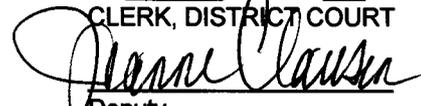


STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 6/9/2020

AT 9:05 O'clock P. M
CLERK, DISTRICT COURT


Deputy

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

**THE STATE OF IDAHO, IDAHO
TRANSPORTATION BOARD,**

Plaintiff,

VS.

**17568 N. HIGHWAY 95, LLC, an Idaho
limited liability company, ET AL,**

Defendants.

Case No. **CV28-19-7953**

**MEMORANDUM DECISION
AND ORDER DENYING
PLAINTIFF'S MOTION TO
STRIKE BUSINESS DAMAGES**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion to Strike Business Damages filed on May 1, 2020, by the plaintiff, State of Idaho, Idaho Transportation Board (ITB) against defendant, 17568 N. Highway 95, LLC (HWY 95). On November 6, 2019, ITB filed its Complaint to condemn land owned by HWY 95. Compl. 2. Tom Paschane is the majority owner of HWY 95. Defendant 17568 Highway 95, LLC's Response to Pl's. Mot. to Strike Business Damages 2. In addition, Tom Paschane owns Eagles Landing, which in turn "owns and operates the Alpine Country Store and RV Park which operates on the real property at issue in this action located at 17568 N. HWY 95, Hayden Idaho." *Id.* Defendants Lamar Company, LLC; Mountain West Bank, Division of Glacier Bank; Kathleen Associates, LLC; and Brewed Coffee Company, LLC are also named in the Complaint as defendants who may have an interest in the property. Compl. 2. "[T]he

property sought to be condemned is to be used for a right of way..." for "the Highway system of the State of Idaho." *Id.* at 3.

Along with the Motion to Strike Business Damages, the ITB also filed a Memorandum in Support of Motion to Strike Business Damages, and a Declaration of Renee R. Hollander-Vogelpohl in Support of Motion to Strike on May 1, 2020. On May 26, 2020, HWY 95 filed Defendant 17568 N. Highway 95, LLC's Response to Plaintiff's Motion to Strike Business Damages, Declaration of Thomas Paschane in Response to Motion to Strike Business Damages, and Declaration of Kevin W. Roberts in Response to Plaintiff's Motion Strike Business Damages. Oral argument on the Motion to Strike Business Damages was held on June 2, 2020. At the conclusion of that hearing, the Court took that matter under advisement.

II. STANDARD OF REVIEW

The Supreme Court of Idaho has held that "[t]he determination of the meaning of a statute and its application is a matter of law over which this Court exercises free review." *Woodburn v. Manco Prods., Inc.*, 137 Idaho 502, 504, 50 P.3d 997, 999 (2002). A trial court was held to an abuse of discretion standard in dismissing with prejudice *sua sponte*, a private condemnation action. *Kirkham v. 4.60 Acres of Land*, 100 Idaho 781, 784, 605 P.2d 959, 962 (1980) citing *Voellmeck v. Northwestern M. L. Ins. Co.*, 60 Idaho 412, 417, 92 P.2d 1076, 1077 (1939). Dismissal under I.R.C.P. 41(b) is reviewed under an abuse of discretion standard. *Strong v. Intermountain Anesthesia, P.A.*, 160 Idaho 27, 29, 368 P.3d 647, 649 (2016).

III. ANALYSIS

The ITB initially made an argument that [t]he (90) day deadline to provide business damage claim in accordance with Idaho Code § 7-711 was February 3,

2019[.]” and “[t]he Defendants presented their notice of a business damages claim on February 3, 2019 with supporting documentation received on February 4, 2020 and by certified mail on February 7, 2020.” Pl’s. Mem. In Supp. of Mot. to Strike Business Damages 3. This argument appears to be moot because in the ITB’s reply brief, the ITB has now agreed with HWY 95 that the deadline to provide the business damages claim was actually February 10, 2020. Reply to Defendant’s Response to Mot. to Strike Business Damages 2. Accordingly, the business damage claim was timely presented.

The ITB next argues that:

Although the Defendant provided 12,967 pages of documentation... [t]he Defendant’s documentation, even if it were on time, did not provide the statutory required five years of federal, state income returns, or state sales tax returns, only the 2018 profit and loss statement (44 pages), and the 2017 balance sheets for Eagles Landing LLC and four unrelated business (sic) (53 pages).

Pl’s. Mem. In Supp. of Mot. to Strike Business Damages 3. Additionally, the ITB argues that HWY 95 failed to segregate the business damages from the property damage claim as required by Idaho Code §7-711(iii), because “[t]he Defendant’s appraisal considered and included business damages to the convenience store in their appraised value for the acquisition.” *Id.* at 4.

