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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HOLM CONSTRUCTION, LLC, an  
Idaho Limited Liability Company, in the  
name of THE UNITED STATES OF  
AMERICA,

Plaintiff,

vs.

DESERT SAGE CONTRACTORS, INC.,  
an Idaho Corporation, and  
DEVELOPERS SURETY AND  
INDEMNITY COMPANY, Surety,

Defendants.

Case No. CV-03-273-E-LMB

BRIEF IN SUPPORT OF MOTION TO  
SET ASIDE DEFAULT AND DEFAULT  
JUDGMENT entered on March 15, 2004  
– Fed.R.Civ.P. 55(c) and 60(b)

COME NOW, the Defendants, DESERT SAGE CONTRACTORS, INC.,

(“Desert Sage”), and DEVELOPERS SURETY AND INDEMNITY COMPANY,

(“Developers”), by and through their attorneys of record, Marty R. Anderson and the law

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("Developers"), by and through their attorneys of record, Marty R. Anderson and the law firm of Ehardt, Smith & Torgesen, PLLC, and submit the following Brief in Support of their Motion to Set Aside Default and Default Judgment.

### FACTUAL BACKGROUND

In the spring of 2002, Desert Sage Contractors, Inc., ("Desert Sage"), sought to obtain the contract for certain trail improvements to be performed under the direction of the Bureau of Land Management on the Cress Trail near Heise Hot Springs. As it is a federal project and under the purview of the Miller Act, 40 U.S.C. §§ 270 a-d, the project was bonded by Developers Surety and Indemnity Company, ("Developers"). Desert Sage sought solicited bids from various sub-contractors, including Holm Construction, LLC ("Holm"). After several drafts, Holm submitted proposals in the amount of \$99,152.50 were submitted related to work on Schedule A and B or \$68,400 for work related to Schedule B only.

Desert Sage proceeded to bid the project without a commitment to any concrete sub-contractor. Subsequent to the award of the contract Desert Sage again met with Holm Construction and negotiated a revised proposal. Desert Sage contracted with Holm to perform various tasks in accordance with the Project Schedule for the total amount of \$55,050. Said contract was issued on a unit price basis consistent with Desert Sage Contractors contract, i.e. sidewalk by the square yard, curbing by the linear foot, structural concrete by the cubic yard.

Shortly after the Cress Trail Project started, Desert Sage encountered difficulty with the Holm workers including scheduling delays and inappropriate behavior. Holm also submitted a draw request which Desert Sage deemed to be inflated. After attempts to alleviate the concerns failed, Holm's subcontract was terminated. Despite Holm's breach of contract, Desert Sage paid Holm the sum of \$20,000 for work completed to date, which amount Holm accepted and signed a Lien Release for all work up to the date of the check on August 14, 2004. Shortly after the check was accepted and the release signed, Holm began demanding additional monies. Desert Sage reviewed the project with Holm and documented the payment under the contract. Desert Sage declined to make further payment.

Unwilling to let the matter drop, Holm apparently retained attorney Stephen Blaser of the law firm Blaser, Sorenson & Hansen, Chartered. Mr. Blaser sent a demand letter on or about September 24, 2002 claiming an additional \$13,451.00. Desert Sage again declined further payment and the matter was considered resolved.

More than five months later, Desert Sage received a subsequent letter from Mr. Blaser on March 7, 2003 together with copies of letters sent to the BLM and Developers making a claim against the Miller Act Bond. The subsequent demand letters sought to increase the amount claimed to \$22,540.00. Desert Sage responded to Mr. Blaser's March 2003 claims by again denying liability for any such claim and further referring the matter to its attorney, Kimball Mason. Mr. Mason enlisted the service of

attorney John L. Stosich to represent its interests as well as the interests of the surety, Developers, in this matter.

Through Mr. Stosich, Desert Sage again documented its position with respect to Holm and the Cress Trail Project, i.e., that Holm had been more than fairly compensated for the work performed pursuant to the terms of the contract and the project specifications. Desert Sage again believed that the matter had been resolved based upon the information it provided.

On October 7, 2003, Desert Sage received a letter from Mr. Blaser together with two documents: 1) a copy of a Notice of Lawsuit and Request for Waiver of Service of Summons; and, 2) two copies of a Waiver of Service of Summons. No Complaint was provided to Desert Sage. Desert Sage forwarded these documents to Mr. Mason and Mr. Stosich via facsimile on October 7, 2003.

