was not bound by the TSA. At the hearing on the Motion to Compel, the Court granted the Motion and advised that UCI was ordered to respond to the extent it had not already done so. The Court advised that if UCI maintained the position that there was nothing relevant left to produce and Gem State Blaine ultimately was able to prove otherwise, then the Court would be more inclined to award fees and sanctions to Gem State Blaine.

About two months later, Gem State Blaine filed a Motion for Sanctions pursuant to Idaho Rule of Civil Procedure 37(b). It asserted that UCI failed to comply with the Court's previous order granting the motion to compel. Gem State Blaine conceded that it appeared UCI produced all of the invoices and estimates that were produced by third parties in response to subpoenas; however, it argued that UCI produced no email communications, except as concerning the Animal Shelter Project. UCI argued that it produced everything it had to Gem State Blaine. It maintained that its business practice was to delete emails after a job was complete and that the Animal Shelter Project was the only ongoing project. The Court initially granted the motion for sanctions, but then it later granted UCI's motion for reconsideration on the issue. Ultimately, the Court ordered that Gem State Blaine could submit third party subpoenas to relevant email service providers (Google and AOL) to attempt to uncover any relevant emails that UCI may have in connection to the instant litigation. No such documents were uncovered, because Google and AOL refused to comply with the subpoenas.

At trial, Kerrie Kuhn, who testified on behalf of UCI, stated under oath that nothing was deleted after the instant litigation commenced and that the only reason that the emails relating to the

Animal Shelter were produced is because it is an ongoing project. She testified that UCI's practice is to delete emails once a job is complete.

Idaho Rule of Civil Procedure 37(a)(5) provides that attorney fees and reasonable expenses must be paid by the party whose conduct necessitated the motion to compel, under the following circumstances:

(A) If the Motion Is Granted (or Discovery Is Provided After Filing). If the motion [to compel discovery] is granted, or if the requested discovery is provided after the motion was filed, the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

Idaho Rule of Civil Procedure Rule 37(b)(2)(C) provides for the payment of expenses when a party fails to comply with a court order:

Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Here, the Court concludes that UCI's objections and failure to produce documents were substantially justified and other circumstances make an award of expenses unjust. In viewing the litigation as a whole, UCI consistently maintained it had nothing more to produce. Gem State Blaine was not able to uncover any additional documents pertinent to its claims. There is no evidence that UCI deleted emails or hid any relevant documents or other evidence of foul play.

Instead, Kuhn's unrebutted testimony was that it was UCI's business practice to delete emails once a job is complete. In addition, to the extent that UCI initially withheld documents in relation to its argument that it was not bound by the TSA, UCI was substantially justified in that regard. UCI vigorously (and in good faith) disputed its liability under the TSA. It was not until the Court issued its *Memorandum Decision and Order* on April 26, 2019 finding that UCI was bound by the TSA that such fact became the law of the case. Likewise, UCI did not admit to various Rule 36 requests for admission based on its contention that it was not bound by the TSA. The Court finds that UCI had a good reason for its failure to admit based on its defense strategy. Accordingly, the Court will not award sanctions.

CONCLUSION

For the reasons contained herein, both parties' Motions for attorney fees and costs are DENIED.

IT IS SO ORDERED.



SAMUEL A. HOAGLAND
District Judge

Signed: 12/13/2019 11:23 AM

Date

CERTIFICATE OF MAILING

Signed: 12/13/2019 12:53 PM

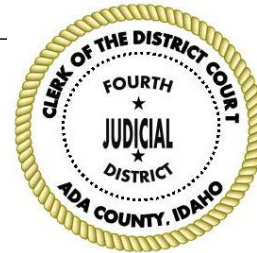
I hereby certify that on _____, I served a true and correct copy of the within instrument to:

Mr. Ryan McFarland, *Esq.*
ryan@mcfarlandritter.com

Ms. Terri Pickens Manweiler, *Esq.*
terri@pickenslawboise.com

Phil McGrane
Clerk of the District Court

By 
Deputy Court Clerk



Terri Pickens Manweiler, ISB No. 5828
Abigail McCleery, ISB No. 11000
PICKENS LAW, P.A.
398 S. 9th Street, Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: 208.954.5090
Facsimile: 208.954.5099
terri@pickenslawboise.com
abigail@pickenslawboise.com

Attorneys for Defendant – Cross-Appellant

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

GEM STATE ROOFING,
INCORPORATED,
Plaintiff – Appellant,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,
Defendant – Cross-Appellant.

