STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

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

ALLIED BAIL BONDS, INC.,

Plaintiffs,

vs.

COUNTY OF KOOTENAI, et al.

Defendants.

Case No. **CV 2007 7471**

ORDER GRANTING MOTION TO DISMISS IN PART AND DENYING MOTION TO DISMISS IN PART

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

In April 2001, plaintiff Allied Bail Bonds, Inc., (Allied) and defendant Kootenai County, through Ron Rankin, the Chairman Pro-Tem of the Kootenai County Board of Commissioners, and Rocky Watson, the Kootenai County Sheriff, entered into a Release and Settlement Agreement which Allied now alleges defendants have breached. Exhibit A to Complaint and Request for Jury Trial, filed October 9, 2007. Allied alleges defendants interfered with Allied's business of providing bonding services, in part by accepting credit cards form inmates for the purposes of posting bail and not regularly charging the $10 bonding fee.

On October 22, 2008, Allied filed its Motion to Amend its complaint, and attached to that Motion was a Second Amended Complaint dated October 22, 2008. Oral argument on that motion was held on November 5, 2008. That motion was taken under advisement.

On July 9, 2008, defendants filed a Motion to Dismiss pursuant to I.R.C.P. 12(b)(1) and 12(b)(6). Oral argument on defendants' motion to dismiss was held on December 4, 2008. At the beginning of that hearing the Court announced its ruling granting Allied's Motion to Amend Complaint, and the Court ordered the Second Amended Complaint, dated October 22, 2008, be filed, and that defendants had twenty-days from December 4, 2008, to answer such.

At that December 4, 2008, hearing, the Court noted that at the conclusion of an earlier hearing on June 3, 2008, Judge Luster (previously assigned to this case) granted Allied's Motion to Amend the Complaint and ordered the Amended Complaint and Request for Jury Trial, dated May 20, 2008, be filed. On June 15, 2007, Judge Luster signed an order allowing Allied to amend its complaint. However, the Amended Complaint was never actually filed with the Court. This Court ordered that Amended Complaint be filed *nunc pro tunc* back to May 20, 2008, the date the Motion to Amend the Complaint was granted.

The Second Amended Complaint dated October 22, 2008, differs very little from the Amended Complaint. The only significant difference this Court can see is that the Second Amended Complaint makes the claim that as to some party defendant (it is not clear which party defendant): "Engaging in conduct which encourages the use of a credit card for bonding purposes violates Article 8, Section 4 of the Idaho Constitution by granting preferential treatment to one private enterprise to the disadvantage of another." Second Amended Complaint, dated October 22, 2008, p. 3, ¶ 12.

At oral argument on December 4, 2008, counsel for defendants made the argument that if only the breach of contract argument is left against the Board of County Commissioners, the Board cannot be liable for the Kootenai County Sheriff's actions

because the Board has no authority over the Sheriff. This argument was not briefed, and the Court allowed additional time for the parties to submit any additional authority. On December 8, 2008, defendants filed “Submission of Additional Authorities”, and on December 15, 2008, Allied submitted “Supplemental Brief in Support of Opposition to Motion to Dismiss.” This Court has read this material. However, since defendants have not formally moved for dismissal on these grounds, this Court will not address that decision in this opinion. A separate motion will need to be filed in order to get that issue before this Court.

II. ANALYSIS.

A. Standard of Review.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schools For Equal Education v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources*., 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schools for Equal Education*, 123 Idaho 573, 578, 850 P.2d 724, 729; *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not

whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co*., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v.. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

Whether a court has properly dismissed a case for lack of jurisdiction pursuant to I.R.C.P. 12(b)(1) is a question of law over which reviewing courts exercise free review. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.,* 127 Idaho 283, 285, 900 P.2d 191, 193 (1995); *Meisner v. Potlach Corp.,* 131 Idaho 258, 260, 954 P.2d 676, 678 (1998).

B. Allied's Claims Discussed in Defendants' Motion to Dismiss.

1. Subject Matter Jurisdiction Under Idaho Tort Claims Act.

Defendants argue that this Court lacks the subject matter jurisdiction to rule on Allied's claims because Allied failed to comply with the Idaho Tort Claims Act (ITCA). Memorandum in Support of motion to Dismiss Amended Complaint, pp. 6-11. Since Allied alleges a deprivation of economic opportunity or prospective business advantage, which sounds in tort, defendants argue Allied was required to comply with the notice requirements of the ITCA. *Id.* at 6-7. Allied argues its claims are contract claims and "taxpayer suits to stop illegal conduct of public officials." Response to Defendants' Motion to Dismiss, p. 2. Defendants argue that since Allied's claim that defendants damaged Allied as a result of a violation of Article 8, Section 4 of the Idaho Constitution, does not arise in contract and cannot arise directly under the Constitution, it must arise under the Idaho Tort Claims Act. That argument only applies to paragraph 8(h) of the Second Amended Complaint dated October 22, 2008.

