

STATE OF IDAHO )  
County of KOOTENAI )<sup>ss</sup>

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AT \_\_\_\_\_ O'clock \_\_\_\_\_ M  
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**

H2O WELL SERVICE, INC., )  
)  
*Plaintiff,* )  
)  
vs. )  
)  
GOLDEN WEST DRILLING & )  
EXPLORATION, ET AL, )  
)  
*Defendants.* )  
)  
)

Case No. **CV 2011 9616**

**MEMORANDUM OPINION,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER FOLLOWING  
COURT TRIAL**

John Redal, Coeur d'Alene, lawyer for H2O Well Services, Inc..  
Larry L. Mundahl, Coeur d'Alene, lawyer for Golden West Drilling, et al.

**I. PROCEDURAL HISTORY AND POSITION OF THE PARTIES.**

This action involves a dispute following an unusual and complicated contractual arrangement which was never reduced to writing. Plaintiff H2O Well Service, Inc., (H2O) is a licensed contractor in a well drilling business, and is an Idaho Corporation with its principal office in Hayden Lake, Idaho. Complaint, p. 1, ¶ 1. Golden West Drilling and Exploration Inc., (Golden West) is also a well drilling business, and is a Washington Corporation doing business in Idaho. *Id.*, ¶ 2. H2O claims on May 15, 2009, Golden West, through its agent, Delos Boyce (Boyce), requested H2O provide Golden West with some well drilling equipment, specifically, a JT 320 Hammer valued at \$19,488.00, and a 19" bit valued at \$7,840.00, plus \$3,000.00 for shipping and handling of the equipment.

*Id.*, p. 2, ¶ 6. These amounts total \$30,328.00. H2O claims Golden West “timely received” that equipment from H2O, and that Golden West “...was to either pay for the equipment or provide Plaintiff [H2O] with new equipment when it was delivered to them [H2O].” *Id.* H2O claims Golden West owes H2O \$32,147.68. *Id.*, ¶ 7. H2O claims that nineteen months later, on December 28, 2010, H2O sent Golden West a letter and invoice for \$32,147.68. *Id.*, p. 3, ¶ 8, Exhibit 1 and 2 to the Complaint [not attached]. Nearly one year after that letter, on December 1, 2011, H2O filed its Complaint, seeking \$32,147.68 in damages from Golden West, “...interest at the statutory rate from Aug. 15, 2009”, and attorney fees under I.C. § 12-120. *Id.*, p. 3, ¶ 11, p. 4, ¶ 16. H2O’s Complaint makes no mention of Down Hole Tooling, LLC, or John Carman.

On May 22, 2012, Golden West, through its successor in interest, Delos Boyce (Boyce), filed an Answer and Counterclaim. Boyce claims Golden West paid for the equipment by a \$32,000.00 check dated August 4, 2006 [2009], from Golden West to Down Hole Tooling, LLC. Answer and Counterclaim, p. 3, ¶ 8. Boyce’s Answer and Counterclaim makes a counterclaim for damages against H2O for the defective hammer and bit Boyce acquired from H2O. Answer and Counterclaim, p. 8, Counterclaim, ¶¶ 1-2.

On June 6, 2012, H2O filed an Answer to Counterclaim and denied such.

On May 25, 2012, Boyce filed a Third-Party Complaint against John Carman d/b/a Down Hole Tooling, LLC, as a Third-Party Defendant. A Sheriff’s Return of Service was filed on July 22, 2013, showing service on John W. Carman in Royal City, Washington, on July 10, 2013. Carman has not appeared and has not answered the Third-Party Complaint. Boyce has not taken any steps to default Carman.