Supreme Court Docket No. 47484-2019

Ada County Case No. CV01-18-13437

NOTICE OF CROSS-APPEAL

TO: GEM STATE ROOFING, INCORPORATED, AND ITS ATTORNEYS RYAN
McFARLAND, McFARLAND AND RITTER LLC, P.O. BOX 1335, MERIDIAN,
IDAHO 83680, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Cross-Appellant United Components, Incorporated, dba Gem State Roofing (“Cross-Appellant”) by and through its counsel of record, cross appeal against the above-named Appellant, Gem State Roofing, Incorporated (“Appellant”) to the Idaho Supreme Court from the Order Re: Attorney Fees and Costs, entered December 13, 2019 (“Order”), in the above-entitled action (the Honorable Samuel A. Hoagland presiding).

2. Cross-Appellant has the right to appeal to the Idaho Supreme Court on the grounds that the Order described in paragraph 1 is an appealable judgment under and pursuant to Idaho Appellate Rules 11(a)(1), 11(f), and 17(e).

3. The following is a preliminary statement of the issues on appeal that Cross-Appellants intend to assert. This list of issues shall not prevent Cross-Appellants from asserting other issues on appeal:

a. Did the District Court err in denying Cross-Appellant's Motion for Costs and Attorney Fees?

4. An order has not been entered to seal a portion of the record.

5. A reporter's transcript of the oral argument on Cross-Appellant's motion for costs and attorney's fees held November 12, 2019 is requested at this time.

6. Cross-Appellant request the following documents be included in the clerk's record: all those documents requested in Cross-Appellant's Request for Additional Documents on Appeal filed October 15, 2019.

7. Cross-Appellant request the following documents, charts, or pictures offered or admitted as trial exhibits be copied and sent to the Supreme Court, and includes a notation of those exhibits that have been marked as confidential: All those documents requested in Cross-Appellant's Request for Additional Documents on Appeal.

8. The undersigned hereby certifies:

a. That a copy of this Notice of Cross Appeal has been served on each reporter who prepared a transcript as named below at the address set out below:

Dianne Cromwell
Court Reporter to the Hon. Samuel A. Hoagland
Ada County Courthouse
200 W. Front St.
Boise, ID 83702

- b. That the reporter has been paid the estimated fee for preparation of the reporter's transcript;
- c. That the estimated fee for preparation of the clerk's record has been paid;
- d. That the appellate filing fee has been paid; and
- e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED: December 24, 2019.

PICKENS LAW, P.A.

By /s/ Terri Pickens Manweiler
Terri Pickens Manweiler, Of the Firm
Attorneys for Defendant – Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 24, 2019, I electronically served the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Ryan T. McFarland
McFarland Ritter PLLC
P.O. Box 1335
Meridian, ID 83680

- First Class Mail
- Facsimile – 208.895.1270
- Hand Delivery
- iCourts – ryan@mcfarlandritter.com

 /s/ Terri Pickens Manweiler
Terri Pickens Manweiler

Filed: January 6, 2020 4:00 p.m.
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Wegener, Kelle

1 To: Clerk of the Court
Idaho Supreme Court
2 451 West State Street
3 (208) 334-2616

4 IN THE SUPREME COURT OF THE STATE OF IDAHO

5 ----- Docket No. 47484 - 2019

6 GEM STATE ROOFING, INCORPORATED,)
7)
8 Plaintiff/Appellant,)
9 vs.)
10 UNITED COMPONENTS, INCORPORATED,)
11 dba GEM STATE ROOFING,)
12 Defendant/Respondent.)
-----)

COPY

13 NOTICE OF TRANSCRIPT OF 266 PAGES LODGED

14 Appealed from the District Court of the Fourth Judicial
15 District of the State of Idaho, in and for the County of
Boise, Honorable Samuel A. Hoagland, District Court
16 Judge.