HWY 95 makes several arguments as to why the Motion to Strike Business Damages should be denied. First, HWY 95 argues that the ITB failed to inform HWY 95 of its rights under Idaho Code §7-711. Def’s. Response to Pl’s. Mot. to Strike Business Damages 7. “As a result, ITB failed to meet a condition precedent to trying to attempt to ‘strike’ the business claim based on rights it failed to disclose.” *Id.*

Second, HWY 95 argues that they provided a “written business damage claim” within the 90 day time limit and met the other requirements of Idaho Code §7-711. *Id.* In addition, HWY 95 argues that “the statute does not place any deadline on when

either the records have to be provided or a 'good faith offer to settle' is made." *Id.*

HWY 95 reasons that:

This makes sense given the fact that if the claim is not resolved through settlement, it will be litigated and a jury will determine the amount of damages awarded. While the statute identifies the records to be provided, it necessarily recognizes the reality of litigation and that there will be deadlines for the exchange of discovery within the case. It also makes sense a 90 day deadline is not provided for the exchange of the business records given the reality that businesses often rely upon professionals for their financial records keeping and such historical records may not be readily available.

Id.

Third, HWY 95 argues that it fulfilled the requirements of I.C. §7-711 by providing its business records. HWY 95 reasons that it (through Alpine):

...provided ITB with more than 12,000 pages of business records. In addition, it referenced additional records and information which were relied upon by ITB'S Appraiser. Alpine also identified for ITB that it was acquiring the 2015, 2016 and 2017 historical financial information and would provide it when obtained. Finally, Alpine offered to cooperate by providing any information ITB felt was necessary to evaluate the claim.

Alpine obtained and made available to ITB the prior tax returns. ITB refused to enter into a protective order. It appears this was done to try to justify the present motion in essentially an attempt to create its own prejudice. **Exs. F to J** to Dec. of Roberts.

Id. at 8-9 (bold in original).

Fourth, HWY 95 argues that they have segregated their damages as required by I.C. §7-711. *Id.* at 9. HWY 95 reasons that the ITB has picked information out of context from a prelitigation appraisal and "the business claim is separate from and does not include damages for the real estate." *Id.* HWY 95 goes on to argue that Mr. Paschane's opinion of just compensation for the real estate will not include the business damages being sought and will be segregated." *Id.* Additionally, "the parties are in discovery in this case and have not yet exchanged appraisals for litigation." HWY 95 concludes this argument by stating that its "appraiser has been instructed to

segregate any business damages from his opinions relating to the just compensation for the before and after of the real property and improvements.” *Id.* (citing Dec. of Paschane).

Finally, HWY 95 argues that they have:

presented the Court with evidence of good faith justifications for needing additional time to acquire and produce the historical business records. This includes the fact they are in the control of a third-party, the third-party’s CPA’S have passed away and retired, have requested limitations on the use and the COVID emergency has delayed and made access more difficult.

Id. at 9.

The ITB replies to HWY 95’s arguments by first arguing that the ITB did in fact expressly inform HWY 95 of their rights as required by Idaho Code §7-711(2)(b)(i).

Reply to Def’s Response to Mot. to Strike Business Damages 4. The ITB argues that in addition to what was stated in Mr. Paschane’s Declaration Exhibit A, the initial offer packet received by HWY 95 also included the acquisition brochure, which included the following language that was not found in Mr. Paschane’s Declaration:

11. If a business has been in existence for five years or more and is owned by a party whose lands are being condemned and the business is located on those lands or upon adjoining lands owned or held by the same party, then the owner of the business may be entitled to damages to the business. (A tenant, business owner does not qualify and no business damage will be paid for a temporary interruption of business due to construction.) The business owner has the right to consult with an attorney and must file a claim with the Idaho Transportation Department to be eligible for this benefit.

Reply to Def’s Response to Mot. to Strike Business Damages 5. The ITB argues that it is unclear why Mr. Paschane did not include the language from the Acquisition Brochure, but the ITB asserts that both the Advice of Rights Form, which was included in Mr. Paschane’s declaration, and the Acquisition Brochure, meet the notice

requirement of I.C. §7-711. *Id.* (citing the Declaration of Larry Rincover and Declaration of Justin Pond).

Next, the ITB argues that HWY 95 failed to timely file a business damage claim in compliance with Idaho Code §7-711 (2)(b)(i). The ITB reasons that:

The Defendant's statement and the declarations provide evidence that documents produced did not meet the statutory requirements and should be stricken. Even if the defendant requested an extension to provide the necessary documents, those documents would not have met the requirements of five (5) years of federal and state income tax returns, state sales tax returns, balance sheets and profit and loss statements.

