

U.S. COURTS

04 JUL -9 PM 4:59

REC'D \_\_\_\_\_ FILED \_\_\_\_\_  
CANTON'S DUKE  
CLERK IDAHO

R. Wade Curtis  
BELNAP & CURTIS, PLLC  
1401 Shoreline Drive, Suite 2  
Post Office Box 7685  
Boise, Idaho 83707

Telephone: (208) 345-3333  
Facsimile: (208) 345-4461

Attorney for Defendant / Counter Claimant

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability company, )

Plaintiff, )

vs. )

AMERICAN FOOD STORES, LLC, a California limited liability company, )

Defendant. )

AMERICAN FOOD STORES, LLC, a California limited liability company, )

Counterclaimant, )

vs. )

RECUPEROS, LLC, an Idaho limited liability company, )

Counter Defendant. )

Civil No. 04-229-S-BLW

ANSWER TO VERIFIED COMPLAINT,  
COUNTERCLAIM AND  
DEMAND FOR JURY TRIAL

**ORIGINAL** 21

COMES NOW the Defendant, American Food Stores, LLC, by and through R. Wade Curtis, of the firm of Belnap & Curtis, PLLC, and answers Plaintiff's Complaint as follows:

**FIRST DEFENSE**

The Plaintiff's Complaint fails to state a claim for declaratory relief under 28 U.S.C. Section 2201 or Idaho Code Section 10-1201 or Rule 57 of the Federal Rules of Civil Procedure or a claim against Defendants upon which relief can be granted.

**SECOND DEFENSE**

1. The Defendant denies each and every allegation of the Plaintiff's Complaint not specifically admitted herein.
2. Except as otherwise denied herein, the Defendant admits the allegations of paragraphs 1 thru 6, 8 thru 9, and 14 of the Plaintiff's Complaint.
3. The Defendant denies the allegations of paragraphs 10, 11, 13, 15, and 17 thru 19 of the Plaintiff's Complaint.
4. With regard to Paragraph 7 of the Plaintiff's Complaint, the Plaintiff does not set forth any new allegation of fact for which the Defendant has a responsibility to answer.
5. With regard to Paragraphs 12 and 16 of the Plaintiff's Complaint, such paragraphs set forth only legal conclusions rather than averments of fact, therefore, no response is required. If the Court were to determine that Paragraphs 12 and 16 do contain factual averments, then Defendant denies the same.

### **FIRST AFFIRMATIVE DEFENSE**

The Plaintiff's claim fails to state a claim upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

The Plaintiff's claim for relief is barred based on the individual and collective legal principles of laches, estoppel, and waiver.

### **THIRD AFFIRMATIVE DEFENSE**

The agreement which is the subject matter of the Plaintiff's Complaint is an invalid or otherwise unenforceable contract. Manjit Sahota, acting by himself, was not authorized by AFS and did not have authority of AFS to enter into the subject settlement agreement, therefore, as to the Defendant AFS, it did not enter into a valid agreement for forfeiture of the initial payment of \$306,155.15. In addition, the subject settlement agreement is not supported by and lacks consideration, the Plaintiff failed to comply with all conditions precedent to Defendant's performance, the Defendant's performance was excused or Plaintiff waived the Defendant's non-performance, and / or the Plaintiff has suffered no loss.

### **FOURTH AFFIRMATIVE DEFENSE**

The subject agreement is an illegal attempt to enforce what is otherwise an illegal and unconscionable liquidated damages clause which is against public policy and, therefore, the subject agreement is invalid and unenforceable.

**FIFTH AFFIRMATIVE DEFENSE**

The Plaintiff may have failed and refused to mitigate its damages.

**SIXTH AFFIRMATIVE DEFENSE**

The Plaintiff caused the Defendant to execute the subject agreement through the use of fraud and misrepresentation.

**SEVENTH AFFIRMATIVE DEFENSE**

The subject settlement agreement is invalid and unenforceable in that Manjit Sahota did not have authority to execute the agreement on behalf of the Defendant, American Food Stores. Further, the Plaintiff by an implied-in-fact provision of the subject agreement, agreed with Manjit Sahota and Sukhdev Kapur that both persons were to execute the subject agreement and that as a condition precedent to the subject agreement, Sukhdev Kapur was to be repaid all of his investment and attorney fees.

**EIGHTH AFFIRMATIVE DEFENSE**

The Plaintiff is barred from recovery on the equitable theories of equitable estoppel and quasi estoppel, in that it would be unconscionable to allow the Plaintiff to retain the \$306,155.15, because retention is inconsistent with the Plaintiff's claim of breach and inconsistent with the Plaintiff's requirement to mitigate damages, in light of the fact that

Plaintiff resold the convenience stores to another buyer at a price greater than the price at which the sale would have been consummated with Defendant.

