STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

HITACHI CAPITAL AMERICA CORP,

Plaintiff,

vs.

HENRY C. DOWNS, JR., MD,

Defendant.

Case No. **CV 2011 1339**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN ALTERNATIVE, MOTION TO STAY PROCEEDINGS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion to Dismiss or in Alternative Motion to Stay Proceedings filed by defendant Henry C. Downs, Jr., M.D., on June 13, 2011.

On February 9, 2011, plaintiff Hitachi Capital America Corp. (Hitachi) filed its Complaint against defendant Henry Downs, Jr., M.D. (Downs), alleging breach of a lease agreement entered into on or about April 29, 2008, via failure to make a payment on January 15, 2009, "or any payments due thereafter despite demand for the same". Complaint, p. 2, ¶ 9. In April of 2008, Downs entered into a lease agreement with Laser Leasing, Inc. (Laser) as lessor; "…the financing, authorization, and approval of the equipment funding and installation payments were made by DeLage Lunden Financial Services (DLL). Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 2. Laser limited its communication with Downs to leasing the medical equipment and securing Downs' signature on the lease.

Id. DLL assigned its interest in the subject lease to Hitachi for collection of sums in April of 2009. *Id.*

On June 13, 2011, Downs filed a motion to dismiss, or alternatively, to stay proceedings and an affidavit of his counsel in support thereof. Downs notes for the Court that Laser does not now, and did not at the time the lease was entered into, possess a valid Certificate of Authority to do business in Idaho and, therefore, dismissal under Idaho Code § 31-1-1502 is proper. Hitachi filed its Plaintiff's Response and the supporting Affidavit of Sean Boutz on July 5, 2011. Hitachi argues its possession of a Certificate of Authority results in an exception to the general requirement that all foreign corporations, i.e. Laser, possess a Certificate of Authority in light of Hitachi's being a successor to Laser. Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 3. Downs has not replied to Hitachi's Response.

This matter is currently set for a two-day jury trial beginning January 9, 2012.

II. STANDARD OF REVIEW.

Downs has not stated a rule basis for his motion to dismiss. Downs claims the "grounds" for his motion to dismiss are 1) Idaho Code § 30-1-1502; 2) Attached records from Secretary of State; and 3) Affidavit of Clayton G. Andersen. In motions to dismiss, the Court is to look only at the pleadings and view all inferences in favor of the non-moving party. *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (regarding 12(b)(6) motions); *Osborn v. United States,* 918 F.2d 724, 729 n. 6 (8th Cir. 1990) (regarding 12(b)(1) motions raising facial challenges to jurisdiction); *Serv. Emp. Intern. V. Idaho Department of Health and Welfare,* 106 Idaho 756, 758, 683 P.2d 404, 406 (1984 (regarding 12(b) challenges generally). Complaints should not be

dismissed under Rule 12(b) unless the plaintiff can prove no set of facts which would entitle him to relief. *Dumas v. Ropp,* 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield,* 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975).

III. ANALYSIS

Hitachi makes four arguments in support of its contention that Downs' motion to dismiss be denied: (1) Hitachi, successor to Laser, has at all relevant time periods possessed a Certificate of Authority as contemplated by I.C. § 30-1-1502(2); (2) it would be inequitable of the Court to grant the motion to dismiss after Downs received benefits under the lease agreement at issue; (3) Laser's actions do not amount to transacting of business within the meaning of I.C. § 30-1-1501(2); and (4) in the event this Court determines Laser must obtain a Certificate of Authority, a stay would be appropriate (as compared to dismissal of its action against Downs). Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 3, *et seq.*

Statutory provisions dealing with qualifications of foreign corporations to do business in Idaho are mandatory and must be complied with to enable such a foreign corporation to maintain an action in Idaho courts to enforce its contracts. *California Brewing Co. v. Rino,* 143 F.Supp. 801, 802-03 (D.C. Idaho, 1956). Idaho Code § 30-1-1502(1) reads:

> A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

Idaho Code § 30-1-1502(2) reads:

> The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of

> action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

Idaho Code § 30-1-1502(3) reads:

> A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

The permissive "may" language found in I.C. § 30-1-15-2(3) indicates the decision to stay a proceeding commenced by a foreign corporation, its successor or assignee obtains a proper Certificate of Authority is vested in the Court's sound discretion. In *KEB Enterprises, LP v. Smedley,* 140 Idaho 746, 101 P.3d 690 (2005), the Idaho Supreme Court refused to consider whether a family trust is required to obtain a certificate of authority where such issue was not raised before the District Court below. In *dicta,* the Idaho Supreme Court wrote:

> The words "transacting business" are not defined in Idaho Code § 53-256. In finding that KEB was not transacting business in Idaho, the district court relied upon Idaho Code §§ 53-657 and 30-1-1501. Section 53-657(1)(g) & (h) provides that a foreign limited liability company is not transacting business in this state by "acquiring indebtedness or mortgages or other security interests in real or personal property" or by "collecting debts or enforcing any rights in property securing the same." Section 30-1-1501(2)(g) & (h) provides that a foreign corporation is not transacting business in this state by "acquiring indebtedness, mortgages and security interest in real or personal property" or by "collecting debts or enforcing mortgages and security interest in property securing the debts." The district court reasoned that there is no rational basis for holding that a foreign limited liability partnership is transacting business under Idaho Code § 53-256(a) by engaging in conduct that is specifically defined as not constituting transacting business if done by a foreign corporation or foreign limited liability company.