Id. at 6. Furthermore, the ITB argues in a footnote that "[t]he documents provided by Defendant on February 4, 2020 only included 2018 profit and loss statement (44 pages[]) (sic), and the 2017 balance sheets for Eagles Landing LLC and four unrelated business[es] (sic) (53 pages)." *Id.* at Footnote 7.

Next, the ITB argues that the defendant has failed to segregate its damages in any of its filings, and it is not sufficient, under I.C. §7-711(2)(b), that HWY 95 has now said in their briefing that he has instructed his appraiser to update the appraisal and will segregate business damages from the property damages. *Id.* at 6 (citing Decl. of Thomas Paschane, 4, ¶13).

Next the ITB argues that:

It is clear from both the language in Idaho statutes and Idaho case law, the ninety (90) day deadline applies to both a written claim AND the business records to substantiate a good faith offer are required. Without a good faith justification for the Defendants' failure to comply with the statute, the court is required to strike the claim from the condemnation proceedings. Defendant admits they did not provide the required documentation nor did they provide a good faith justification for their failure to comply with the statute.

Id. at 8.

Next, the ITB argues that HWY 95 has not offered any good faith justification for failure to comply with I.C. §7-711(2)(b). The ITB argues that COVID-19 is not a good faith justification because the COVID-19 stay at home order was issued by the Governor on March 13, 2020, and the deadline to submit the business damage claim was February 10, 2020. *Id.* at 8-9. Additionally, the ITB argues that HWY 95 did not provide the tax returns within the 90 day time limit, and “[e]ven if those three years would have been timely produced, it would still not have satisfied the requirements...” *Id.*

Finally, the ITB argues that It did not sign the protective order for the three years of tax returns offered by HWY 95 because:

The State was unwilling to sign the stipulated protective order due to the untimeliness submittal of the business damage claim. If the State agreed to the stipulation for protective order this could have been construed as a waiver of the State’s claim in the Motion to Strike Business Damages for, three years of tax returns, this is not in compliance with the requirements. The State would not enter into an agreement with another named defendant party to this case, who is not represented by Mr. Roberts... The State has not prohibited defendant from presenting the required documentation in a timely fashion. The Defendant has failed to present a timely and complete business damage claim through their own action or lack thereof.

Id. at 9-10.

A. ITB’s Motion to Strike Business Damages is denied because the ITB has not met the notice requirements of Idaho Code §7-711(2)(i).

For the reasons set forth below, this Court finds that the ITB has not met the notice requirements of Idaho Code §7-711(2)(i). The relevant part of Idaho Code §7-711(2)(i) reads “[t]he plaintiff’s initial offer letter or accompanying information must expressly inform the defendant of its rights under this subsection, and must further inform the defendant of its right to consult with an attorney.” This Court finds that the ITB has fulfilled the notice requirement regarding the defendant’s right to consult an

attorney by providing HWY 95 with notice that reads “[t]he Owner has the right to consult with an attorney at any time during the acquisition process.” Decl. of Thomas Paschane Ex. 1. However, this Court finds that ITB has not fulfilled the notice requirements of I.C. §7-711(2)(i) which states “[t]he plaintiff’s initial offer letter or accompanying information must expressly inform the defendant of its rights under this subsection,” because, ITB’s initial offer letter and accompanying information does not contain language informing HWY 95 that it has the right under subsection (ii) to submit a business damages claim, but must do so within the 90 day time limit which begins to run when the defendant is served with a copy of the summons and complaint for condemnation. I.C. §7-711(2)(i), (ii).

The ITB argues that the following language found in the ITB’s “advice of rights form” (Decl. of Paschane Ex. 1) and the “acquisition brochure” (Decl. of Justin Pond Ex. A) fulfill the notice requirement of I.C. §7-711(2)(i). Reply to Def’s. Resp. to Mot. to Strike Business Damages 4-5.

(2) The condemning authority must negotiate with the property owner in good faith to purchase the property sought to be taken and/or settle with the owner *for any other damages* which might result to the remainder of the owner’s property;

(3) The owner of private property to be acquired by the condemning authority is entitled to be paid for any diminution in the value of the owner’s remaining property which is caused by the taking and the use of the property taken proposed by the condemning authority. This compensation, called “severance damages,” is generally measured by comparing the value of the property before the taking and the value of the property after the taking. *Damages are assessed according to Idaho Code.*

(8) The owner has the right to consult with an attorney at any time during the acquisition process.