In his Answer, Boyce claims the arrangement was as follows:

1. In July of 2009, Defendant Golden West Drilling was in need of a large diameter downhole hammer and bit for an upcoming drilling job. Defendant Delos

Boyce contacted various dealers of these hammers, learned that they were custom manufactured, and learned that there was a seven to eight week delivery time. One of the dealers that [Boyce] contacted was John Carman of Down Hole Tooling. He represented a couple of manufacturers of downhole equipment located in Korea. The Korean equipment is less expensive than the U.S. made equipment but had a little longer lead time. Mr. Carman advised that he would check with some of the other people he had previously sold these types of hammers to see if one of them would be willing to sell their hammer. Mr. Carman thereafter reported back to ...Boyce that [H2O], located in Hayden, Idaho, had the equipment that ...Golden West needed and would be willing to sell it for the cost of new replacement equipment. It was represented that this equipment was used on one job for about 500 feet of drilling. Mr. Carman quoted ...Golden West the hammer and a 19-inch diameter bit. Thereafter, ...Boyce, on behalf of Golden West, went to [H2O's] shop in Hayden, Idaho, and met with the president of the company, Thomas Richardson, and looked at the hammer and bit that Mr. Carman had been referring to. Boyce, on behalf of Golden West, determined that the hammer and bit was suitable for Golden West's use. Golden West was willing to pay new price for used equipment to get it in the timeframe needed by ...Golden West. Thomas Richardson, president of [H2O], said that [H2O] did not have an immediate need for the hammer, and would be willing to sell it and have it replaced with new equipment. Third-Party Defendant John Carman was not present at this inspection of the equipment, and ...Boyce and ...Golden West were not present or a party to any of the discussions between [H2O] and Third-Party Defendant John Carman.

2. Thereafter, ...Boyce, on behalf of ...Golden West, contacted Third-Party Defendant John Carman and told him that [H2O's] hammer and bit would work for ...Golden West and that ...Golden West wanted to go ahead with the purchase transaction. Thereafter, ...Boyce made another trip to Hayden, Idaho, on behalf of ...Golden West to acquire the hammer and bit. While sitting in the office of [H2O's] president, Thomas Richardson, ...Boyce, on behalf of Golden West, asked who payment for the hammer and bit should be made out to. Boyce had not previously discussed the price with [H2O's] president, Thomas Richardson, but only with Third-Party Defendant John Carman. [H2O's] president, Thomas Richardson, asked the secretary to look up what they had paid for the hammer and bit. [H2O's] president, Thomas Richardson, then directed ...Boyce, on behalf of ...Golden West, to pay Third-Party Defendant John Carman of Down Hole Tooling for the hammer and bit. Boyce, on behalf of ...Golden West, advised [H2O's] president, Thomas Richardson, that ...Golden West would prefer to pay [H2O] directly, but Thomas Richardson said no, and instructed ...Boyce, on behalf of ...Golden West, to pay Third-Party Defendant John Carman directly, and that Third-Party Defendant John Carman would order [H2O] a new hammer and bit. Pursuant to said instruction of [H2O's] president, Thomas Richardson, ...Boyce caused ...Golden West to issue its check number 1970 to Down Hole Tooling on August 4, 2009, in the amount of \$32,600 for payment in full for the hammer and bit. The subject hammer and bit were specifically referenced on the check in the memo section.

3. After receiving the hammer and bit from [H2O], ...Boyce, on behalf of,,Golden West, took it to...Golden West's job site and attempted to drill with it. It

did not work. Boyce pulled the hammer and bit out of the hole and took it to a company that had to break out tools to disassemble it. It was full of dirt and cuttings. The piston of the hammer was rusted in place. Boyce, on behalf of ...Golden West, called [H2O] and talked to [H2O's] president, Thomas Richardson. His response was that ...Boyce had looked at the hammer, it belonged to...Golden West and was the problem of ...Golden West, and that [H2O] wasn't going to do anything about the problem. It took...Boyce, on behalf of,,Golden West, three days to completely disassemble and clean the hammer. Once it was reassembled and taken back to the job site, the hammer and bit worked fine. Over a week of production was lost by...Golden West as a result of the problem with the hammer. Thereafter, ...Boyce, on behalf of ...Golden West, again called [H2O's] president, Thomas Richardson, and informed him that the hammer and bit were now working fine. [H2O's] president, Thomas Richardson, advised ...Boyce that [H2O's] new hammer had been ordered by the Third-Party Defendant and was in the process of being manufactured. Sometime thereafter, Third-Party Defendant John Carman mentioned to ...Boyce that he had been able to get the new hammer and bit for [H2O], but that they then did not want it but rather wanted something else. In the Fall of 2010, [H2O's] president, Thomas Richardson, called ...Boyce and stated that Third-Party Defendant John Carman had never gotten [H2O] the new equipment that [H2O] was supposed to receive. Boyce advised [H2O's] president that was between [H2O] and John Carman, as ...Boyce and ...Golden West were not responsible for obtaining a replacement hammer and bit for [H2O].