17 Volume One contains:

- 18 Motion to Compel held October March 19, 2019.
- Motion for Reconsideration held July 9, 2019.
- 19 Court Trial held August 5, 2019.

20 Date: January 1, 2020

21 *Christine Anne Olesek, CSR-RPR*

22 Christine Anne Olesek, RPR
23 Official Court Reporter,
24 Idaho Certified Shorthand Reporter No. SRL-1044
25 Registered Professional Reporter

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To: Clerk of the Court
Idaho Supreme Court
451 West State Street
(208) 334-2616

Filed: April 6, 2020 4:00 p.m.
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Wegener, Kelle

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 47484-2019

)
GEM STATE ROOFING,)
)
INCORPORATED,)
)
Plaintiff-Appellant,)
)
vs.)
)
)
UNITED COMPONENTS,)
)
INCORPORATED, dba GEM STATE)
)
ROOFING,)
)
)
Defendant-Cross Appellant)

ORIGINAL

Appealed from the District Court of the
Fourth Judicial District of the State of
Idaho, in and for the County of Ada,
Honorable Samuel A. Hoagland, District Court Judge

NOTICE OF TRANSCRIPT OF 25 PAGES LODGED

Volume One contains:

Plaintiff's Motion for Sanctions held June 19, 2019.

Date: April 3, 2020

Christine Anne Olesek, CSR-RPR

Christine Anne Olesek, RPR
Official Court Reporter,
Idaho Certified Shorthand Reporter No. SRL-1044
Registered Professional Reporter

TO: Idaho Supreme Court/Court of Appeals
Post Office Box 83720
Boise, Idaho 83720-0101
Email: Sctfilings@idcourts.net

GEM STATE ROOFING,) DOCKET NO. 47484
INCORPORATED.)
)
Plaintiff-Appellant,)
)
vs.)
)
UNITED COMPONENTS,)
INCORPORATED, dba GEM STATE)
ROOFING.)
)
Defendant-Cross-Appellant.)

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on April 28, 2020,
I lodged 1 transcript of 29 pages in length for the
above-referenced appeal with the District Court Clerk of
the County of Ada in the Fifth Judicial District.

Appeal transcript consisting of the following
hearing: Motion for Costs and Attorney's Fees,
November 12, 2019.

Roxanne K. Patchell, CSR, RPR

Roxanne K. Patchell, RPR, CSR
Idaho CSR Number 733
California CSR Number 12057

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff-Appellant-
Cross Respondent,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant-Respondent-
Cross Appellant.

Supreme Court Case No. 47484

CERTIFICATE OF EXHIBITS

I, PHIL McGRANE, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 13th day of May, 2020.

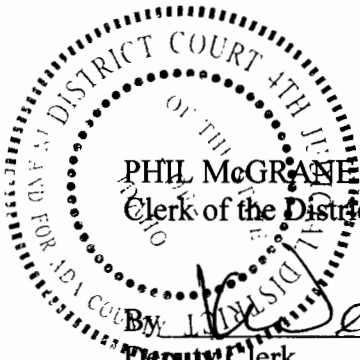


PHIL McGRANE
Clerk of the District Court
BY: 
Deputy Clerk

EXHIBIT LIST

Samuel A . Hoagland/ Maura Olson /Janet Hoskins
 Judge Clerk

DATE: 08/05/19 DISPOSITION: Court Trial
 CASE NO. CV01-18-13437

Gem State Roofing, Inc.	Ryan McFarland
-------------------------	----------------

Plaintiff Attorney(s)
 vs.

United Components Inc.	Terri Pickens Manweiler
------------------------	-------------------------

Defendant Attorney(s)

