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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 BONNER**

ADFLAVOR, LLC.,)
)
) *Plaintiff,*)
 vs.)
)
 COREMIRTH, INC.,)
)
) *Defendant.*)
 _____)

Case No. **CV 2010 8289**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Coremirth, Inc.'s (Coremirth) Motion to Dismiss. Plaintiff (AdFlavor) filed its Complaint on September 27, 2010, alleging Coremirth owed AdFlavor \$53,607.55, and "Defendant's failure to pay the \$53,607.55 to Plaintiff constitutes a breach of contract." Complaint p. 2, ¶¶ 9-10 [sic, there are two paragraphs No. 9]. On October 26, 2010, Coremirth appeared and filed a Motion to Dismiss, along with a supporting affidavit and memorandum, arguing AdFlavor was violating the parties' forum selection clause, pursuant to which the parties had submitted to the jurisdiction of Contra Costa County, California. Memorandum in Support of Motion to Dismiss, pp. 2-3. No answer has been filed by Coremirth.

On November 22, 2010, AdFlavor filed its opposition to the motion to dismiss, along with the Affidavit of John Solamito. AdFlavor argued the unsigned, undated agreement attached to the affidavit of Laura Belzer, in support of Coremirth's motion to dismiss, was not entered into by the parties and did not govern their commercial

relations. Defendant's Opposition to Motion to Dismiss, p. 1. Coremirth replied on December 23, 2010, and provided the affidavits of Laura Belzer (responding to the Affidavit of John Salomito) and Samuel Prokop.

Oral argument was held on the motion to dismiss on January 4, 2011. At the conclusion of that oral argument, this Court ordered any additional briefing on the applicability of I.C. § 29-110 to be filed by the parties if they wished to submit such, by January 7, 2011. AdFlavor filed its "Supplemental Briefing of Plaintiff Regarding Application of I.C. 29-110 on January 5, 2011. Coremirth filed "Defendant's Supplementary Memorandum in Support of Defendant's Motion to Dismiss on January 6, 2011. The motion to dismiss is now at issue. This case has not yet been scheduled for trial.

II. STANDARD OF REVIEW.

Whether a Court properly dismissed a claim for lack of personal jurisdiction pursuant to I.R.C.P. 12(b) is a question of law which Appellate Courts freely review. *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005). 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). Rule 12(b)(1) facial challenges provide a moving party with the same protections it has under Rule 12(b)(6), while factual challenges allow the court to go beyond the pleadings without converting the motion into one for summary judgment. *Owsley*, 141 Idaho 129, 133 fn. 1, 106 P.3d 455, 459 fn. 1. Where the Rule 12(b)(1) challenge is facial, the standard of review mirrors that in Rule 12(b)(6). *Id.*

III. ANALYSIS.

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985), Justice Brennan reasoned minimum contacts for personal jurisdiction required by *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), are present where a defendant “purposefully directs” activities at residents in the forum state and litigation arises out of or relates to those activities. *Burger King*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182. In “minimum contacts” cases, where a defendant reaches out beyond one state and creates a continuing relationship and obligation to residents in another state, the defendant is subject to suit in the other state for the consequences of his activities. *Id.*

Choice of *law* provisions are addressed by the Idaho Code at Section 28-1-105:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or such other state or nation shall cover their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to the state.

I.C. § 28-105(1). While choice of law provisions are permitted in Idaho, choice of *forum* provisions are limited by I.C. § 29-110, which states:

Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within he may thus enforce his rights, is void.

I.C. § 29-110 (1).

Problematic in this regard is Coremirth's quotation to *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct.App. 1994). Claiming *Ponderosa Paint* establishes Coremirth's right to enforcement of a forum selection clause, Coremirth argues:

In *Ponderosa Paint Manufacturing, Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct.App. 1994), defendants residing in Utah sought to dismiss the claim for personal guarantee. The guarantees had a forum selection clause designating the Fourth District Court (Ada County) as the forum. The Court of Appeals upheld denial of the defendant's motion to dismiss:

Each of the guaranties specified, "The undersigned also agree that any action to enforce this guaranty may be brought in the Fourth District Court of the State of Idaho." It is well-established that parties to a contract may agree in advance of litigation to submit to the personal jurisdiction of a given court.^{FN. 3.} (citations omitted).