(11) Nothing in this section changes the assessment of damages set forth in *section 7-711, Idaho Code*; and

Any questions concerning the Summary of Rights Form should be directed to Larry Rincover, Right of Way Agent.

Id. (citing Declaration of Thomas Paschane, Exhibit A.) (italics in original). As mentioned above, the acquisition brochure states:

11. If a business has been in existence for five years or more and is owned by a party whose lands are being condemned and the business is located on those lands or upon adjoining lands owned or held by the same party, then the owner of the business may be entitled to damages to the business. (A tenant, business owner does not qualify and no business damage will be paid for a temporary interruption of business due to construction.) The business owner has the right to consult with an attorney and must file a claim with the Idaho Transportation Department to be eligible for this benefit.

Id. (citing the acquisition brochure found in Dec. of Justin Pond Ex. 1).

Idaho Code §7-711(2)(i) requires that a defendant be “expressly” informed of their rights. *Id.* The word “expressly”, is defined in Black’s Law dictionary as “[c]learly and unmistakably communicated; directly stated.” *Express, Black’s Law Dictionary* (7th ed.1999.) This denotes a high level of detail and precision in conveying the rights provided in Idaho Code §7-711(2). What the ITB failed to include in the information they provided to HWY 95 was the most critical piece of information pertaining to HWY 95’s right to claim business damages, the fact that the 90 day time limit to submit a written damages claim to the plaintiff starts to run once the defendant is served with the summons and complaint for condemnation. This time limit is critical information that could be outcome determinative for a defendant’s claim. This Court finds that such information must be provided to a defendant under I.C. §7-711(2)(i), in order to meet the statutory requirement that a defendant is “expressly” informed of their rights. Because the ITB has failed to satisfy the notice requirements of Idaho Code § 7-711(2), specifically, ITB’s failure to inform HWY 95 of the 90 day time limit to file a business

damages claim, this Court cannot strike HWY 95's business damages claim for HWY 95's supposed tardiness in filing that claim, or for its alleged incompleteness.

B. HWY 95 has met the requirements of submitting a written business damages claim within the 90 day time limit

Even if the ITB had satisfied the notice requirements of I.C. §7-711(2)(i), HWY 95 has met the requirement of submitting a written business damages claim under I.C. 7-711(2). Idaho Code §7-711(2), (i)-(iv) reads:

- (i) If the business owner intends to claim business damages under this subsection, the owner, as defendant, must submit a written business damage claim to the plaintiff within ninety (90) days after service of the summons and complaint for condemnation. The plaintiff's initial offer letter or accompanying information must expressly inform the defendant of its rights under this subsection, and must further inform the defendant of its right to consult with an attorney.
- (ii) The defendant's written claim must be sent to the plaintiff by certified mail, return receipt requested. Absent a showing of a good faith justification for the failure to submit a business damage claim within ninety (90) days, or an agreed extension by the parties, the court shall strike the defendant's claim for business damages in any condemnation proceeding.
- (iii) The business damage claim must include an explanation of the nature, extent, and monetary amount of such claimed damages and must be prepared by the owner, a certified public accountant, or a business damage expert familiar with the nature of the operations of the defendant's business. The defendant shall also provide the plaintiff with copies of the defendant's business records that substantiate the good faith offer to settle the business damage claim. The business damage claim must be clearly segregated from the claim for property damages pursuant to subsections (1) and (2)(a) of this section 7-711, Idaho Code.
- (iv) As used in this subsection, the term "business records" includes, but is not limited to, copies of federal and state income tax returns, state sales tax returns, balance sheets, and profit and loss statements for the five (5) years preceding which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim.

The Idaho Supreme Court held in *Rocky Mountain Power v. Jensen*, 154 Idaho 549, 300 P.3d 1037 (2012), that the defendants "were required to submit a written business damage claim along with copies of [the defendant's] business records that substantiate

a good faith offer to settle the business damage claims within 90 days after service of the summons and complaint for condemnation.” 154 Idaho at 555, 300 P.3d at 1043 (citing I.C. §7-711(2)(b)(i), (iii)). When reading I.C. § 7-711(2) as a whole, this Court finds it is clear that this Court is allowed to strike a business damages claim only if the defendant fails to submit a business damages claim within the statutory 90 day time limit.

Idaho Code 7-711(2)(i) states that “[i]f a business owner intends to claim business damages under this subsection, the owner, as defendant, must submit a written business damages claim to the plaintiff within ninety (90) days after service of the summons and complaint for condemnation.” I.C. § 7-711(2)(i). Idaho Code 7-711(2)(ii) states that:

The defendant’s written claim must be sent to the plaintiff by certified mail, return receipt requested. Absent a showing of a good faith justification for the failure to submit a business damage claim within ninety (90) days, or an agreed extension by the parties, the court shall strike the defendant’s claim for business damages in any condemnation proceeding.