4. In January of 2011, [H2O's] president, Thomas Richardson, sent ...Boyce, on behalf of ...Golden West, an email asking if [Golden West's] hammer and bit would be available for [H2O] to use. He also then sent [Golden West] an invoice for \$32,147.68 for the hammer and bit, which [Golden West] has refused to pay, as they previously had paid for the hammer and bit in the manner and to the party directed by [H2O's] president, Thomas Richardson, the authorized agent of [H2O].

Answer and Counterclaim, pp. 4-8, Affirmative Defense ¶¶ 1-4.

H2O views the arrangement somewhat differently. H2O claims these are the facts:

1. [H2O] entered into an agreement with [Boyce] to provide [Boyce] a used JT 320 Hammer value of \$19,488.00 and a 19" Bit valued at \$7,840.00, plus Shipping and Handling of the equipment costing \$3,000.00.
2. [Boyce] came to [H2O's] business in Hayden Idaho and picked up the items as discussed.
3. [Boyce] wrote a check to a third party, John Carman of Down the Hole Drilling [Tooling] for a replacement Hammer and Bit as contemplated under the agreement between the parties.

Plaintiff's Post Trial Brief, p. 2. Based on those facts, H2O claims:

At the trial of this matter, [Boyce] claimed he tried to pay [H2O] for the drill and bit when he picked it up. Even if he did it is clear that [H2O] did not wish to be paid for the drill and bit but wanted a replacement, because that was the agreement. No other conclusion can be drawn other than the fact that [H2O] told [Boyce] to provide a replacement and that he did not want to be involved with the money aspect of it. It is absolutely unbelievable that [Boyce] tendered a check to [H2O] and that after [H2O] refused the check he later told defendant to pay the money to John Carman of Down Hole Drilling [Tooling]! [H2O] had purchased many items over the years from Carman and never once paid for those items up front. It was always payable upon delivery. [H2O] also testified that in all his years of business he had never paid for a piece of equipment up front. Furthermore, when you look at the check written by [Boyce], its only reference is to a drill and a bit in the memo line. There is no mention whatsoever that the check is for H2O Well drilling.

Plaintiff's Post Trial Brief, p. 3.

A one day court trial was held September 9, 2013. Following which the Court ordered the parties to file post-trial briefing by September 30, 2013. On September 18, 2013, Golden West/Delos Boyce filed Defendant's Post-Trial Brief, and on September 30, 2013, H2O Well Service filed Plaintiff's Post Trial Brief. This matter was taken under advisement on September 30, 2013.

## **II. ANALYSIS BY THE COURT.**

### **A. INTRODUCTION.**

The Court is convinced that this lawsuit would not have been filed if Carman/Down Hole Tooling had not disappeared. According to H2O, this transaction occurred May 15, 2009, when H2O/Richardson let Golden West/Boyce pick up H2O's used hammer and bit. Complaint, p. 2, ¶ 6. The evidence shows H2O/Richardson then began a nineteen month wait for the delivery of a new hammer and bit, during which time H2O/Richardson took no action at all against Golden West/Boyce, yet Richardson testified he was in contact with Carman. What Carman apparently didn't tell Richardson in those conversations and what Carman apparently didn't tell Boyce when Carman cashed Boyce's \$32,600.00 check on August 4, 2009, was that Down Hole Tooling was in financial trouble. Seven months after

the May 15, 2009, transaction, and four months after the August 4, 2009, check, on December 2, 2009, Down Hole Tooling, LLC, filed its last Annual Report with the Idaho Secretary of State. Exhibit F. On March 8, 2011, the Secretary of State administratively dissolved Down Hole Tooling, LLC. *Id.* Carman, who now had Boyce's money and was supposed to get Richardson the new equipment, apparently disappeared, so Richardson sued Boyce and Boyce sued Richardson. As is shown below, the disappearance of the middle-man creates fatal problems for both Richardson and Boyce.