The only claim Allied makes regarding the Idaho Constitution is found in paragraph 8(h) of the Second Amended Complaint dated October 22, 2008, and reads: "Engaging in conduct which encourages the use of a credit card for bonding purposes violates Article 8, Section 4 of the Idaho Constitution by granting preferential treatment to one private enterprise to the disadvantage of another". Even though the allegation in paragraph 8(h) of the Second Amended Complaint dated October 22, 2008, alleges a constitutional violation, (*see School Dist. No. 8, Twin Falls County v. Twin Falls County Mutual Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917) for a discussion of Idaho Constitution Article 8, § 4), as alleged it is a tort. The allegation made by Allied is that by violating that section, defendants are "granting preferential treatment to one private enterprise to the disadvantage of another." Second Amended Complaint, ¶8(h). As discussed immediately below, that is essentially a tortiuous interference with a business relationship.

Allied admits that: "[t]o the extent that Allied has any tort claims, and has in fact failed to comply with the act, that would only justify dismissing the tort claims, not any of the other claims or outright dismissing the entire complaint." Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 2. The question then is "What claims has Allied alleged which are torts?"

Allied's use of the language "to deprive Plaintiff of its economic opportunity and prospective business advantage" (Complaint filed October 9, 2007, pp. 2-3, ¶ 8) and "interferes with Plaintiff's economic opportunity and prospective business advantage", (Amended Complaint filed May 20, 2008, p. 3, ¶¶ 8(g) and 10), certainly sounds in tort. The language in Allied's most recent pleading, that: "Defendants, amongst other things, engaged in a course of conduct designed and intended to interfere with Plaintiff's ability

to engage in Plaintiff's chosen business of providing bonding services to inmates being held at the Kootenai County jail"; "such other conduct as may be developed through discovery showing the scheme and plan of Defendant to deprive Plaintiff of its economic opportunity and prospective business advantage"; and "Engaging in conduct which encourages the use of a credit card for bonding purposes violates Article 8, Section 4 of the Idaho Constitution by granting preferential treatment to one private enterprise to the disadvantage of another"; "The continued operation of pre-trial services interferes with Plaintiff's economic opportunity and prospective business advantage by reducing the amount of bonds…"; certainly sounds in tort. Second Amended Complaint, pp. 2-5; ¶ ¶ 6, 8(h), 10, 12 and 16. The common law *tort* of interference with prospective advantage is recognized in *Twin Falls Farm & City Distributing, Inc, v. D & B Supply Co., Inc.,* 96 Idaho 351, 359, 528 P.2d 1286, 1294 (1974).

Any claim by Allied which is a tort must be dismissed as a matter of law pursuant to I.R.C.P. 12(b)(1), because this Court lacks subject matter jurisdiction where there was a failure to comply with the notice requirements of the ITCA. *Madsen v. Idaho Dept. of Health and Welfare,* 116 Idaho 758, 761, 779 P.2d 433, 436 (Ct.App. 1989); Memorandum in Support of Motion to Dismiss Amended Complaint, p. 7. Allied failed to give Kootenai County an opportunity to evaluate the claims and approve or deny them within 90 days, pursuant to Idaho Code §6-909 and § 6-910. Memorandum in Support of Motion to Dismiss, pp. 10-11. The only notice Allied gave the county was via the filing of its Complaint. Idaho Code §6-909 6-910 of the Idaho Tort Claims Act were not complied with.

Allied has not set forth any purported question of fact regarding the timing of its ITCA notice, the amount of damages, or of its having given the County an opportunity to

evaluate the claim and act as required by the ITCA. In *Wickstrom v. North Idaho College,* 111 Idaho 450, 451-52, 725 P2d 155, 156-57 (1986), the Idaho Supreme Court held that a plaintiff's demand letter failed to serve as notice pursuant to the ITCA where it did not state the names and addresses of the claimants, the amounts of claimed damages, or the nature of the injury claimed; the Court barred the claim. Failure to comply with the notice requirement is fatal to the claims. *Udell v. Idaho State Land Board,* 119 Idaho 1018, 1020, 812 P.2d 325, 327 (Ct.App. 1991). Dismissal is mandated by Idaho Code §6-908.