Desert Sage discussed various means to resolve the lawsuit including mediation, additional settlement offers, etc. It was agreed that the parties should try to mediate the case to avoid legal expenses. Mr. Stosich contacted Mr. Blaser to arrange the mediation as a means of resolving the suit. Mr. Stosich had numerous conversations with Mr. Blaser regarding the mediation and Mr. Blaser represented to the Court at a telephonic hearing on November 5, 2003 that Mr. Stosich was representing Desert Sage and Developers.

Thereafter, Desert Sage believed that the matter was being handled by its

attorneys and was proceeding to mediation. Concurrent with the case reaching this stage of the proceedings, Mr. Stosich accepted a position with the Idaho Attorney General's office. Mr. Stosich contends he informed opposing counsel and Mr. Mason that he would not be able to carry on his representation in the case. He believed that the matter would proceed to mediation under the direction of Mr. Mason and the Mr. Blaser would follow up

Desert Sage was contacted in July 2004 and informed that Holm had secured a Default Judgment. Desert Sage contacted Mr. Mason and learned that Mr. Stosich had subsequently joined the Idaho Attorney General's office. Mr. Mason helped arrange alternate counsel.

#### POINTS AND AUTHORITIES

1. The Default and Default Judgment herein should be set aside in the interests of justice.

The decision to set aside a default judgment is within the discretion of the Court. Shapkin/Crossroads Productions, Inc. v. Legacy Home Video, Inc., 122 F.3d 1073 (9<sup>th</sup> Cir.1997) (Hon. B. Lynn Winmill sitting by designation). Default judgments are disfavored, and, whenever it is reasonably possible, cases should be decided upon their merits. Community Dental Services v. Tani, 282 F.3d 1164, 1170 (9<sup>th</sup> Cir.2002); Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9<sup>th</sup> Cir. 1985). In this case, the interests of justice are best served by allowing this action to proceed to a resolution on the merits.

2. The Default and Dcfault Judgment were entered in contravention of the Fed.R.Civ.P. 55(b)(2) because the Defendants were not given notice and an opportunity to respond.

It is well settled that default may not be taken against a party that has appeared in a lawsuit unless proper notice was given. In the instant case, even though there is a Notice of Intent to Take Default on file, the Notice of Intent was never served upon Desert Sage and Developers. Accordingly, the Default and the Default Judgment entered herein should be set aside.

A. The Notice of Intent to Take Default was not properly served.

In the instant case, neither Desert Sage nor Developers were properly served with the Notice of Intent to Take Default. The Federal Rules of Civil Procedure state that:

If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.

Fed.R.Civ.P. 55(b)(2). Service on a person represented by an attorney is effective when the attorney is served. Fed.R.Civ.P. 5(b)(1). Service is achieved by delivering a copy of every pleading by:

- (A) ...
  - (i) handing it to the person;
  - (ii) leaving it at the person's office with a clerk or other

person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

...

Fed.R.Civ.P. 5(b)(2). Any pleadings filed must be accompanied by a proper Certificate of Service reflecting the manner of service. Fed.R.Civ.P. 5(d).

In this case, counsel for Holm purported to serve Desert Sage and Developers with the Notice of Intent to Take Default by mailing a copy to their counsel of record, Mr. John Stosich. However, the Notice of Intent to Take Default was never received by Mr. Stosich. Affidavit of John Stosich ("Stosich Aff."), ¶ 11. Furthermore, it seems unlikely that the Notice of Intent to Take Default was mailed in the manner reflected by the Certificate of Service. Specifically, the Notice of Intent to Take Default was filed with the Court on **December 11, 2003**. However, the pleading was signed by Mr. Stephen Blaser on **December 19, 2003** and further certified to have been served on Desert Sage and Developers on **December 19, 2003**. The discrepancy on the dates reflected on the Certificate of Service casts considerable doubt that the Notice of Intent to Take Default was served on December 11, 2003, if at all. It is clear that the only

evidence of service of the Notice of Intent to Take Default is the Certificate of Service, which is patently not accurate.