#### **A. CLAIMS BY H2O AGAINST BOYCE.**

Boyce's Exhibit A admitted at trial shows Boyce paid Down Hole Tooling, LLC, \$32,600.00 on August 4, 2006 [All other checks in sequence show the check was written August 4, 2009]. As mentioned above, H2O notes: "[Boyce] wrote a check to a third party, John Carman of Down the Hole Tooling for a replacement Hammer and Bit as *contemplated under the agreement between the parties.*" Plaintiff's Post Trial Brief, p. 2. (italics added). Even according to H2O, Boyce performed all of his obligations under this unorthodox agreement. Whether Boyce first tried to pay H2O directly and then paid Carman/Down Hole Tooling is not relevant. The fact is undisputed that Boyce paid Down Hole Tooling, and that H2O claims that was "...as *contemplated under the agreement between the parties.*" *Id.* Boyce performed his part of the agreement. The problem for H2O is Carman/Down Hole Tooling did not perform; Carman/Down Hole Tooling did not deliver the new equipment to H2O. The reason Carman/Down Hole Tooling did not perform appears to be that Carman/Down Hole Tooling became insolvent. The undisputed fact that H2O waited until December 28, 2010, nineteen months after this May 15, 2009, three-way transaction, before H2O finally sent Golden West a letter and invoice for \$32,147.68 (Complaint, p. 3, ¶ 8) is evidence that H2O was at all times looking

to Boyce to pay for the new equipment (which he did), and was looking to Down Hole Tooling to deliver the equipment to H2O (which did not happen). If that wasn't the arrangement, why wouldn't H2O have invoiced Boyce right away, immediately after Boyce taking away H2O's used equipment and upon H2O's not receiving the new replacement equipment H2O was expecting? If that wasn't the arrangement [that Boyce pay Carman and Carman deliver new equipment to H2O for H2O's letting Boyce take H2O's used equipment], then why, twenty months later, on January 25, 2011, did Richardson send the following cordial email to Boyce?

Del,

Any ideas on our hammer dilemma. I am going to need a hammer for an up coming job in two weeks. I don't know what I'm going to do. Is yours available?

Let me know what you think.

Tom Richardson  
H2O Well Service, Inc.

Exhibit C. This is now twenty months after Boyce took H2O's used hammer and drill from H2O's shop and began using it. It is incredible to believe that if Richardson were looking to Boyce to deliver new equipment or were expecting Boyce to pay Richardson directly, that Richardson's email would have not only a cordial, but plaintive tone.

H2O's claim that H2O's experience with Carman/Down Hole Tooling was that H2O did not pay for equipment is not relevant because H2O was never going to be the party paying the money in this three-way arrangement. The fact is Boyce paid Carman/Down Hole Tooling \$32,600.00 on August 4, 2009. Exhibit A. The moment Carman/Down Hole Tooling cashed that check, Boyce fully performed his obligation under this contract. There was nothing left for Boyce to do. The fact that Carman/Down Hole Tooling did not deliver the equipment to H2O is not the fault of Boyce, and H2O cannot now look to

Boyce for damages; H2O can only look to Carman/Down Hole Tooling for any remedy H2O might have. H2O has made no claim here against Carman/Down Hole Tooling.

H2O's looking to Boyce for damages in this lawsuit is inconsistent with the actions taken by H2O/Richardson back at the time of the transaction. H2O's Richardson testified on direct examination that the arrangement was that H2O would "loan" Boyce the "...rig as long as Richardson gets reimbursed with the new one, which was deal that Carman had brokered." However, none of Richardson's subsequent actions support any "loan" of this equipment. Richardson's subsequent actions show that at all times Richardson was looking to Carman to provide H2O/Richardson with new equipment to replace the used equipment H2O/Richardson had let Boyce take and keep. Richardson testified that after this transaction he had no communications with Boyce. On cross-examination, Richardson also testified that he had more than one conversation with Carman as to the whereabouts of the new equipment. Richardson testified Carman first told Richardson, "It's been shipped." In a subsequent conversation, Carman told Richardson that Richardson's new equipment had come in, but he had another sale of that equipment to a different customer, and had to order new equipment again. Richardson testified that each time Carman would tell Richardson that it was "a couple weeks down the road." On re-direct, Richardson testified the only reason he was looking to Carman for the equipment was because Boyce had told him that's who he'd paid to have it delivered. That statement does nothing to rehabilitate Richardson's incredible claim that Boyce is somehow now financially responsible for the new equipment which never showed up after Boyce fully paid Carman for it. Richardson's testimony on direct, that he "gets reimbursed with the new one, which was deal that Carman had brokered", belies the fact that even Richardson recognizes that Carman is *Richardson's* agent in this three-way transaction.