The breach of contract claims of Allied, if any have been pled, survive defendants' motion to dismiss, at least on the ground that Allied failed to comply with the Idaho Tort Claims Act. *Greenwade v. Idaho State Tax Commission,* 119 Idaho 501, 506, 808 P.2d 420, 425 (Ct.App. 1991), *see also City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 899 P.2d 411 (1995). All claims for money damages arising out of the negligent *or otherwise wrongful acts or omissions* of any governmental entity or its employee or its employees, must be dismissed. Idaho Code §§ 6-902(7), 6-903(a). (emphasis added). It is clear from this language that a tort is more than just negligence. *Greenwade* makes it clear that a "claim" also encompasses trespass, trover and conversion (119 Idaho 501, 503, 808 P.2d 420, 422), as well as fraud. 119 Idaho 501, 506 808 P.2d 420, 425. "To conclude that the ITCA governs *all* claims against the state is to extend the reach of the act beyond its reasonable interpretation, for the term 'claim' is specifically defined and limited in the ITCA to tort claims." *Id.* (italics in original).

The Idaho Tort Claims Act is to be construed liberally and with a view to accomplishing its aims and purposes, and attaining substantial justice. *Sterling v.*

Bloom, 111 Idaho 211, 723 P.2d 755 (1986). Defendants' motion to dismiss all tort claims under its complaints must be granted. This would include any claims of tortious interference of a business relationship, if such is alleged by Allied. *See Government Payment Service, Inc., v. ACE Bail Bonds,* 854 N.E.2d 1205, 1209-10 (Ct.App.Ind. 2007), for the elements of such tort in a similar fact setting. Tortious interference with a business relationship seems to have been alleged by Allied in paragraphs 6, 8(h), 10, 12, and 16 of the Second Amended Complaint dated October 22, 2008.

2. Public Records Request

Defendants argue Allied cannot complain for damages pursuant to a denial of public records requests pursuant to the plain language of I.C. § 9-343. Memorandum in Support of Motion to Dismiss Amended Complaint, p. 11. In response, Allied claims it seeks only attorney's fees, not damages, for the alleged violation of § 9-301, *et seq.* In *Cowles Publishing Co., v. Kootenai County Board of Commissioners,* 144 Idaho 259, ___, 159 P.3d 896, 901 (2007), the District Court and the Idaho Supreme Court held email correspondence between the county prosecutor and the manager of juvenile education and training was public and ordered disclosure. The Idaho Supreme Court held that Cowles' request for attorney's fees and costs in the last line of its response brief and its reply brief was not supported by authority or argument and denied the request. *Id.,* 159 P.3d 896, 903. The Idaho Supreme Court refused to consider a request for fees on appeal that was not supported by legal authority or argument. *Id.*

The "sole remedy" under Idaho Code § 9-343 "for a person aggrieved by the denial of a request for disclosure" of information is to compel the disclosure of documents. There is no provision for damages in this statute. Allied admits it is not seeking damages, only attorney fees. But this Court cannot think of any possible way

for Allied to get attorney fees when Allied is not seeking the "sole remedy" that Idaho Code § 9-343 provides…that being disclosure of the documents. If Allied is not seeking the remedy allowed (disclosure of the documents), this Court simply cannot envision an outcome where Allied would be a prevailing party entitled to attorney fees. *Cowles Publishing* supports that conclusion.

Defendants also argued Allied lacks standing to protest the denial of the public records request as the requests were submitted by Frank Davis, not Allied Bail Bonds. Memorandum in Support of Motion to Dismiss Amended Complaint, p. 12. Allied responds that Frank Davis is the owner and president of Allied Bail Bonds and was requesting the information in that capacity. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 2. Here, although Mr. Davis did not print his name and add that he was President and Owner of Allied Bail Bonds, he did list the Allied Bail Bonds address and telephone number on each public records request. *See* Complaint (filed October 9, 1007), Exhibits B-K. This Court is not persuaded by defendants' lack of standing argument. However, Allied's admission that they are only seeking attorney's fees under Idaho Code § 9-343, coupled with this Court's determination that the "sole remedy" allowed under that statute is disclosure, is dispositive on this issue. Defendants motion to dismiss all claims brought by Allied under Idaho Code § 9-343 must be granted.

3. The Bonding Requirements of I.C. § 6-610.

Defendants argue Allied failed to comply with the bond requirements of I.C. § 6-610 by not posting the bond before the filing of its complaint and by not posting the bond with two sureties as required. Memorandum in Support of Motion to Dismiss Amended Complaint, pp 13-15. Defendants argue this failure (not posting the pre-filing

bond) is fatal to the claim against Sheriff Watson, citing *Beehler v. Fremont County,* 145 Idaho 656, 182 P.3d 713 (Ct.App., April 14, 2008). Idaho Code § 6-610(2) requires:

> Before any civil action may be filed against any law enforcement officer or service of civil process on any law enforcement officer, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such law enforcement officer, the proposed plaintiff or petitioner, as a condition precedent thereto, shall prepare and file with, and at the time of filing the compliant or petition in any such action, a written undertaking with at least two (2) sufficient sureties in an amount to be fixed by the court. The purpose of this requirement is to ensure diligent prosecution of a civil action brought against a law enforcement officer, and in the event judgment is entered against the plaintiff or petitioner, for the payment to the defendant or respondent of all costs and expenses that may be awarded against the plaintiff or petitioner, including an award of reasonable attorney's fees as determined by the court.

