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Attorneys for Plaintiff/Counterdefendant Recuperos, LLC

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,

Counterdefendant.

Civil No. 04-229-S-BLW

REPLY TO COUNTERCLAIM

COMES NOW the plaintiff/counterdefendant, Recuperos, LLC, by and through the undersigned counsel of record, and hereby answers and responds to the defendant/counterclaimant's counterclaim as follows:

REPLY

1. The plaintiff/counterdefendant hereby denies each and every allegation set forth in the counterclaim, unless otherwise expressly admitted herein.
2. The plaintiff/counterdefendant hereby admits the allegations set forth in paragraph 3 of the counterclaim.
3. The plaintiff/counterdefendant hereby denies the allegations set forth in paragraphs 1, 2 and 4-26 of the counterclaim, in their entirety.

AFFIRMATIVE DEFENSES

4. The counterclaim fails to state a claim upon which relief can be granted.
5. The defendant/counterclaimant has waived, and/or is estopped from bringing, the counterclaim.
6. The defendant/counterclaimant has failed to notify the plaintiff/counterdefendant within a reasonable time after discovery of the alleged breach of contract and is therefore barred from bringing any such action.
7. The defendant/counterclaimant has failed to take reasonable steps to mitigate its alleged damages.
8. The defendant/counterclaimant is guilty of laches and unreasonable delay in bringing this action and such delay was without good cause and substantially prejudices the plaintiff/counterdefendant.

9. Defendant/counterclaimant is barred from maintaining this action because plaintiff/counterdefendant's breach of its contract with defendant/counterclaimant, if any, is excused by defendant/counterclaimant's breach of the contract.

10. Defendant/counterclaimant is barred from maintaining this action because plaintiff/counterdefendant's breach of its contract with defendant/counterclaimant, if any, is excused by a material failure of consideration.

11. Defendant/counterclaimant is barred from maintaining this action because plaintiff/counterdefendant's breach of its contract with defendant/counterclaimant, if any, is excused by defendant/counterclaimant's anticipatory breach of the contract.

12. Defendant/counterclaimant should be denied any equitable relief herein on the basis of unclean hands.

13. Defendant/counterclaimant is barred from maintaining this action against plaintiff/counterdefendant, because a condition precedent to plaintiff/counterdefendant's duty of immediate performance failed to occur.

14. Defendant/counterclaimant is barred from maintaining this action because it has failed to join an indispensable party to this action.

15. Defendant/counterclaimant is barred from maintaining this action because it is not the real party in interest to some or all of its claims.

16. Defendant/counterclaimant's fraud claim is barred due to its failure to plead its claim with sufficient particularity.

17. Defendant/counterclaimant is barred from maintaining this action because it has settled and released all claims against the plaintiff/counterdefendant.

18. Discovery is ongoing in this matter and the plaintiff/counterdefendant therefore reserves the right to amend its reply, if and to the extent a factual basis is later discovered which supports the assertion of one or more additional affirmative defenses.

COSTS AND ATTORNEY FEES

The plaintiff/counterdefendant has been required to retain the services of counsel to defend the counterclaim and is entitled to an award of costs and attorney fees pursuant to Idaho Code Sections 12-120 and 12-121, the terms of the parties' written agreements and/or pursuant to other applicable law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff/counterdefendant prays for relief as follows:

1. For dismissal of the counterclaim with prejudice;
2. For an award of costs and attorney fees; and
3. For such other relief as the Court may deem proper.

DATED this 28 day of July, 2004.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Michael O. Roe – Of the Firm
Attorneys for Plaintiff/Counterdefendant
Recuperos, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of July, 2004, I caused a true and correct copy of the foregoing **REPLY TO COUNTERCLAIM** to be served by the method indicated below, and addressed to the following:

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