B. Notice was required because Mr. Stosich had appeared on behalf of Desert Sage and Developers.

Default may only be entered when a party “has failed to plead *or otherwise defend*” against an action. In the instant case, Desert Sage and Developers had actively engaged in the defense of this lawsuit and were attempting to have the case resolved by mediation. Affidavit of John Stosich (“Stosich Aff.”), ¶¶ 9, 11, 13. Holm clearly recognized that Mr. Stosich had appeared because they at least attempted to give Notice of Intent to Take Default to Mr. Stosich. See, Notice on Intent to Take Default filed December 11, 2003. Accordingly, default should not have been entered against Desert Sage or Developers without notice.

The Ninth Circuit Court of Appeals has said that, normally, an appearance in an action involves some presentation or submission to the court but because judgments by default are disfavored, a court usually will try to find that there has been an appearance by defendant. Franchise Holding II, I.L.C. v. Huntington Restaurants Group, Inc., \_\_\_\_\_ F.3d \_\_\_, 2004 WL 1615060 at 5 (9<sup>th</sup> Cir. 2004). What constitutes an appearance is a matter of interpretation but typically contemplates some participation evidencing an intent to defend the lawsuit. New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996); Trust Co. Bank v. Tingen-Millford Drapery Co., Inc., 119 F.R.D. 21, 22 (E.D.N.C.

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1987); Heleasco Seventeen, Inc. v. Drake, 102 F.R.D. 909, 912 (D.C. Del. 1984). An appearance is not limited to physical appearances in court or the actual filing of documents in the record. Id. Appearances “include a variety of informal acts on defendant’s part which are responsive to plaintiff’s formal action in court, and which may be regarded as sufficient to give plaintiff a clear indication of defendant’s intention to contest the claim.” New York, 84 F.3d at 142-43. Therefore, an appearance is an indication “in some way [of] an intent to pursue a defense” and is “a relatively low threshold.” Id.

Moreover, the Ninth Circuit in Franchise Holding went on to acknowledge that some courts have concluded that a defendant did appear where it evidenced an intent to defend itself. 2004 WL 1615060 at 4. Similarly, in Walker & Zanger (West Coast) Ltd. v. Stone Design S.A., 4 F.Supp.2d 931 (C.D.Cal. 1997), the court found a defendant who has not formally appeared, for example by filing a responsive pleading, may be deemed to have appeared for purposes of Fed.R.Civ.P. 55 if the defendant clearly manifested an intention to defend the action. Id. at 934-35. (citing Wilson v. Moore & Assoc., Inc., 564 F.2d 366, 369 (9th Cir.1977) (“In limited situation, informal contacts between the parties have sufficed when the party in default has thereby demonstrated a clear purpose to defend the suit.”); see also United States v. McCoy, 954 F.2d 1000, 1003 (5th Cir.1992)). Thus, the court found, where informal contacts rise to the level of settlement negotiations or are sufficient to establish that the defendant expressed an intent

to defend the lawsuit, notice of the application for default should be required (because the defendant is deemed to have appeared). Id.

In Tingen-Millford, the plaintiff's attorney and the defendant's attorney discussed a possible extension of time. Although this extension was not granted by the plaintiff, it was clear that the defendant had every intention of defending the suit. The court ruled, therefore, that this constituted an "appearance" and, because an appearance had been made, the entry of judgment under Rule 55(b)(1) was improper. Id. at 23.

In Heleasco, the defendant's attorney initiated two telephone conversations with the plaintiff's attorney. The court found that these conversations demonstrated the defendant's intent to defend the suit and that the telephone exchanges between the parties' counsel constituted an "appearance" by defendants within the meaning of Rule 55(b)(2).. Thus, the plaintiff's application for default should have been made pursuant to Rule 55(b)(2) and not Rule 55(b)(1), and was set aside.

In New York Life, the defendant took two actions which could be considered appearances: (1) he participated in a telephone conference with the other parties before the magistrate judge and (2) he spoke with counsel for the plaintiff, informing her that he would not sign a stipulation and that he was attempting to retain counsel to contest the suit. The court concluded that the defendant's attendance at the phone conference before the magistrate judge was an appearance, because he actually appeared in court (albeit by phone). Id. at 142. Likewise, his phone call to the plaintiff's

counsel, informing him that he would contest the suit, was also an appearance. *Id.*