That statue speaks in mandatory terms ("shall"), and requires filing of a bond, with at least two sufficient sureties, prior to filing the action. That did not happen in this case, as Allied filed a $700 bond on October 10, 2007, the day *after* filing their complaint.

The Court of Appeals in *Beehler* held that compliance with I.C. § 6-610 is mandatory in cases against law enforcement officers, with only a narrow exception for indigent prisoners and non-prisoners who seek a waiver under I.C. § 31-3220. *Beehler,* 145 Idaho at ___, 182 P.3d at 717. *Monson v. Boyd,* 81 Idaho 575, 582, 348 P.2d 93, 97 (1959) also held when Idaho Code § 6-610 has not been complied with, the action must be dismissed.

The facts in *Beehler* are to some extent distinguishable from the instant matter, as the Beehlers did not comply in <u>any</u> manner with the requirements of § 6-610. Allied attempted "some" compliance with its requirements, but after the fact. Allied filed a $700 bond on October 10, 2007, the day after its complaint was filed. Later, the issue was brought before Judge Luster. Judge Luster's Order, filed March 24, 2008, also orders "that Plaintiff, Allied Bail Bonds, Inc., shall file with the Clerk of the District Court,

no later than five (5) days from the date this order is received by plaintiff's counsel, a bond with at least two sufficient sureties in an amount not less than $25,000. Order Granting Defendants' Motion Excepting to Bond, p. 2. That Order was entered following the hearing on defendants' Motion Excepting to Bond pursuant to Idaho Code § 6-610, held on March 3, 2008. Allied filed the $25,000 bond on March 17, 2008, but posted the bond with only one surety, again, not completely complying with Idaho Code § 6-610.

Allied makes two arguments. First, as it argued at the hearing before Judge Luster on March 3, 2008, counsel for Allied also argued at the hearing before this Court on Defendants' Motion to Dismiss that compliance with that statue was impossible because the bond has to be posted before filing the complaint, yet the bond must be determined by a judge, and you cannot get before a judge without filing a complaint. Even if that argument were true, the language of the statute and *Beehler* is mandatory. And even if that argument were true, it does not address the secondary defect by Allied, the failure to utilize two sureties. Allied's second argument is that defendants waived their right to make this argument because they stipulated to the filing of a sufficient bond at the March 3, 2008, hearing, and because "the original complaint is *functus officio,* and is not part of the record", and that the bond was in place when the amended complaint was filed. Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, pp. 2-3. This waiver argument ignores the fact that Judge Luster's Order Granting Defendants' Motion Excepting to Bond, specifically stated: "IT IS FURTHER ORDERED that the objection of Defendant, Rocky Watson, Kootenai County Sheriff, to the failure of the Plaintiff, Allied Bail Bonds, Inc., to file a bond prior to instituting this action is not waived." Order Granting Defendants' Motion Excepting to Bond, p. 2. This waiver argument also ignores the fact that Judge Luster

ordered in that same order that the bond had to be filed with at least two sufficient sureties. *Id.* That requirement of Idaho Code § 6-610 and Judge Luster's Order Granting Defendant's Motion Excepting to Bond has not been met.

This Court is not persuaded by Allied's *functis officio* argument. Allied cites *Pacheo v. Safeco Ins. Co. of America,* 116 Idaho 794, 809, 780 P.2d 116, 131 (1989) as support for this argument. Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, pp. 2-3. That statement, found in the well written dissenting opinion written by Justice Bistline, actually cuts against that doctrine being used in the present case. The pertinent portion of Justice Bistline's dissent reads:

> One might be asked what to make of the fact that Safeco amended its answer so as to remove the allegations of fraud and fraudulent conduct on the part of Dr. Pacheco which were contained in its initial answer. The general rule as stated in *Jenkins v. Donaldson*, 91 Idaho 711, 429 P.2d 841 (1967) is that the prior answer becomes *functus officio*, and is not properly in the record. In this case, however, it *is* still in the record, and moreover the defendant itself cites to it and uses it in its brief. If not properly in the record, rather than use it, Safeco could have moved that it be stricken. But it did not, nothwithstanding its amended answer was so careful not to allege fraud.
>
> That it is still in the record entitles not just Safeco to make use of and refer to it, but this Court as well may do so. Although an amended pleading supersedes the prior pleading as a pleading, the prior pleadings are not ineffective for all purposes. *Las Vegas Network, Inc. v. Sawcross,* 80 Nev. 405, 395 P.2d 520 (1964).