Richardson wanted new equipment out of this deal, and Richardson knew that Carman, not Boyce, was the only one that could deliver that new equipment. Once Boyce paid Carman, not only had Boyce fully performed, but Boyce had no control over Carman's actions. Richardson had control over his agent, Carman, and other than being told multiple times by Carman that the new equipment was only a couple of weeks away, Richardson completely failed to exercise that control for *nineteen months* before invoicing Boyce. This Court finds the only reason Richardson invoiced Boyce nineteen months later was Richardson finally realized Carman had become financially insolvent and that his new equipment was never going to arrive.

Another way of looking at this three-way transaction is as follows. In order for H2O/Richardson to now hold Boyce financially responsible in this lawsuit, the arrangement would have to have been truly a "trade" between Richardson and Boyce alone...Richardson providing Boyce with used equipment right now with Boyce agreeing to provide Richardson directly (not through a third party such as Carman) with identical new equipment as soon as possible. But even Richardson recognized Carman was the "broker" of this deal, and the benefit to Richardson of this deal was to obtain brand new equipment. There is simply no way to characterize this as a two-party agreement between Boyce and Richardson alone.

Following the trial, H2O/Richardson submitted the following proposed finding of fact via email to the Court (but did not file such): "3. Because plaintiff [H2O] provided the requested items to defendant [Boyce], the defendant [sic plaintiff, H2O] was entitled to receive in return the replacement items or the value of the items if the replacement items were never provided." Plaintiffs [sic] Post Trial Proposed Findings of Fact and conclusions of Law (received October 9, 2013), p. 3, ¶ 3. The problem is there is

absolutely no evidence that H2O/Richardson ever looked to Boyce to *deliver* the new equipment. Richardson did not testify that such was the arrangement. Richardson's testimony belies such claim, as Richardson testified he never talked to Boyce after the transaction. Richardson's inaction vis-a-vis Boyce by not initiating any contact with Boyce for nineteen months shows Richardson never looked to Boyce to deliver the new equipment. There was no testimony that Boyce was to take delivery of the new equipment and then deliver that new equipment to H2O/Richardson. All the evidence shows that both Boyce and Richardson felt the arrangement was that H2O/Richardson was to allow Boyce/Golden West to immediately pick up H2O's hammer and drill which H2O had used once, Boyce/Golden West was to pay Down Hole Tooling/Carman the purchase price of a new identical hammer and drill that was already ordered but not yet in Down Hole Tooling's possession, and when that new hammer and drill arrived, Down Hole Tooling/Carman would deliver such to H2O. There is no evidence of any other arrangement. Even Boyce's and Richardson's subsequent interactions with Carman show this was the arrangement. Richardson testified that Carman "brokered" this deal. Richardson testified that after Boyce picked up the used equipment, the next contact he had was from Carman, who said Boyce was having trouble with the equipment because it was full of sand. And Boyce testified that when the equipment wouldn't work, Boyce called Carman because that's who Boyce considered he'd bought the used equipment from, not Richardson. There is no evidence other than this whole transaction pivoted around Carman. Boyce fully performed his part of the bargain by paying Carman. Richardson performed his part by delivering the used (but non-working) equipment to Boyce. But Carman failed to perform by delivering new equipment to Richardson. However, at all times Richardson's remedy has rested with Carman, not Boyce.