In our case, Mr. Stosich had a number of telephone conversations with attorneys for the plaintiff, discussing mediation and other avenues to resolve the matter. Stosich Aff., ¶ 3-14. Many of these conversations took place after the lawsuit was filed and indicated a clear intent to defend the litigation. Additionally, Mr. Blaser represented to the Court that Mr. Stosich was representing Desert Sage at the Telephonic Scheduling Conference on November 5, 2003. See, Minute Entry and Order dated November 5, 2003. This acknowledgement of representation on the record constitutes a presentation to the Court of representation. Mr. Stosich also signed the Waiver of Service of Summons on November 14, 2003. See, Waiver of Service of Summons filed December 11, 2003. In fact, Desert Sage was waiting to hear back from Holm with respect to mediation. These actions should be regarded as sufficient to give plaintiff a clear indication of defendant's intention to contest the claim, and, therefore, should constitute an appearance for the purposes of Rule 55. At a minimum, these facts reflect "good cause" for setting aside the Default entered herein. Fed.R.Civ.P. 55(c).

3. The Default and Default Judgment should be set aside for good cause and on the basis of mistake, inadvertence, surprise or excusable neglect pursuant to Fed.R.Civ.P. 60(b)(1).

Even if the Court determines that the Default and Default Judgment were properly entered, Desert Sage and Developers are entitled to have the judgment set aside

on the basis of mistake, inadvertence, surprise or excusable neglect. Fed.R.Civ.P.

60(b)(1). The Court may relieve a party from a final judgment pursuant to Rule 60(b)(1) after consideration of at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the moving party acted in good faith. Laurino v. Syringa General Hosp., 279 F.3d 750, 752-53 (9<sup>th</sup> Cir.2002). In the instant case, a review of these factors reveals that the judgment herein should be set aside.

First, there is no prejudice to the opposing party by setting aside the Default Judgment. Prejudice from delay in the collection of a judgment or the inherent delay in proceedings to set a judgment aside are not enough. Owens-Illinois, Inc. v. T & N LTD, 191 F.R.D. 522 (E.D. Texas 2000) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 394, 113 S.Ct. 1489, 1497 (1993)). With the exception of a relatively insignificant amount of attorney fees and costs expended to secure the Default Judgment, there has been no change in the parties' respective positions. To the contrary, setting aside the Default Judgment would allow the litigation to proceed on the merits, which will allow Holm to recover the appropriate amount under the subject contract. Sec. Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 887-890 (9<sup>th</sup> Cir.2001) (Judge Ferguson, *dissenting*, noting that default judgments are appropriate in extreme circumstances only and whenever possible a case should be decided on the merits). There can be nothing prejudicial about a judicious result.

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Second, there has been no unwarranted delay in this case. Desert Sage and Developers only learned of the Default Judgment on July 13, 2004. Desert Sage and Developers immediately contacted Holm regarding the judgment. Since then, Desert Sage and Developers have moved expeditiously to bring this matter before the Court. See, Owens-Illinois, 191 F.R.D. at 529. Although the litigation is just over a year old, the case was not served in a timely manner in accordance with Fed.R.Civ.P. 4(m) and has only been "active" for a period of about nine (9) months. The judgment itself was not served for four months after its entry. Although this is perhaps slightly off-schedule, it is certainly not a gross deviation from the normal litigation track and does not warrant preclusion of a trial on the merits.

Third, the delay in this case is partially attributable to all parties and does not rest solely on Desert Sage and Developers. Holm is culpable in part because of the delay in effecting service or even sending out the Waiver of Service of Process. Holm was tasked with arranging the mediation and with getting back to Desert Sage. Stosich Aff., ¶¶ 9, 11, 13. At about the same time as the mediation was being discussed, Mr. Stosich was offered a position with the Idaho Attorney General's office and was in the process of winding up his private practice. Stosich Aff., ¶ 10. Unfortunately, in the resulting transition period, the above-captioned matter was not pursued further by Mr. Stosich. Mr. Stosich believed that the file was being handled by another attorney in Idaho Falls, Mr. Kimball Mason. Stosich Aff., ¶¶ 11, 13.

Fourth, Desert Sage and Developers acted in good faith to resolve the case.