116 Idaho 794, 809, 780 P.2d 116, 131. A review of *Jenkins v. Donaldson*, 91 Idaho 711, 429 P.2d 841 (1967), shows that "where an amended complaint and answer thereto are filed, the original complaint and answer *cease to perform any functions as pleadings* and are not part of the record." 91 Idaho 711, 715, 429 P.2d 841, 845 (1967). While the original complaint by Allied in the present case may "cease to perform any functions as pleadings", this Court's reading of these cases does not allow *functus*

officio to apply as a way for Allied to side-step its obligations to post a bond with two sureties under Idaho Code § 6-610.

This Court concludes Allied has failed to state a claim against Sheriff Watson upon which relief may be granted, due to its failure to follow Judge Luster's order and Idaho Code § 6-610, and due to the mandatory language in that statute and the Court of Appeals decision in *Beehler* and the Idaho Supreme Court decision in *Monson. See also Greenwade v. Idaho State Tax Commission,* 119 Idaho 501, 503, 808 P.2d 420, 422 (Ct.App. 1991).

4. The Contract Claim and Non-Compete Clause

Defendants argue that the Settlement Agreement between the County and Allied Bail Bonds (Exhibit A, Complaint filed October 9, 2007) is void and unenforceable as it contains no limitation as to time and Allied is attempting to enforce the settlement as a covenant not to compete. Memorandum in Support of Motion to Dismiss Amended Complaint, p. 16. Allied responds it is defendants who seek to characterize the agreement as a covenant not to compete. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 3. Allied argues the County does not compete with bail bondsmen, but rather, Allied's competition is credit card companies. *Id.*

The Release and Settlement Agreement, entered into by the parties on April 19, 2001, cannot be construed as a covenant not to compete. The terms of the settlement include: (1) that the county will use and provide GTE/Verizon directories to inmates; (2) the county agrees to collect the $10 fee if the funds are in an inmate's account and the inmate requests the fee be subtracted, or if the inmate wished to use Allied, Allied may pay the fee; (3) the jail will provide a receipt in the name of the payee to whoever pays the fee; (4) jail personnel will make change for up to $50 bills when Allied posts the fee;

(5) the jail will provide Allied with an inmate's booking sheet when posting bond for that inmate, but will not provide a blanket list of booking sheets and allow Allied random access to unspecified inmates to solicit business; (6) it shall be the jail's policy that personnel refrain from advising inmates or third parties against posting bonds, rather they shall direct those with questions to the "After you are booked in your options are:" plaque; and (7) if the County is responsible for blocking calls from the jail to Allied, if the jail receives notice, it will make a good faith effort to remove such a block within 48 hours, *inter alia.*

None of these terms appear to comprise a covenant not to compete, and as Allied argues, by pushing credit cards, the County is giving preferential treatment to a private enterprise, Allied's competition the credit card companies, to the detriment of Allied. Reply to Defendants' Objection to Plaintiff's Second Motion for Preliminary Injunction and Motion to Amend Complaint, pp. 1-2. Even if this Court were to determine that the language at issue constitutes a covenant not to compete, this is certainly not such a covenant in an employment setting. The Idaho Supreme Court has said non-compete covenants are disfavored in the employment context; but the Court has not stated that they are disfavored when ancillary to the sale of a business, for example. *Bybee v. Isaac,* 145 Idaho 251,___, 178 P.3d 616, 621 (1008); *Stipp v. Wallace Plating, Inc.,* 96 Idaho 5, 6, 523 P.2d 822, 823 (1974) ("restrictive covenants in contracts limiting employee's natural right to pursue an occupation and thus support himself and his family will be strictly scrutinized," but courts are less strict in construing the reasonableness of such covenants ancillary to the sale of a business). Here, it is likely that taking all inferences in favor of Allied, a claim for relief (breach of the Release and Settlement Agreement) has been stated. Accordingly, defendants' Motion to

Dismiss on the grounds that the agreement is a covenant not to compete must be denied.

5. Allied's Property or Contract Right to the Bail Bond Business

Defendants argue Allied has a mere license to conduct its business which is a privilege and not a right of property or contract, citing *BHA Investments v. State*, 138 Idaho 348, 63 P.3d 474 (2004) in support of that argument. Memorandum in Support of Motion to Dismiss Amended Complaint, pp. 16-17. Allied claims defendants' reliance on *BHA* is inapt because the claim in that case was based on a taking of property without just compensation because a transfer fee was too high, and the Court noted, in *dicta,* that a liquor license is not a property right. Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, p. 4.