Memorandum in Support of Motion to Dismiss, p. 4. In its briefing, Coremirth failed to quote the footnote in this case. Footnote 3 of *Ponderosa Paint* reads:

This is not a forum selection clause such as that found to be violative of I.C. § 29-110 in *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989). The clauses in the Yack's guaranties do not purport to limit the parties in bringing suit only in Ada County and do not attempt to oust any other court of jurisdiction.

125 Idaho 310, 314 fn. 3, 870 P.2d 663, 667 fn. 3. By way of contrast, the forum selection clause in the instant matter does not use the permissive "may" language used in *Ponderosa Paint*. In the present case, the forum selection language is mandatory:

16.2 Controlling Law

These Terms and Conditions, the terms of the Programs and the relationship contemplated thereby, shall be governed by the laws of the United States and the State of California, without giving effect to principles of conflicts of law. Each party, to the extent permitted by applicable law, hereby irrevocably and unconditionally (i) submits to the general jurisdiction of the federal and state courts located in Contra Costa County, California; (ii) agrees that any action or proceeding concerning this agreement will be brought exclusively in such courts; and (iii) waives any objection that I may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding in any such court was brought in an inconvenient court and agrees not to claim

or plead the same.

Memorandum in Support of Motion to Dismiss, pp. 2, 3; Affidavit of Laura Belzer, attachment, p. 9, ¶ 16.2.

While *Cerami-Kote* provides some guidance, it is not dispositive when applied to the instant facts. In *Cerami-Kote*, the Idaho Supreme Court determined Florida law bore a reasonable relation to the transaction and the district court should have applied Florida law to determine the validity of the forum selection clause in the contract. 116 Idaho 56, 58, 773 P.2d 1143, 1145. The Idaho Supreme Court found Florida law expressly permitted contracting parties to agree on what state's law applies to an agreement (choice of law provision) and that according to Florida law (*Maritime Limited Partnership v. Greenman Advertising Association, Inc.*, 455 S.2d 1121, 1123 (Fla.App. 4th Dist. 1984)), choice of forum clauses are enforceable only where three conditions are present:

1. The forum was not chosen because of overwhelming bargaining power by one party which would constitute overreaching at the other party's expense;
2. Enforcement would not contravene a strong public policy set forth by statute of judicial fiat in the forum where suit has been brought or in the forum from which suit has been excluded;
3. The purpose was not to transfer an essentially local dispute to an alien forum in order to seriously inconvenience one or both of the parties.

116 Idaho 56, 59, 773 P.2d 1143, 1146. Because of Idaho Code § 29-110, the Idaho Supreme Court found the second of the three conditions was not met and therefore, the forum selection clause in *Cerami-Kote* could not stand. The Idaho Supreme Court wrote:

What is at issue, however, is whether I.C. § 29-110 expresses a strong public policy against the enforcement of foreign selection clauses which would run afoul of *Maritime's* condition two. The statute provides as follows:

Limitations on rights to sue. - Every stipulation or condition in a contract by which any party thereto is

restricted from enforcing his rights under the contract by the usual proceedings in the original tribunals, or which limits the time within which he may thus enforce his rights, is void.

This statute has been interpreted to render unenforceable a clause in a promissory note which provided for venue in a county other than that designated by the relevant venue statute. *McCarty v. Herrick*, 41 Idaho 529, 240 P. 192 (1925). Similarly, we conclude that the forum selection clause in this case cannot stand in light of I.C. § 29-110.

This conclusion finds support in a recent Montana case, *State ex rel Polaris Industries v. District Court*, 695 P.2d 471 (Mont.1985). The Montana court, interpreting a statute virtually identical to I.C. § 29-110, held that the statute operated to void a forum selection clause in a contract which mandated an out-of-state forum. (See also, *Rose v. Etling*, 255 Or. 395, 467 P.2d 633 (1970), wherein the court ruled that a specific statute providing for protection of the usual remedies granted to the buyer by statute under a retail installment sales contract operated to void a venue selection clause included in the retail installment sales contract of the seller.)

Although Judge Woodland did not specifically reference Florida law in his memorandum decision, he did apply *M/S Bremen v. Zapata Off-shore Company*, cited above, which provides the analysis adopted by the Florida Supreme Court in *Manrique v. Fabbri*, 493 So.2d 437 (Fla.1986). Thus we reach the same result as the district court.