Mr. Stosich had communicated effectively with counsel for Holm and discussed the issues of the case. Mr. Stosich had then communicated the issues to his clients and convinced them to mediate the case as a means of resolving the case. There is no evidence that Mr. Stosich did not respond to requests from Holm regarding a certain mediator or available times. There is no evidence that Mr. Stosich was acting in bad faith to mislead, stall or delay the case. If anything, the evidence suggests that Mr. Stosich was waiting to hear back from Mr. Blaser on the mediation scheduling. At or about this time, Mr. Stosich was offered a position with the Idaho Attorney General's Office and closed his private practice. The coincidence of the suspension of the litigation process to accommodate mediation with the change in positions caused Mr. Stosich to lose track of the defense of the litigation. Furthermore, Mr. Stosich believed that a colleague of his, Mr. Kimball Mason, was taking the case over and pursuing the mediation and defense of the matter. See, Affidavit of John Stosich.

Application of the foregoing factors to the facts of this case indicates that the Default and Default Judgment should be set aside. Mr. Stosich was making reasonable efforts to try and resolve the litigation. The miscue in representation is attributable to his switch in positions and to his mistaken belief that Mr. Mason was taking over the litigation. The facts here indicate that the Default and Default Judgment should be set aside on the basis of excusable neglect and/or mistake in accordance with

Fed.R.Civ.P. 60(b)(1).

4. The Default and Default Judgment should be set aside for good cause and on the basis that said Default Judgment is voidable in accordance with Fed.R.Civ.P. 60(b)(6).

The Default Judgment should be set aside herein for any reason not considered by the rules that justify granting relief pursuant to Fed.R.Civ.P. 60(b)(6). Community Dental Services v. Tani, 282 F.3d 1164, 1168 (9<sup>th</sup> Cir.2002). In the Community Dental case, the Ninth Circuit reversed and remanded a decision by the District Court not to set a default judgment aside. Id. at 1172. The default in that case was based upon the attorney's failure to file an answer and upon representations to the client that the litigation was progressing smoothly. Id. at 1170-1172. In essence, the court determined that even though the attorney was grossly negligent, it was manifestly unjust to make the client accountable for his conduct. Id., but see Speiser, 271 F.3d at 886. Similarly, it is unjust to make Desert Sage and Developers accountable for an error on the part of their attorney in this case. See, Stosich Aff., ¶¶ 9-14. Desert Sage and Developers both believed that the litigation was proceeding smoothly, that the case was scheduled for mediation and were awaiting further instruction.

As an additional basis under Rule 60(b)(6) and as set forth above, failure to give notice in accordance with Fed.R.Civ.P. 55(b)(2) renders a judgment voidable in accordance with Fed.R.Civ.P. 60(b)(6). New York v. Green, 2004 WL 1375555 at 4-5

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(W.D.N.Y. 2004). As set forth herein, Desert Sage and Developers did not receive the Notice of Intent to Take Default.

5. Desert Sage and Developers have a meritorious defense.

It is necessary for a party seeking a default judgment to establish a meritorious defense. American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9<sup>th</sup> Cir.2000). This action is simply a breach of contract case for which Desert Sage has numerous meritorious defenses.

A. Holm breached the contract and is not entitled to recover thereunder.

A contractor may recover the contract price of a job, less the cost of repairing minor defects in the structure, only if the work substantially conforms to the terms of the contract. Ervin Constr. Co. v. Van Orden, 125 Idaho 695, 702, 874 P.2d 506, 513 (1993); Frceman & Co. v. Bolt, 132 Idaho 152, 160, 968 P.2d 247, 255 (Ct.App. 1998). Substantial performance is performance which provides the important and essential benefits of the contract even though the performance may deviate from the contract specifications. Tentinger v. McPheters, 132 Idaho 620, 622, 977 P.2d 234, 236 (1999); Ervin Constr. Co., 125 Idaho at 699, 874 P.2d at 510. The determination of whether the performance is substantial and whether the defects are minor is based upon the particular structure involved, its intended purposes, the nature and relative cost of the repairs and equitable considerations. Ervin Constr. Co., 125 Idaho at 702, 874 P.2d at 513.

However, these legal standards presume that the contract was completed. In the instant case, Holm did not complete the contract but instead breached the contract and was terminated. *Bare Aff.*, ¶¶ 8-13. If a breach of contract is material, the other party's performance is excused. *J.P. Strayens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct.App. 1996). Arguably, under the contract, Desert Sage was not required to pay any amount to Holm, let alone the additional damages claimed in the litigation.