BHA dealt with a dispute over whether the plaintiff in that case had a valid property interest in a transfer fee being charged by the State under the Takings Clause. 138 Idaho 348, 354, 63 P.3d 474, 480. The plaintiff argued that money charged in excess of a reasonable transfer fee was a taking and plaintiff had a property interest in that money. *Id.* at 355, 63 P.3d at 481. The plaintiff in *BHA* cited *Coeur d'Alene Garbage Service v. Coeur d'Alene,* 114 Idaho 588, 759 P.2d 879 (1988) for the proposition that it had a valid economic property interest, because *Coeur d'Alene Garbage* had held the right to conduct business is property and found that the Garbage Service's interest in the business it conducted in areas annexed by the city was a valid property interest. In *BHA,* the Idaho Supreme Court distinguished *BHA* from *Coeur d'Alene Garbage* because in *BHA* the claim was money taken in excess of a reasonable transfer fee constituted the property taken, not that the license itself was property. *BHA,* 138 Idaho 348, 354, 63 P.3d 474, 480. Here, unlike in *BHA,* Allied is claiming that its

license gives rise to the property right it claims: "As such, Allied has the right and license to sell bail bonds and make a profit doing so and that is a property right." Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, p. 4. Allied has submitted evidence via Affidavits (*see* Affidavits of Nathan Simpson, Steven Tucker, Joshua Jones, Michael Holt, Tim Welch, and Andrew Robles) that its claim is not altogether speculative because pre-trial services participants would have bonded with Allied.

Coeur d'Alene Garbage Service dealt with a private company which picked up garbage in suburban areas outside the City of Coeur d'Alene. By city ordinance, the City of Coeur d'Alene required its citizens to use Lake City Disposal for garbage collection. Coeur d'Alene Garbage Service was licensed as a hauler of garbage by Panhandle Health. The City of Coeur d'Alene began annexation proceedings, but before those proceedings were completed, Coeur d'Alene Garbage Service obtained written contracts with its customers in the areas about to be annexed to haul their garbage for a period of three months with an automatic renewal for additional periods of three months unless cancelled by prior notice within ten days of the expiration of a three-month term. Following annexation, Coeur d'Alene Garbage Service sued the City of Coeur d'Alene and Lake City Disposal in an inverse condemnation action for providing garbage service within the annexed areas. The trial court held the City of Coeur d'Alene had taken Coeur d'Alene Garbage Service's property. 114 Idaho 588, 590, 759 P.2d 879, 881.

On appeal, the Idaho Supreme Court affirmed the trial court, stating:

> The essence of our holding here is that the City went too far by excluding Garbage Service from continuing to service its customers in the annexed areas. * * * If the City had merely regulated the operation of Garbage Service in the annexed areas by requiring it to comply with

> reasonable standards established by the City, there would have been no taking. Instead, the City chose to take from Garbage Service any opportunity to continue to service its customers in the annexed areas. It was this exclusion that entitles Garbage Service to just compensation. Thus, a claim for relief was likely stated.

114 Idaho 588, 591, 759 P.2d 879, 882. The Idaho Supreme Court noted: "It is also established that the 'right to conduct a business is property.'" *Id., citing Robison v. H. & R. E. Local # 782,* 35 Idaho 418, 429, 207 P. 132, 134 (1922), *O'Connor v. City of Moscow,* 69 Idaho 37, 42-43, 202 P.2d 401, 404 (1949), and *Village of Weippe,* 91 Idaho 798, 803, 430 P.2d 401, 404 (1967). Then, the Idaho Supreme Court stated:

> Garbage Service had a property interest in the business it conducted in the areas annexed by the City. The City chose to take this property in order to allow Disposal to provide exclusive garbage service to the annexed areas.

Id. There are two important features which distinguish the present case from *Coeur d'Alene Garbage Service.* First, in *Coeur d'Alene Garbage Service*, Coeur d'Alene Garbage Service had a contractual right with specific existing customers in the annexed areas. In the present case, Allied, while licensed to write bonds, has no contractual right to write a bond for any specific person. There are other bonding companies, and a defendant may post cash or property bond. Second, as the Supreme Court stated above: "The essence of our holding here is that the City went too far by excluding Garbage Service from continuing to service its customers in the annexed areas." The defendants Kootenai County and Sheriff Watson have not "excluded" any bonding business, Allied or any other bonding business. Against these two important distinctions, this Court turns its attention to *Government Payment Service, Inc., v. ACE Bail Bonds, et.al.,* 854 N.E.2d 1205 (Ct.App.Ind. 2007). (hereafter ACE).