116 Idaho 56, 59, 773 P.2d 1143, 1146.

An odd feature of I.C. § 29-110 is that while subsection (1) purports to deal with all “contracts”, subsections (2) and (3) concern only “franchise agreements”. At oral argument, Coremirth’s attorney made the argument that the entire statute applies only to franchise agreements, and thus, since the present case does not involve a franchise agreement, I.C. § 29-110 is not applicable to this case. At oral argument, counsel for AdFlavor argued that the plain language of I.C. § 29-110(1) applies to all contracts.

Following oral argument, the Court reviewed the briefs submitted by counsel on this issue. AdFlavor’s argument, in its entirety is:

I.C. 29-110(1) is not limited to franchise contracts but by its literal terms, applies to all contracts. The statute was so applied in *Cermi-Kote, Inc. v Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (Idaho 1989). The case law only limits the application of the statute where it conflicts with federal maritime law; *Fisk v. Royal Caribbean [sic] Cruises, Ltd.* 141 Idaho 290,

108 P.3d 990 (Idaho 2005).

Supplemental Briefing of Plaintiff Regarding Application of I.C. 29-110, p. 1. Coremirth argues:

Subsequent legislation has limited the scope of Idaho Code §29-110 and in turn eliminated *Cerami-Kote, Inc., v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989) as a precedent applicable to this case.

In 2003 in the First Session of the 57th Legislature there was introduced House Bill No. 383 which amended Idaho Code Section 29-110. The bill passed in the House of Representatives 68 to 1 and unanimously passed in the Senate. A copy of the Daily Data tracking History for House Bill No. 383 is attached by this memorandum.

The first amendment to the title is significant “29-110.

LIMITATIONS ON RIGHT TO SUE – FRANCHISE AGREEMENTS. (1)”

The amendment constituting Sections (2) and (3) together with the addition to the title caption make the so-called policy to be limited to Franchise Agreements for all the reasons set forth by supporters of House Bill No. 383 set forth in the right column as being summaries of testimony before the House Education Committee.

Supplementary Memorandum in Support of Motion to Dismiss, pp. 2-3. (emphasis in original).

The Court has reviewed the material attached to Coremirth’s brief. This Court is convinced for a variety of reasons, that I.C. § 29-110, *subparagraph one*, applies to *all* contracts, not just franchise agreement contracts. Subparagraphs two and three apply only to franchise agreements.

This Court’s interpretation of what happened to Idaho Code § 29-110 is as follows. Prior to the 57th Legislature in 2003, I.C. § 29-110 only dealt with contracts.

First, regarding the title of I.C. § 29-110, in 2003 the words “FRANCHISE AGREEMENT” was added to the title of I.C. § 29-110, so that after 2003, and at present, the title reads: “LIMITATIONS ON RIGHT TO SUE – FRANCHISE AGREEMENT.” The title incorporates two concepts, the “Limitations on right to sue” and “Franchise agreement”. The title does not read “Limitations on right to sue

regarding franchise agreement”.

Second, regarding the text of I.C. § 29-110 the entire text prior to 2003 read:

Every stipulated condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

That’s all there was prior to 2003. All of this is evident by reviewing H.B. 383 from that 2003 legislative session:

IN THE SENATE
SENATE AMENDMENT TO H.B. NO. 383

1 AMENDMENT TO SECTION 1

2 On page 1 of the printed bill, delete lines 11 through 41 and insert:

3 "29-110. LIMITATIONS ON RIGHT TO SUE -- **FRANCHISE AGREEMENT**. (1) Every
4 stipulation or condition in a contract, by which any party thereto is
5 restricted from enforcing his rights under the contract by the usual proceed-
6 ings in the ordinary tribunals, or which limits the time within which he may
7 thus enforce his rights, is void.