## **B. BOYCE'S CLAIMS AGAINST H2O.**

As mentioned above, Boyce's Answer and Counterclaim makes a counterclaim for damages against H2O for the defective hammer and bit Boyce acquired from H2O. Answer and Counterclaim, p. 8, Counterclaim, ¶¶ 1-2. Boyce's attorney argued for a minimum in damages of \$24,000.00, arguing H2O breached the implied warranty of merchantability under I.C. § 28-2-314. In Boyce's post-trial brief, without any calculation or evidentiary basis, his claim ballooned to \$50,000.00. Defendant's Post-Trial Brief, p. 5.

The evidence shows Boyce paid Down Hole Tooling, LLC, \$32,600.00 by check on August 4, 2009. Exhibit A. On direct examination in defendant's case, Boyce testified that when Boyce's employee arrived at the job site in Odessa/Wilbur, Washington, the piston in the hammer would not move at all. Boyce testified that Boyce then called Carman and told Carman that the hammer did not work. Boyce's attorney asked him why he called Carman, and Boyce testified, "That's who I bought it from." The check, Exhibit A, corroborates that fact. Boyce then testified that, "At Carman's instruction I took it to Blue Star in Richland, Washington" where they had equipment big enough to take apart or "break down" the hammer. Boyce testified he went to Richland, Washington, saw the broken down hammer, saw it was full of cuttings and rusted in place, so Boyce took it back to his shop, soaked it in oil, honed it, cleaned it and got working, took it back to the job in Odessa/Wilbur, Washington, but had missed a week of income during the week that the hammer was down. Boyce bases his counterclaim damage against H2O upon that lost week of work.

The following side note must be made regarding conflicting testimony. Boyce testified that after he called Carman about the seized hammer, he then called Richardson who told Boyce, "Too bad, you bought it used." Richardson denies any such

conversation. Even if Boyce's testimony is believed on this point, it does not change Boyce's testimony that Boyce looked to Carman first for Boyce's remedy to the seized hammer, and that Boyce followed Carman's directive to take the seized hammer to Richland to have it broken down. Boyce looked to Carman to fix the used hammer. That makes all the sense in the world because he paid Carman for that hammer. Boyce's remedy for any damages for the down time for that equipment, and the cost to repair such equipment, lies with Carman, not Richardson/H2O. While Boyce has filed a third-party complaint against Carman/Down Hole Tooling, that third-party complaint is for additional tools for the hammer that Boyce/Golden West ordered from Carman/Down Hole Tooling, in the amount of 24,478, which were never delivered. Third-Party Complaint, p. 3, ¶ 7. Boyce has never sued Carman for the repairs and down time caused by the seized hammer.

### **C. BOYCE'S THIRD PARTY CLAIM AGAINST CARMAN.**

As mentioned above, on May 25, 2012, Boyce filed a Third-Party Complaint against John Carman d/b/a Down Hole Tooling, LLC, as a Third-Party Defendant. A Sheriff's Return of Service was filed on July 22, 2013, showing service on John W. Carman in Royal City, Washington, on July 10, 2013. The claim is basically one of indemnification (if H2O prevails against Boyce, then Carman should pay Boyce any amounts Boyce is ordered to pay H2O), and, as mentioned above, a claim for damages for additional parts Boyce ordered and paid for from Carman, which were never delivered. Carman has not appeared and has not answered the Third-Party Complaint. However, Boyce has not taken any steps to default Carman.

Accordingly, Boyce's third-party complaint must be dismissed. Boyce has failed to prosecute such.

### **III. FINDINGS OF FACT.**

After considering all of the evidence submitted by the parties and having weighed the credibility of the witnesses, the Court makes the following findings of fact:

1. Plaintiff H2O Well Service, Inc. (H2O) is an Idaho corporation in good standing and is a licensed contractor with the state of Idaho, with its principal place of business at 582 W. Hayden Avenue, Hayden, Idaho.

2. Defendant Golden West Drilling & Exploration, Inc. (Golden West) was a Washington corporation transacting business in Idaho, but is no longer in business. Defendant Delos Boyce (Boyce) is the successor-in-interest to Golden West with respect to the equipment and claims which are the subject of H2O's Complaint and Golden West's claims herein.

3. The commercial transaction which is the subject of this lawsuit occurred in the state of Idaho, and this Court has both personal and subject matter jurisdiction.