140 Idaho 746, 753-54, 101 P.3d 690, 697-98.

Without directly addressing Hitachi's general equity argument, this Court agrees with Hitachi's arguments that Hitachi, as successor, has at all relevant times possessed

the proper Certificate of Authority and that Laser's interaction with Downs did not amount to "transacting business" in Idaho. Thus, the alternative request for a stay by Downs is rendered moot. Hitachi's equity argument need not be reached by this Court in light of Idaho case law. A foreign corporation's failure to obtain a Certificate of Authority does not invalidate a contract; it merely goes to the capacity of a foreign corporation to maintain a cause of action in Idaho courts. *Aero Service Corp. v. Benson,* 84 Idaho 416, 374 P.2d 277 (1962); *Dairy Equipment Co. of Utah v. Boehme,* 92 Idaho 301, 442 P.2d 437 (1968). It was Hitachi who filed this lawsuit on February 9, 2011. Hitachi has a Certificate of Authority. As Laser's successor, Hitachi maintains it at all times possessed the proper Certificate of Authority. Laser's failure to have obtained a Certificate of Authority does not render the lease agreement void, but rather has the effect of denying access to Idaho courts for Laser's enforcement until such certificate is obtained.

As argued by Hitachi, the non-exhaustive list found in I.C. § 30-1-1501(2) sets forth actions which do not amount to "transacting business" within the State of Idaho. In this regard, Downs has not set forth any argument to dispute the actions of Laser in this matter go beyond selling through independent contractors (I.C. § 30-1-1501(2)(e)); soliciting or obtaining orders (I.C. § 30-1-1501(2)(f)); creating or acquiring indebtedness (I.C. § 30-1-1501(2)(g)); securing or collecting debts (I.C. § 30-1-1501(2)(h)); or transacting business in interstate commerce (I.C. § 30-1-1501(2)(k). Hitachi argues:

> Any or all of these exceptions are applicable to the facts of this case. For example, DLL was selling medical equipment to Downs through LL [Laser], its private label independent contractor. DLL was also soliciting orders for its medical equipment through LL [Laser] that requires acceptance and execution by an out of state business before a valid contract existed. DLL, though LL [Laser], was creating, acquiring, and securing indebtedness and security in personal property from Downs under the terms of the Lease. Most importantly, however, the transaction in this case falls squarely under the interstate commerce exception.

Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 6. The Court finds all these examples are applicable to Laser, and its successor, Hitachi. Laser was not "transacting business" within the State of Idaho in its dealings with Downs. Thus, Downs' motion to dismiss must be denied, as well as Downs' alternative motion to stay.

At oral argument, counsel for Downs objected to certain portions of the Affidavit of John Casey (president of Laser Leasing, Inc.) as being "hearsay". Specifically, Downs' counsel argued the following was hearsay, when Casey wrote:

> LL is a duly organized and licensed legal business entity in the state of Delaware. LL has been licensed to conduct business in MA since before the Lease Agreement ("Lease") that is the subject of this action was executed by Defendant Henry C. Downs, Jr., MD in April 2008. LL was incorporated in MA.

Affidavit of John Casey, p. 2, ¶ 3. Casey stated under oath that he is the president of Laser Leasing, Inc. *Id.,* p. 1, ¶ 2. Counsel for Downs also objected that Casey did not attach any written proof of incorporation to his affidavit. There is no requirement that written proof of incorporation be filed with Casey's affidavit, though Casey could have done so. Attaching written proof of incorporation would not have affected the hearsay status of the above quoted paragraph, contrary to Downs' argument at hearing. Casey's Affidavit was filed July 7, 2011. Downs' counsel having such affidavit for seven weeks certainly afforded the opportunity to check Massachusetts records, and submit those findings to the Court under I.R.E. 803(8). Most pertinent, nothing in the above quoted paragraph is hearsay, as it is Casey testifying as to matters within his own knowledge. I.R.E. 801. [H]earsay signifies all evidence which is not founded upon personal knowledge of the witness from whom it is elicited. C.J.S. Evidence § 365. Laser's corporate status does not depend upon some other witness, nor does it depend

on Casey's credibility. There is no out of court asserter of whom this Court needs to determine that person's credibility. Casey's above quoted paragraph is really a personal observation, and Casey has set forth the foundation for that personal observation (I.R.E. 601); he is president of that corporation.

But most importantly, the above quoted portion of Casey's affidavit is simply not relevant. There is nothing in I.C. § 30-1-1502 which requires Laser to have been incorporated in any state, requires Laser to have had a certificate of authority. As mentioned above, I.C. § 30-1-1502 reads:

> A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation ***or*** its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

Hitachi has a certificate of authority. The statute is written in the *disjunctive*. To grant the relief Downs requests, this Court would have to find both Laser and Hitachi lacking a certificate of authority, and there is no dispute Hitachi has a certificate of authority. The statute requires: "A court may stay a proceeding commenced by a foreign corporation [this was initiated by Hitachi]…until it determines whether the foreign corporation [Hitachi] …requires a certificate of authority." Hitachi has a certificate of authority. Even if this Court could be convinced to read this statute as: "A court may stay a proceeding commenced by a foreign corporation [litigation was commenced by Hitachi, not Laser, but for the sake of argument we will insert Laser here], its successor, or assignee [Hitachi is Laser's assignee] until it determines whether the foreign corporation [Laser] or its successor [Hitachi] requires a certificate of authority." Hitachi has a certificate of authority.

IV. CONCLUSION AND ORDER.

For the reasons above, Downs' motion to dismiss or stay must be denied.

IT IS HEREBY ORDERED defendant Downs' Motion to Dismiss or in Alternative, Motion to Stay Proceedings is DENIED.

Entered this 30th day of August, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Sean P. Boutz	509-455-3632	Clayton Andersen	664-1684

_____
Jeanne Clausen, Deputy Clerk