

Julie Klein Fischer
 MORROW & FISCHER, PLLC
 332 North Broadmore, Suite 102
 Nampa, Idaho 83687
 Telephone: (208) 475-2200
 Facsimile: (208) 475-2201
 ISB No.: 4601
 jffischer@morrowfischer.com

Attorneys for Owyhee Motorcycle Club

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 30 2010	
By _____	_____ Clerk Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case 39576

SUBCASE NO. 63-18957

**OWYHEE MOTOR CYCLE
 CLUB'S RESPONSE TO MOTION
 TO STRIKE**

BACKGROUND AND ISSUES

On November 27, 2009, Owyhee Motorcycle Company ("OMC") made a request for attorneys' fees and costs as against the Terteling Company, Inc. ("TCI") in the above-matter. In connection therewith, OMC's counsel submitted an affidavit in support of OMC's motion. The affidavit included a June 4, 2008 letter regarding settlement negotiations as well as the Report prepared by OMC's expert, Paul Drury of ERO Resources, Corp dated March 5, 2009 ("Report"). On December 9, 2009 TCI moved to strike the letter and Report. This constitutes OMC's Response to TCI's *Motion to Strike*

ARGUMENT AND AUTHORITY

1. The Admissibility of Rule 408 Offers

TCI seeks to exclude the June 4, 2008 letter from Julie Fischer to Charlie Honsinger on the basis it contains settlement negotiations and therefore is precluded from disclosure pursuant to Idaho Rule of Evidence ("IRE") 408.

IRE 408 reads as follows:

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for any other purpose, such as proving bias or prejudice of a witness, negating [sic] a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation.

First, TCI is correct in that the June 4, 2008 letter constitutes settlement negotiations. Similarly, *if* the letter was being offered to prove liability, or the invalidity of one of the parties' claims, it would *not* be proper evidence. However, in this instance the letter is not being used to support or refute any underlying claim. Rather, it was submitted to establish that OMC is the prevailing party. Thus, because the letter is being offered for *another purpose*, it may be considered. At a minimum, the matter is left to the discretion of the court. *See Soria v. Sierra Pac. Air-lines*, 111 Idaho 594, 726 P.2d 706 (1986).

That being said, in January 2010 (after both the motion for fees and objection were filed), the Idaho Supreme Court held that district courts may not consider settlement negotiations in

making a determination on attorneys' fees. *See Jorgensen v. Coppedge*, 148 Idaho 536; 224 P.3d 1125 (January 27, 2010). Whether that determination is different than determining which party prevailed (the purpose for which OMC submitted the letter) is unclear. However, it does appear that the plain meaning of Rule 408 (regarding other uses of settlement offers) has been narrowed by this recent decision.

2. The Technical Report is Appropriately Included in the Record

TCI argues that ERO Resources March 5, 2009 Report, attached to the affidavit of Counsel, should be stricken as it contains inadmissible hearsay.

Contrary to TCI's argument, the Report is not hearsay because it is not offered to prove the truth of the matter asserted. IRE 803(c). Rather, the Report is offered to establish OMC was decreed slightly more water (in terms of annual volume) than it requested from the Department and/or this Court. The Report also establishes that the amount decreed is much closer OMC's claim than the annual volume limit argued by TCI.¹ Thus, it should be clear the Report was submitted to establish that OMC prevailed – not that OMC's annual volume should be 25 acre feet annually. Because the Report is not offered for the truth of the matter asserted it is properly considered by this Court.

Further, even if the Court determines the Report is hearsay, it clearly falls within the exception set forth in IRE 803(6), which provides that reports and data compilation, kept in the regular course of business, are *admissible* hearsay. There can be no dispute that ERO Resources is in the business of, and regularly conducts, the type of analysis and reporting as is

¹ Recall that Counsel for TCI submitted a report from Ed Squires suggesting half-time use of the OMC well would result in an annual volume of 12 acre feet year. *See Exhibit A, to Affidavit of Charles L. Honsinger in Support of Motion to Compel* dated December 30, 2008.

set forth in the Report. Further, the Report was submitted to the Court by counsel who certified the same was a true and accurate copy of ERO Resources' Report generated in this litigation. In addition, ERO Resources' work in this matter is referenced throughout the record, including comments regarding the same by TCI's expert, Ed Squires. Thus, all the elements of trustworthiness regarding the Report are satisfied.

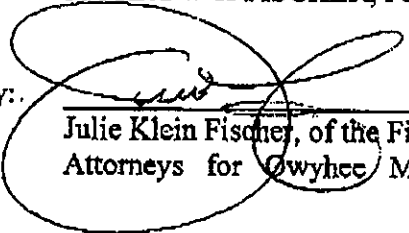
In sum, the Report is not hearsay, and even if construed in that manner, is subject to an exception allowing its use in these proceedings. Quite simply, there is not basis on which to exclude the Report. Nonetheless, and to quell any additional concern over the admissibility of the Report, an affidavit from Paul E. Drury, the author thereof, is being submitted simultaneous herewith. Mr. Drury does nothing more than identify the work as his own.

CONCLUSION

For the reasons set forth above, OMC respectfully requests TCI's *Motion to Strike* be denied.

DATED this 29 day of March, 2010.

MORROW & FISCHER, PLLC

By: 

Julie Klein Fischer, of the Firm
Attorneys for Owyhee Motorcycle Club

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 29th³⁰ day of March, 2010, a true and correct copy of the above and foregoing document was served upon the following by:

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Office of the Attorney general
State of Idaho
PO Box 44449
Boise, ID 83711-4449

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Edwards Family LLC
c/o Dana Hofstetter
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, ID 83702

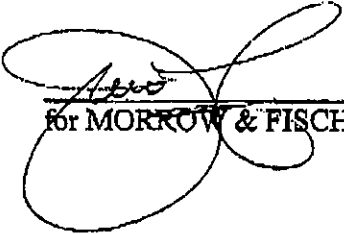
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The Terteling Co. Inc.
c/o Charles L. Honsinger
RINGERT CLARK, Chtd.
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

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US Mail
Overnight Mail
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for MORROW & FISCHER, PLLC