BY	NO.	DESCRIPTION	STATUS
Stip	1	Trademark Settlement Agreement	Admitted 8/5/19
Stip	2	Gem State- Blaine Cert of Assumed Business Name for "Gem State Roofing" dated 8/12/97	Admitted 8/5/19
Stip	3	Gem State- Boise Cert of Assumed Business Name for "Gem State Roofing" dated 7/19/99	Admitted 8/5/19
Stip	4	Gem State- Blaine corrected App for Reg of Trademark Service Mark dated 4/8/02 for "Gem State Roofing" Trademark	Admitted 8/5/19
Stip	5	Gem State- Blaine Cert of Reg of Trademark/ Service Mark dated 5/2/02 for "Gem State Roofing" Trademark	Admitted 8/5/19
Stip	6	Gem State Boise Cert of Reg of Trademark/ Service Mark dated 12/29/04 for "Gem State Roofing" Trademark	Admitted 8/5/19
Stip	7	Gem State Boise Estimate for roofing job in Blaine Co dated 9/30/10	Admitted 8/5/19
Stip	8	Gem State Boise Estimate for roofing job in Blaine Co dated 9/30/10	Admitted 8/5/19
Stip	9	Gem State Boise Estimate for roofing job in Blaine Co dated 6/20/11	Admitted 8/5/19
Stip	10	Gem State Boise Estimate for roofing job in Blaine Co dated 7/12/11	Admitted 8/5/19
Stip	11	Gem State Boise Estimate for roofing job in Blaine Co dated 7/12/11	Admitted 8/5/19
Stip	12	Gem State Boise Invoice for roofing job in Blaine Co dated 8/30/11	Admitted 8/5/19
Stip	13	Articles of Incorp of United Components, Incorp dated 10/25/11	Admitted 8/5/19
Stip	14	UCI cancellation or Amendment of Cert of Assumed Business Name for "Gem State Roofing" dated 10/26/11	Admitted 8/5/19

EXHIBIT LIST

Samuel A . Hoagland/ Maura Olaon/Janet Hoskins
Judge Clerk

DATE: 08/05/19 DISPOSITION: Court Trial
CASE NO. CV01-18-13437

Stip	15	App for Reg of Assignment of Trademark-Service mark of "Gem State Roofing" trademark from Gem State Boise to UCI dated 12/1/14	Admitted 8/5/19
Stip	16	Cert of Assignment Reg of Trademark Service Mark from Gem State Boise to UCI dated 12/1/14	Admitted 8/5/19
Stip	17	UCI Estimate for asphalt job in Blaine Co dated 5/5/16	Admitted 8/5/19
Stip	18	UCI Estimate for roofing job in Blaine Co dated 6/13/16	Admitted 8/5/19
Stip	19	UCI Estimate for roofing job in Blain Co dated 7/29/16	Admitted 8/5/19
Stip	20	UCI Transactions Detail Report for Pioneer West Property Management (Blaine Co Customer)	Admitted 8/5/19
Stip	21	UCI Estimate for roofing job in Blaine Co dated 8/17/16	Admitted 8/5/19
Stip	22	UCI Estimate for asphalt job in Blaine Co dated 8/17/16	Admitted 8/5/19
Stip	23	UCI Estimate for asphalt job in Blaine Co dated 8/17/16	Admitted 8/5/19
Stip	24	UCI Estimate for roofing job in Blaine Co dated 2/5/17	Admitted 8/5/19
Stip	25	UCI Estimate for roofing job in Blaine Co dated 12/5/17	Admitted 8/5/19
Stip	26	UCI Estimate for roofing job in Blaine co dated 12/5/17	Admitted 8/5/19
Stip	27	UCI Transactions Detail Report for Kerry Armstrong (Blaine Co customer)	Admitted 8/5/19
Stip	28	McAlvain email to UCI inquiring about "Hailey Idaho Roofing Work?" dated 1/17/18	Admitted 8/5/19
Stip	29	UCI Estimated for roofing job in Blaine Co dated 5/25/18	Admitted 8/5/19
Stip	30	Email from Tracey Felix to Kerrie Kuhn requesting bid to do roofing job for Wood River Valley Animal Shelter	Admitted 8/5/19
Stip	31	McAlvain Construction Subcontract Agreement w/ UCI for roofing job for Wood River Valley Animal Shelter dated 2/16/18	Admitted 8/5/19
Stip	32	UCI invoice dated 3/7/18 outlining work to be performed for Wood River Valley Animal Shelter roofing job	Admitted 8/5/19
Stip	33	UCI Transactions Detail Report for McAlvain Construction (Blaine Co customer)	Admitted 8/5/19
Stip	34	Change Order #1 for McAlvain/UCI Subcontract Agreement	Admitted 8/5/19
Stip	35	UCI Invoice dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per change order #1	Admitted 8/5/19
Stip	36	Email from Kerrie Kuhn re McAlvain roofing project confusion between Gem State – Blaine and UCI	Admitted 8/5/19
Stip	37	UCI invoiced dated 3/20/18 for additional roofing work performed on Wood River Valley Animal Shelter per change order #1	Admitted 8/5/19
Stip	38	Change order #2 for McAlvain/ UCI subcontract agreement	Admitted 8/5/19