4. In May 2009, Golden West was in need of a large diameter downhole hammer and bit for an upcoming drilling job. Boyce contacted various dealers of these hammers and learned they were custom manufactured with a seven to eight week delivery time.

5. One of the dealers Boyce contacted was Third-Party Defendant John Carman (Carman) of Third- Party Defendant Down Hole Tooling, LLC. Carman represented a couple of manufacturers of downhole equipment. As the lead time for acquiring said equipment was longer than Golden West desired, Carman advised that he would check with other people he had previously sold similar hammers to see if one would be willing to sell their hammer. Carman thereafter reported back to Boyce that H2O had the equipment that Golden West needed, and would be willing to sell it for the cost of new replacement equipment.

6. Thereafter, Boyce, on behalf of Golden West, went to H2O's shop in Hayden, Idaho, and met with the president of the company, Thomas Richardson (Richardson), and looked at the hammer and bit that Carman had described. Boyce, on behalf of Golden West, determined that the hammer and bit was suitable for Golden West's use. Golden West was willing to pay new price for used equipment to get it in the timeframe needed by Golden West.

7. Richardson, president and authorized representative of H2O, said H2O did not have an immediate need for the hammer, and would be willing to sell it and have it replaced with new equipment.

8. Thereafter, Boyce, on behalf of Golden West, contacted Carman and told him that H2O's hammer and bit would work for Golden West, and that Golden West wanted to go ahead with the purchase transaction.

9. Thereafter, Boyce made another trip to Hayden, Idaho, on behalf of Golden West to acquire the hammer and bit. While sitting in Richardson's office, Boyce asked who payment for the hammer and bit should be made out to. Boyce had not previously discussed the price with Richardson, but only with Carman. Richardson asked his secretary to look up what they had paid for the hammer and bit. Richardson then directed Boyce to pay Carman of Down Hole Tooling, LLC for the hammer and bit.

10. The dispute as to whether (as claimed by Boyce) Boyce advised Richardson that Boyce preferred to pay Richardson directly, to which Richardson said "no" and instructed Boyce Carman directly, and that Carman would order H2O a new hammer and bit, or (as claimed by Richardson) Boyce had already ordered a hammer and bit from Carman is simply not relevant.

11. Pursuant to Richardson's instruction, Boyce caused Golden West to issue its check number 1970 to Defendant Down Hole Tooling, LLC on August 4, 2009 [check itself is errantly dated 2006], in the amount of \$32,600 for payment in full for the hammer and bit. Exhibit 1. The subject hammer and bit were specifically referenced on the check in the memo section. *Id.*

12. There was a verbal contract between the parties.

13. After receiving the hammer and bit from H2O, Boyce's employee took it to Golden West's job site in Washington and attempted to drill with it. The hammer did not work. Boyce called Carman because, as Boyce testified, "That's who I bought it from." At Carman's direction, Boyce transported the hammer to Richland, Washington, to a company that had the break out tools to disassemble the hammer. Boyce had the hammer broken down and saw that it was full of dirt and cuttings. The piston of the hammer was rusted in place.

14. Boyce then disassembled, cleaned and re-assembled the hammer. Once it was reassembled and taken back to the job site, the hammer and bit worked fine. Over a week of production was lost by Golden West as a result of the problem with the hammer. While Boyce was damaged by this, Boyce did not prove his damages with requisite specificity, and Boyce's damages are not the responsibility of H2O. Until this lawsuit, Boyce did not look to H2O for those damages.

15. After Boyce had incurred the expense of fixing the hammer and the down time on the job in Washington, Boyce again called Richardson and apparently did not mention a word about those expenses or those damages. In that conversation, Boyce told Richardson the hammer was now working. The Court finds Boyce credible in his claim that Richardson, in that phone conversation, informed Boyce that Richardson had

ordered the new replacement hammer from Carman. The Court finds Boyce credible in his claim that at no time did he order the new replacement hammer from Carman.

16. The Court finds Boyce credible in his testimony that in the Fall of 2010, Richardson called Boyce and stated that Carman had never sent H2O the new equipment that H2O was supposed to receive.

17. In January of 2011, Richardson sent Boyce, on behalf of Defendant Golden West Drilling, an email asking if the Defendant's hammer and bit would be available for Plaintiff to use. Exhibit C.