In *ACE,* Government Payment Service, Inc. (GPS), facilitated cash bail in the State of Indiana by helping credit card holders access their credit in order to make

payments to government agencies, including cash bail or a fine. 854 N.E.2d 1205, 1207. ACE Bail Bonds and other bail bond companies sued GPS for tortious interference with a business relationship. The Indiana Court of Appeals noted that the first element of tortious interference with a business relationship is the existence of a valid business relationship. *Id.* The Indiana Court of Appeals found there was no evidence that either the bail agents or their clients had any such relationship with the local governmental entities. That might not be accurate in the present case where Allied and defendants have the agreement which is the center of this dispute. The Indiana Court of Appeals went on to state that "There is no evidence of *property or other rights* held by the Bail Agents." *Id.* Although *ACE* concerned tortious interference with a business relationship, and the present part of defendants' motion to dismiss deals with a property right, the Indiana Court of Appeals was looking for *any* right held by the bail agents, and found specifically that they had no "property right."

This Court finds that while Allied has a contractual right with defendants Kootenai County and its Sheriff Rocky Watson, there is no property right to this bail bond business.

6. Allied's Standing.

Defendants next argue Allied has failed to establish a particularized injury not suffered by all taxpayers and lacks standing to challenge the acceptance of credit cards or the operation of pre-trial services and adult misdemeanor probation (AMP). Memorandum in Support of Motion to Dismiss Amended Complaint, p. 17. Allied responds that it is part of an exclusive group of individuals and entities licensed to provide surety bonds for bail purposes and the use of credit cards, and that the operation of pre-trial services and AMP reduces the number of bonds written, thereby

injuring only licensed bail bonding companies like Allied. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 5.

In *Gallagher v. State,* 141 Idaho 665, 115 P.3d 756 (2005), a smoker brought a claim for injunctive and declaratory relief against Idaho, the Governor, the legislature, the State Tax Commission, State Treasurer, State Auditor, and State Controller for allegedly unconstitutional increases in the cigarette tax and the sales and use tax. 141 Idaho 665, 666, 115 P.3d 756. 757. The Idaho Supreme Court held: "Taxpayers who have a 'generalized grievance' shared by a large class of citizens do not have standing… The taxpayers remedy is through the political process." *Id.* (citations omitted). In the present case, Allied posits the particularized injury is suffered only by bail bonding companies, not a large class of citizens, and Allied therefore has standing. This court agrees that Allied has demonstrated that it bears the incident of the use of credit cards, operation of AMP and pre-trial services, and therefore, has standing to challenge the use of credit cards, operation of AMP and pre-trial services.

7. Accepting Bail by Credit Cards.

Defendants argue Idaho law specifically allows for the payment of a cash bail bond by credit card, citing Idaho Code § 31-3221. Memorandum in Support of Motion to Dismiss Amended Complaint, pp.18-19. Idaho Code § 31-3221, entitled "Payments to court by credit card or debit card," states that the clerk of the district court may accept payment of a debt owed the court by credit or debit card. Idaho Code § 31-3221(1). A debt to court is later defined as, "any assessment of fines, court costs, surcharges, penalties, fees, restitution, cash deposit of bail." Idaho Code § 31-3221(2)(d).

Allied argues subsection (3) of the statute provides that the Supreme Court may adopt rules for the administration of this section and may enter into contracts with an

issuer or organization to implement the provisions of this section. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 5. Allied goes on to state the "Idaho Supreme Court was asked to speak and speak it did; credit cards are not authorized for cash bond purposes. Furthermore, only the Supreme Court may enter into contracts with credit card issues [sic], not the county as in this case." *Id.* However, in briefing, Allied has failed to provide for this Court what rules the Supreme Court has adopted so as not to authorize the use of credit cards for cash bond purposes. At oral argument, counsel for Allied argued that Idaho Criminal Rule 46(d) provides such, specifically the portion of Idaho Criminal Rule 46(d) which reads:

> Provided, bail may be posted by depositing a cashier's check, money order, or a personal check payable to the clerk of the court under such procedures as shall be established by the administrative district judge, or where acceptance of a personal check has been approved by a magistrate or a district judge.

This Court does not agree that this provision of Idaho Criminal Rule 46(d) results in the Idaho Supreme Court's prohibition of credit cards for cash bond. First of all, this sentence reads "…bail *may* be posted by depositing a cashier's check, money order or personal check…", it does not say it has to be posted by only those means or that any other means are prohibited. Second, as noted by defendants, Idaho Code § 31-3221 provides that the Idaho Supreme Court may enter into contracts with an issuer, but does not require that all contracts be entered into by the Idaho Supreme Court. Third, Administrative Judge James F. Judd allowed for the payment of cash bail in the First Judicial District. (Defendants') Request for Judicial Notice, filed May 28, 2008, Exhibit C; Administrative Order E-DW.1 (June 16, 2000). Fourth, as stated in *Government Payment Service, Inc., v. ACE Bail Bonds, et.al.,* 854 N.E.2d 1205 (Ct.App.Ind. 2007):

> Indiana law permits licensed bail agents to write bonds for incarcerated defendants. It also permits a cash bail program. Facilitating the access of

> incarcerated defendants to credit which they in turn post as cash bail is not engaging in the writing of bail bonds, and it is not tortious interference with the business relationships of the Bail Agents.