**NINTH AFFIRMATIVE DEFENSE**

The Plaintiff is barred from recovery in that Plaintiff obtained the subject agreement as a result of undue influence exerted on representatives of the Defendant.

**TENTH AFFIRMATIVE DEFENSE**

This action is barred by illegality in that the transaction alleged by the Plaintiff was illegal and is, therefore, unenforceable.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendants reserve the right to amend this Answer to allege and set forth any other matter constituting an avoidance or affirmative defense of which the Defendant is presently unaware but which may come to light as the parties do discovery and prepare for trial.

**ATTORNEY FEES**

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, Defendant requests that all issues properly triable by a jury be tried before a jury. Defendant will not stipulate to a jury of less than twelve (12) members.

### PRAYER FOR RELIEF

1. That Plaintiff's Complaint be dismissed with prejudice, and that Plaintiff take nothing thereunder;
2. That Defendant be awarded costs and disbursement necessarily incurred in defending this action, pursuant to Idaho Code Section 12-120, 12-121 and Rule 54 of the Idaho Rules of Civil Procedure, as well as Rule 54 of the Federal Rules of Civil Procedure, as well as the initial contract, i.e., Asset Purchase Agreement; and
3. For such other and further relief as the court may deem just and proper.

### COUNTERCLAIM

COMES NOW the Defendant and Counterclaimant, American Food Stores, LLC, by and through R. Wade Curtis, of the firm of Belnap & Curtis, PLLC, and complains and alleges as follows:

### COMMON AVERMENTS

1. As to each Count hereinafter set out, all averments of this Complaint, whether or not the specific averment is set out as a part of a particular Count, are averred and re-averred in each Count as if the individual averment was specifically set out and made a direct part of each Count, without repeating at the beginning of each Count that all other averments of this Complaint are incorporated therein by reference.

2. The Defendant, American Food Stores, LLC, hereinafter AFS, incorporates herein by reference as if set forth herein verbatim all allegations of all paragraphs of the Plaintiff's Complaint that Defendant has admitted.

**COUNT ONE: BREACH OF CONTRACT**

3. AFS and Recuperos entered into a certain Asset Purchase Agreement, by which AFS was to purchase from Recuperos 19 "Everyday" convenience stores located in Colorado.

4. Thereafter Recuperos and AFS entered into an oral agreement modifying certain terms and provisions of the Asset Purchase Agreement with regard to the time frame within which AFS had to do its due diligence and pay the initial one million dollar deposit.

5. In addition, the parties entered into an oral and written agreement that AFS's rights under the initial Asset Purchase Agreement would be assigned to and transferred to an entity called TwentyFour-Seven, LLC.

6. Recuperos breached the said Agreements as follows:

a. Recuperos required AFS to make a million dollar deposit directly to Recuperos rather than to the Title Company closing the purchase.

b. Recuperos required the million dollar deposit in violation of the parties' agreement to extend the date and timing of the said payment.

c. After agreeing to the assignment to TwentyFour-Seven, Recuperos refused and failed to make payment to Sukhdev Kapur of his investment.

d. AFS reserves the right to amend this Counterclaim to include other acts by which Recuperos breached the parties' oral and written agreements.

c. All of which was contrary to the terms of the parties' agreements.

7. AFS performed all acts required or requested by the parties' oral and written agreements.

8. As a result of Recuperos' breach of the parties oral and written agreements, AFS has suffered damages, both general and special, in an amount in excess of the jurisdictional limits of the Court as will be proven at trial.

**COUNT TWO: FRAUD AND MISREPRESENTATION**

9. Recuperos, by and through its agents, made certain representations to AFS to include but not limited to the following:

a. That AFS would have additional time within which to conduct its due diligence.

b. That AFS could transfer its interest in the initial Asset Purchase Agreement to TwentyFour-Seven,

c. Recuperos promised Manjit that it would obtain Sukhdev's signature on the subject Settlement Agreement, in reliance upon the promise Manjit signed the settlement agreement. Thereafter, Recuperos failed and refused to obtain Sukhdev's signature on the Agreement.