B. Holm is not entitled to claim lost profits.

Furthermore, Holm sought to claim damages related to its lost profits. As a general rule, lost profits are not recoverable in contract unless there is something in that contract itself that suggests the parties specifically contemplated them and the amount can be proved with reasonable certainty. *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 884-85, 42 P.3d 672, 677-78 (2002) (citing *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 764 P.2d 423 (1988)). Contracts that come within the gamut of the Miller Act are likewise evaluated in light of the underlying contract. *See*, Miller Act, §§ 1-5, as amended, 40 U.S.C.A. § 3133, formerly cited as §§ 270a to 270d-1, 270e, 270f; *United States for the Use and Benefit of Walton Technology, Inc. v. Westar Engineering, Inc.*, 290 F.3d 1199, 1207 (9<sup>th</sup> Cir.2002); *Taylor Const. Inc v. ABT Service Corp., Inc.*, 163 F.3d 1119 (9<sup>th</sup> Cir.1998). “[T]here is no doubt that under the Miller Act recovery for work performed under the subcontract is the amount due

under the subcontract.” Taylor, 163 F.3d at 1122-23.

In the instant case, Holm’s claims for “business profit” as a stand alone proposition are misplaced. The underlying subcontract did not contemplate a separate category for profits, although, as the Court recognized in Taylor, the contract price presumably included some profit or there would be no point in doing business. Taylor, 163 F.3d at 1123. The point being that Holm is now attempting to restructure the original subcontract to contemplate a specific amount of profits that was not contemplated by the bid’s original per unit basis nor as contemplated by the original bonded contract. Bare Aff., ¶ 3-6, Exhibits A & B. The Court must look to the underlying bonded contract to determine the proper measure of damages. Taylor, 163 F.3d at 1122.

As noted by Desert Sage, Holm was paid for all of the work completed by its employees on a pro rata share of the work performed through the date its contract was terminated on August 14, 2002. Bare Aff., ¶¶ 16-22. Quite simply, Holm was paid for the exact amount of linear feet or units completed versus the overall linear feet or units contemplated by the original bid and project schedules. These linear feet or unit prices included Holm’s profit as part of the bid amount. There is nothing in the contract documents that arbitrarily allows Holm to assign heavier costs for additional labor or hardship or arbitrarily assign profits. Accordingly, Holm’s damages claims are speculative and without merit. See, Bare Aff.

C. Holm signed a release of all claims and waived its right to collect

from Desert Sage or under the bond.

A party may waive the right to collect on a payment bond provided the waiver is 1) in writing; 2) signed by the person whose right is waived; and 3) executed after the labor or material was provided under the bonded contract. 40 U.S.C.A. § 3133(c); Westar Engineering, 290 F.3d at 1208-09. In the instant case, Holm accepted \$20,000 from Desert Sage for work performed through August 14, 2002. Concurrent with the payment, Jason Holm, acting on behalf of Holm, executed a Lien Release which released “. . . **all mechanic’s liens, stop notice, equitable lien and labor and material bond rights . . .**” [against the] **“owner, prime contractor, the construction lender, and the principal and surety on any labor and material bond.”** Bare Aff., ¶ 23, Exhibit “E”. This language clearly constitutes a waiver of any rights that Holm had to collect on any amount from either Desert Sage or Developers for work performed through August 14, 2002.

For the foregoing reasons, both Desert Sage and Developers have valid defenses to the underlying claims and should be allowed to pursue the same on the merits.

6. The Default and Default Judgment should be set aside as the Summons and Complaint were not properly served in accordance with Fed.R.Civ.P. 4(m).

The Complaint in the above-referenced matter was filed on June 30, 2003. Pursuant to Fed.R.Civ.P. 4(m), the Complaint must be served within 120 days after filing or the Court “shall dismiss the action without prejudice” unless plaintiff can demonstrate

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good cause for the failure. In the instant case, the Complaint and Summons were never personally served. To the contrary, Holm forwarded the Waiver of Service of Process forms to Desert Sage and Developers on or about October 12, 2003. The Waivers were not executed, and, therefore, service was not achieved, until on or about November 13, 2003 --approximately 136 days after the Complaint was filed. See, Waiver of Service or Process. Because the Complaint and Summons were not timely filed, the action should have been dismissed without prejudice.

DATED this 13<sup>th</sup> day of August, 2004

EHARDT SMITH & TORGESEN, PLLC

By   
Marty R. Anderson  
Attorneys for Defendant

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY  
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery, or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 15<sup>th</sup> day of August, 2004.

  
Marty R. Anderson

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