854 N.E.2d 1205, 1210.

Allied's claims challenging the acceptance of a credit card to post bail fails to state a claim upon which relief can be granted. Therefore, defendants motion to dismiss on this ground must be granted.

8. The County's Operation of Pre-Trial Services and AMP

Defendants claim that "Allied alleges that the county's operation of the Adult Misdemeanor Probation Department is without statutory authority and in violation of Article 10, § 5, of the Idaho Constitution and therefore the pre-trial services program is unlawful. Amended Complaint, ¶¶ 12-15." Memorandum in Support of Motion to Dismiss Amended Complaint, p. 19. Defendants claim "Allied argues that Article 10 § 5 of the Idaho Constitution provides that the Department of Corrections has exclusive authority for providing misdemeanor probation services." Reply to Plaintiff's Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, p. 7. Indeed, Allied makes the claim that: "The Department of Corrections is in charge of adults on probation." Response to Defendants' Motion to Dismiss Second Amended Complaint and Motion to Reconsider, p. 6. Defendants argue that operation of both pre-trial services and Adult Misdemeanor Probation is lawful. Memorandum in Support of Motion to Dismiss Amended Complaint, pp. 19-20. Defendants state that while the Constitution addresses the board of corrections' power concerning those convicted of a felony, persons convicted of a misdemeanor are managed by the counties. *Id.* at 19. Allied argues that Article 10, § 5 of the Idaho Constitution provides the Department of Corrections the exclusive authority for providing

misdemeanor probation services, and the word "felony" is found nowhere in the section. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 6. Article 10, § 5 of the Constitution states:

> …The state legislature shall establish a nonpartisan board to be known as the state board of correction,… This board shall have the control, direction, and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole, with such compensation, powers, and duties as may be prescribed by law.

Allied argues this provision is unambiguous and not subject to interpretation, and that the State of Idaho Department of Corrections is in charge of adults on probation. Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 6.

Although no case law in Idaho is on point, defendants' argument is well taken. Article 10, § 5 is entitled "State Prisons—Control Over", and must be read with that limitation. As pointed out by defendants, Idaho Code § 18-113(1) clearly states that misdemeanors are punishable by imprisonment in county jails, not to exceed six months, or a fine not to exceed $1,000, or both. Memorandum in Support of Motion to Dismiss Amended Complaint, p. 19. Because Article 10, § 5 was never intended to govern *all* adults on probation, but only those who had been in or who face punishment in *state prisons,* (ie. felons), Allied has not stated a claim upon which relief can be granted. Defendant is entitled to a motion to dismiss on Allied's claims that the county's operation of the Adult Misdemeanor Probation Department is without statutory authority and in violation of Article 10, § 5, of the Idaho Constitution.

III. ORDER.

IT IS HEREBY ORDERED:

1. Defendants' motion to dismiss all tort claims under its complaints is GRANTED.

2. Defendants' motion to dismiss all claims brought by Allied under Idaho Code § 9-343 is GRANTED.

3. Defendants' motion to dismiss on the ground that Allied has failed to state a claim against Sheriff Watson upon which relief may be granted is GRANTED, due to Allied's failure to follow Judge Luster's order and Idaho Code § 6-610, and due to the mandatory language in that statute and the Court of Appeals decision in *Beehler* and *Greenwade* and the Idaho Supreme Court decision in *Monson.*

4. Defendants' Motion to Dismiss on the grounds that the agreement is a covenant not to compete is DENIED.

5. Defendants' Motion to Dismiss on the grounds that Allied has no property right to the bail bond business is GRANTED, and defendants' motion to dismiss on the ground that Allied has no contractual right is DENIED as there may be contractual rights which attach to the April 2001 agreement.

6. Allied has standing to challenge the use of credit cards, operation of AMP and pre-trial services, and to that extent, defendants' motion to dismiss on the grounds that Allied lacks standing is DENIED.

7. Defendants' motion to dismiss on the ground that Allied's claims challenging the acceptance of a credit card to post bail fails to state a claim upon which relief can be granted is GRANTED.

8. Defendants' motion to dismiss on Allied's claims that the county's operation of the Adult Misdemeanor Probation Department and Pre-Trial Services is without statutory authority and in violation of Article 10, § 5, of the Idaho Constitution is GRANTED.

Entered this 12th day of December, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2008, 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 #**
Arthur Bistline	676-8680	Darrin Murphey	446-1621

_____
Secretary