- d. Recuperos submitted to Manjit signature pages that it requested him to sign, which signature pages were later attached to a settlement agreement that Manjit had not in fact approved and agreed to.
10. The representations were false and misleading;
  11. The represented facts were individually and collectively important;
  12. Recuperos knew the representations were false (or acted with a reckless disregard of the truth of the representations);
  13. AFS was not aware of the falsity of the representations;
  14. Recuperos intended that AFS rely upon the representations in agreeing to enter into the contract;
  15. AFS, acting through Manjit Sahota did rely upon the representations;
  16. AFS' reliance was justified; and
  17. That, Manjit Sahota was compelled by Recuperos to accept the Settlement Agreement by deceit and / or force or fear;
  18. That but for the deceit and / or force or fear, Manjit Sahota would not have entered into the settlement agreement.
  19. AFS has returned to Recuperos those items of records and information that AFS is legally obligated to return in order to prevent his being unjustly enriched.
  20. AFS reserves the right to amend this Counterclaim to include a cause of action for punitive damages based on Recuperos' alleged fraud.

### COUNT THREE: LIQUIDATED DAMAGES

21. Alternatively, the forfeiture provisions of the Asset Purchase Agreement and the Settlement Agreement were, in effect, liquidated damages and are unenforceable because the forfeiture of the \$306,155.15 is not reasonably related to any actual damages suffered by Recuperos which would have flowed from any breach committed by AFS, if in fact AFS committed any breach.

22. Assuming there was a breach of the Asset Purchase Agreement by AFS, actual damages, if any, suffered by Recuperos are not uncertain in their nature and are readily susceptible of proof by the ordinary rules of evidence.

23. The amount forfeited, i.e., \$306,155.15 is disproportional to the probable actual damages, if any, suffered by Recuperos and is therefore unconscionable.

24. The liquidated damage provision of the Asset Purchase Agreement and the Settlement Agreement was intended by Recuperos to be a penalty or punishment and bears no reasonable relation to the damages that might actually be sustained if the contract is breached.

25. Considering all of the circumstances, the forfeiture of the \$306,155.15 does not bear any reasonable relation to the damages, if any, actually sustained and are exorbitant or in the alternative, the liquidated damages stated in the Asset Purchase Agreement and the Settlement Agreement were not intended to be compensation for the consequences of any breach of the contract, but rather are intended to be a penalty to deter a party from not performing or as punishment against a party for breaching the contract.

26. As such, the \$306,155.15 should be applied either to the actual damages suffered by Recuperos, if any, and the balance returned to AFS.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b), Idaho Rules of Civil Procedure, Defendant requests that all issues properly triable by a jury be tried before a jury. Defendant will not stipulate to a jury of less than twelve (12) members.

**PRAYER**

WHEREFORE, Counter Claimant AFS, prays judgment against Recuperos as follows:

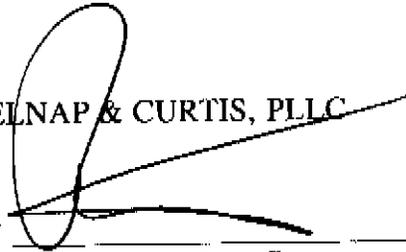
1. For general damages in an amount in excess of one million dollars or such greater amount as proven at trial, to include return of the \$306,155.15;
2. For special damages as plead herein and as proven at trial;
3. Alternatively, for specific performance requiring Recuperos to comply with the terms and provisions of the parties original Asset Purchase Agreement as modified and assigned to TwentyFour-Seven, LLC.
4. To amend this Counterclaim to include a prayer for relief of punitive damages;
5. For attorney fees under Idaho Code Section 12-120 and 12-12, Rule 54 of the Idaho Rules of Civil Procedure, as well as the initial agreement, Asset Purchase Agreement;
6. For costs of suit;

7. For post judgment interest as allowed by law;

8. For such other relief as the Court deems just and reasonable under the facts presented.

DATED this <sup>2</sup>9 day of July, 2004.

BELNAP & CURTIS, PLLC

By   
R. Wade Curtis of the firm  
Attorney for Defendant / Counterclaimant



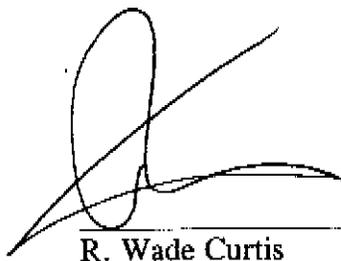
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 9<sup>th</sup> day of July, 2004, I caused to be served a true and correct copy of the above and foregoing document by the method indicated below, and addressed to the following:

- MAILED
- FAXED -- 385-5384
- HAND DELIVERED
- OVERNIGHT DELIVERY

Attorney(s) and/or Individual(s) Served:

Michael O. Roe  
Post Office Box 829  
Boise, Idaho 83701



R. Wade Curtis