18. The Court finds Boyce credible in his testimony that Boyce was contacted by a sheriff deputy who was investigating a complaint by Richardson that he had stolen a hammer, and that later Boyce received a demand letter from Richardson's attorney.

19. Boyce has not proved any of his claims in his third-party complaint against Carman/Down Hole Tooling, nor has Boyce sought default of that third-party.

20. Boyce is the prevailing party as to all of the claims by H2O in the Complaint.

21. H2O is the prevailing party as to all of Boyce's claims in Boyce's counterclaim against H2O.

22. If any of the statements in the introduction, Course of Proceedings, discussion, or the Conclusions of Law are determined to be Findings of Fact, they are so deemed and to that extent, they are incorporated into these Findings of Fact.

#### **IV. CONCLUSIONS OF LAW.**

Based upon the foregoing Findings of Fact, the Court makes the following conclusions of law:

1. This Court has personal and subject matter jurisdiction over the parties and their claims.

2. H2O and Golden West entered into a verbal contract whereby H2O sold to Golden West the used hammer and bit which is the subject of H2O's Complaint. Golden West and Boyce fully performed its part of the contract by paying for the equipment as directed by H2O's authorized agent and president, Thomas Richardson. Golden West did not breach the parties' contract nor was Golden West/Boyce unjustly enriched in any way. H2O is not entitled to any damages or return of equipment from Golden West/Boyce.

3. Delos Boyce is the successor-in-interest to Golden West Drilling & Exploration, Inc. with respect to the equipment and claims which are the subject of Plaintiff's Complaint and defendants' counterclaim and third-party-claims.

4. As the prevailing party on H2O's claims in its Complaint, defendants Golden West/Boyce are entitled to an award of their reasonable attorney fees and costs against the plaintiff H2O, for the defense of H2O's claims.

5. The Court finds the verbal contract which is the subject of the dispute in this lawsuit is a "commercial transaction" under I.C. § 12-120(3).

6. Defendant Delos Boyce is not entitled to judgment against the plaintiff H2O on defendants' Boyce's/Golden West's counterclaim for damages for the down time caused by defective equipment received from H2O for down time damages in the amount of \$23,750 as claimed in that counterclaim by Boyce/Golden West. Accordingly, plaintiff H2O is the prevailing party on defendants' Boyce's/Golden West's counterclaim for damages. As such, plaintiff H2O is entitled to an award of its reasonable attorney fees and costs against the defendants Golden West/Boyce for H2O's defense of that counterclaim.

7. Third-Party Plaintiff Golden West/Boyce is not entitled to judgment on Third-Party Plaintiff's second cause of action against Third-Party Defendants Carman/Down Hole Tooling, due to Golden West's/Boyce's failure to prosecute that claim.

8. If any of the statements in the introduction, Course of Proceedings, discussion, or

the Findings of Fact are determined to be Conclusions of Law, they are so deemed, and to that extent, they are incorporated into these Conclusions of Law.

**V. ORDER.**

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS ORDERED** that:

1. Judgment should enter in favor of defendants Golden West/Boyce and against plaintiff H2O on H2O's claims in its Complaint; and costs and attorney fees are awarded to defendants Golden West/Boyce against H2O in an amount to be determined.
2. Judgment should enter in favor of plaintiffs H2O and against defendants Golden West/Boyce on all of defendants Golden West/Boyce counterclaims; and plaintiff H2O is entitled to an award of its reasonable attorney fees and costs against the defendants Golden West/Boyce for H2O's defense of that counterclaim.
3. Counsel for plaintiff H2O shall prepare a form of proposed judgment, circulate it to counsel for Golden West/Boyce for signature that the same is approved as to form, and present such form of judgment to the court for entry on or before October 30, 2013.

Entered this 16<sup>th</sup> day of October, 2013.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 16<sup>th</sup> day of October, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

John Redal      Fax # 676-8680  
5431 N. Government Way, Suite 101A  
Coeur d'Alene, ID 83815  
Fax 676-8680

Larry L. Mundahl  
Ewing Anderson, P.S.  
2101 Lakewood Dr. Suite 235  
Coeur d'Alene, ID 83814  
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Deputy Clerk