8 **(2) Any condition, stipulation or provision in a franchise agreement is**
9 **void to the extent it purports to waive, or has the effect of waiving venue**
10 **or jurisdiction of the state of Idaho's court system. Any condition, stipula-**
11 **tion or provision in a franchise agreement, to the extent it purports to**
12 **assert, or has the effect of asserting the choice of law is enforceable. This**
13 **subsection shall apply to any franchise agreement entered into or renewed on**
14 **or after July 1, 2003, by any person who at the time of entering into or**
15 **renewing such franchise agreement was a resident of this state or incorporated**
16 **or organized under the laws of this state.**

17 **(3) As used in this section "franchise agreement" means a written con-**
18 **tract or agreement by which:**

19 **(a) A person ("franchisee") is granted the right to engage in the busi-**
20 **ness of offering, selling or distributing goods or services under a mar-**
21 **keting plan or system prescribed in substantial part by a third party**
22 **("franchisor");**

23 **(b) The operation of the franchisee's business pursuant to such plan or**
24 **system is substantially associated with the franchisor's trademark, ser-**
25 **vice mark, trade name, logotype, advertising or other commercial symbol**
26 **designating the franchisor of such plan or system; and**

27 **(c) The franchisee is required to pay the franchisor one thousand dollars**
28 **(\$1,000) or more for the right to transact business pursuant to the plan**
29 **or system. Such payments shall not include amounts paid:**

30 **(i) As a reasonable service charge to the issuer of a credit card**
31 **by an establishment accepting or honoring the credit card; or**

32 **(ii) For the purchase of goods at a bona fide wholesale price."**

Fifty Seventh Legislature, First Regular Session, H.B. 383. So prior to 2003, I.C. § 29-110 applied to all contracts. After 2003, I.C. § 29-110(1) still applies to all contracts,

and subsections (2) and (3) apply to only franchise agreements. There is nothing in the language of the statute that would support a reading that after 2003, subsection (1) only applies to franchise agreements. This amendment in 2003 does nothing to eviscerate *Cerami-Kote* and the fact that I.C. § 29-110(1) applies to all contracts. The 2003 amendment keeps the original language and adds new and different language only for franchise agreements. This Court's interpretation of I.C. § 29-110 in its entirety is as follows: As to all contracts *other* than franchise agreements, forum selection clauses are void, just as the Idaho Supreme Court stated in *Cerami-Kote*: "Similarly, we conclude that the forum selection clause in this case cannot stand in light of I.C. § 29-110." 116 Idaho 56, 59, 773 P.2d 1143, 1146. As to franchise agreements, a forum selection clause could be enforceable if the terms of subsection (2) and (3) are met. The Court is not at all persuaded by Coremirth's argument that: "Subsequent legislation has limited the scope of Idaho Code §29-110 and in turn eliminated *Cerami-Kote, Inc., v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989) as a precedent applicable to this case." Supplementary Memorandum in Support of Motion to Dismiss, p. 2. Were that the case, the legislature would have had to have eliminated the old language (prior to 2003 the *only* language), which is currently found in I.C. § 29-110. The legislature kept that language in, and in so doing, in no way restricted that language to franchise agreements. Indeed, had the legislature intended paragraph one of I.C. § 29-110 to apply to only franchise agreements, it would have created an internally inconsistent statute which forbade forum selection clauses in subsection (1), and then allowed them in certain situations in subsection (2) and (3). There is no possible reading of I.C. § 29-110 that would support Coremirth's interpretation.

The reasoning from *Cerami-Kote* is equally applicable in the instant matter.

Thus, regardless of whether the contract at issue was entered into on September 29, 2009, and is therefore applicable to any purported debts as of October 2009, as argued by Coremirth, the forum selection clause in the contract (to the extent the actual agreement between the parties is that entered into on September 29, 2009) is invalid according to Idaho public policy as set forth in Idaho Code § 29-110. Coremirth's motion to dismiss must be denied.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny defendant Coremirth's motion to dismiss.

IT IS HEREBY ORDERED defendant Coremirth's motion to dismiss is DENIED.

IT IS FURTHER ORDERED defendant Coremirth has until January 31, 2011, to file its Answer to AdFlavor's Complaint.

IT IS FURTHER ORDERED a scheduling conference will be held in this matter on February 28, 2011, at 2:00 p.m., to set the case for trial. Counsel for both parties may participate telephonically if they contact the Court's Clerk to make arrangements.

Entered this 14th day of January, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 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
Tevis Hull

Fax #
255-4217

| Lawyer
James Paulsen

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Jeanne Clausen, Deputy Clerk