EXHIBIT LIST

Samuel A . Hoagland/ Maura Olaon/Janet Hoskins
Judge Clerk

DATE: 08/05/19 DISPOSITION: Court Trial
CASE NO. CV01-18-13437

		dated 4/17/18	
Stip	39	UCI invoice for additional roofing work performed on Wood River Valley Animal Shelter per change order #2 dated 4/11/18	Admitted 8/5/19
Stip	40	Change order #3 for McAlvain/UCI subcontract agreement dated 6/25/18	Admitted 8/5/19
Stip	41	Change order #5 for McAlvain/ UCI subcontract agreement dated 8/22/18	Admitted 8/5/19
Stip	42	Change order #6 for McAlvain/ UCI subcontract agreement dated 9/4/18	Admitted 8/5/19
Stip	43	Cease and desist letter from McFarland Ritter to UCK dated 6/22/18	Admitted 8/5/19
Stip	44	Letter from Pickens to Conzakos to McFarland dated 6/29/18	Admitted 8/5/19
Stip	45	UCI Invoice for additional roofing work performed on Wood River Valley Animal Shelter dated 9/27/18	Admitted 8/5/19
Stip	46	UCI estimate for additional roofing work performed on Wood River Valley Animal Shelter dated 11/19/18	Admitted 8/5/19
Stip	47	UCI subcontractor app for payment to McAlvain dated 1/28/19	Admitted 8/5/19
Stip	48	Cert of Incorporated of Flynn Inc	Admitted 8/5/19
Stip	49	Articles of Amendment changing Flynn Inc to Gem State Roofing and Asphalt Maintenance	Admitted 8/5/19
Stip	50	Articles of Incorp of Gem State Roofing Inc.	Admitted 8/5/19
Stip	51	App for Reg of Trademark Service Mark	Admitted 8/5/19
Stip	52	Cert fo Reg of Trademark Service Mark	Admitted 8/5/19
Stip	53	App for Renewal Reg of Trademark Service Mark	Admitted 8/5/19
Stip	54	Cert Renewal Reg of Trademark Service Mark	Admitted 8/5/19
Stip	55	Estimate- Kerry Armstrong	Admitted 8/5/19
Pltf	104-A (Pg1 & 2)	Table/ Bar Graph	Admitted 8/5/19
Pltf	109	Pgs from internet	Admitted 8/5/19

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff-Appellant-
Cross Respondent,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant-Respondent-
Cross Appellant.

Supreme Court Case No. 47484

CERTIFICATE OF SERVICE

I, PHIL McGRANE, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

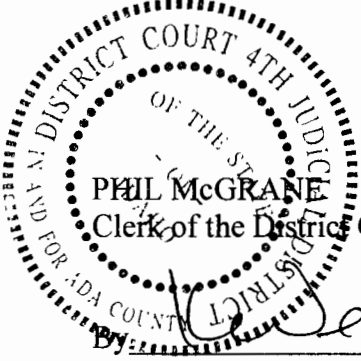
CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

RYAN T. McFARLAND
ATTORNEY FOR APPELLANT
MERIDIAN, IDAHO

TERRI PICKENS MANWEILER
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

Date of Service: MAY 13 2020


PHIL McGRANE
Clerk of the District Court
[Signature]
Deputy Clerk

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

GEM STATE ROOFING,
INCORPORATED,

Plaintiff-Appellant-
Cross Respondent,

vs.

UNITED COMPONENTS,
INCORPORATED, dba GEM STATE
ROOFING,

Defendant-Respondent-
Cross Appellant.

Supreme Court Case No. 47484

CERTIFICATE TO RECORD

I, PHIL McGRANE, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 7th day of October, 2019.