There is no dispute that HWY 95 has submitted a business damages claim within the 90 day time limit. Reply to Defendant’s Response to Mot. to Strike Business Damages

2. The ITB only argues that HWY 95:

fails to provide any evidence how the 12,967 pages provides an accurate measurement of business damages suffered by the Defendant, how the 12,967 pages includes the required documents in accordance with Idaho Code § 7-711(2)(b)(i), or point to any evidence how the damages are segregated and different than those damages accounted for in the appraisals performed by both the State and the Defendant.

Id.

This Court finds that HWY 95 has submitted a business damages claim within the 90 day time limit, and the ITB’s assertions of defects in the business records, and the segregation of damages, is not sufficient under the statute to strike HWY 95’s

business damage claim. The only way a court can strike a business damage claim is “[a]bsent a showing of a good faith justification for the failure to submit a business damages claim with ninety (90) days, or an agreed extension by the parties[.]” I.C. § 7-711(2)(ii). Contrary to the ITB’s assertions, the findings in *Rocky Mountain Power* do not allow a court to strike business damages for additional reasons outside the failure of a defendant to file a business damage claim within the 90 day statutory time limit. 154 Idaho at 555, 300 P.3d at 1043 (citing I.C. § 7-711(2)(b)(i), (iii)). Again, *Rocky Mountain Power* simply states that the defendants, “were required to submit a written business damage claim along with copies of [the defendant’s] business records...” *Id.* This is obviously true when reading the statute. What is not true, is the assertion by the ITB that defects within the business records, or the segregation of damages, can allow the court to strike a business damages claim (just as if it were a claim filed outside the 90-day time period). There is no language within the statute that requires not only that the written business damage claim be filed within 90 days, but that it must be perfectly submitted, submitted with no errors, and submitted with all supporting evidence, or be dismissed. Idaho Code §7-711(2)(iii) specifies what “must” be included in the written business damage claim, but the statute simply does not provide the condemning authority the remedy of dismissal because the landowner submits a timely, but technically inadequate written damage claim. The only way to read the statute under its plain language, and in light of *Rocky Mountain Power*, is that the only reason a court can strike business damages under Idaho Code § 7-711(2)(ii) is “for the failure to submit a business damages claim with ninety (90) days...” I.C. § 7-711(2)(ii). This Court finds that nowhere in the statute, or in case law, is the issue of sufficiency in the

business records or segregation of business damages allowed as a reason to strike a business damage claim.

Finally, even if this Court were to construe Idaho Code §7-711(2)(iii) as not only specifying what “must” be included in the written business damage claim, but also mandating dismissal for claims that while timely, are deficient for some reason or reasons (which this Court does not), the Court finds the ITB has not shown prejudice. ITB’s motion to strike business damages is essentially a motion to dismiss part of HWY 95’s damage claims. A motion to dismiss based on timeliness must typically show prejudice on the moving party due to the non-moving party’s delay. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987); *Systems Assocs. v. Motorola Communications & Elecs., Inc.*, 116 Idaho 615, 778 P.2d 737 (1989); *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992); *Jackson v. Omnibus Group, Ltd.*, 122 Idaho 347, 834 P.2d 864 (1992); *Strong v. Intermountain Anesthesia, P.A.*, 160 Idaho 27, 368 P.3d 647 (2016). The ITB has not shown any evidence of how any delay by HWY 95 has left ITB with “actual instances of an inability to adequately and effectively prepare their case” *Strong*, 160 Idaho at 31-32, 368 P.3d at 651-52. No claim has been made by ITB that witnesses have disappeared or that the books of the corporation were no longer available due to the delay. *Jackson*, 122 Idaho at 347, 834 P.2d at 864. Prejudice will not be presumed. *Strong*, 160 Idaho at 32, 368 P.3d at 652 citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 93, 982 P.2d 917, 928 (1999). Dismissal is considered a sanction rather than a remedy and should be used sparingly. *Strong*, 160 Idaho at 31, 368 P.3d at 651, citing *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 1017, 772 P.2d 222, 224 (1989). There is not a single mention of prejudice in ITB’s Plaintiff’s Memorandum in Support of Motion to

Strike Business Damages, let alone any “actual instances of an inability to adequately and effectively prepare their case. *Strong*, 160 Idaho at 31-32, 368 P.3d at 651-52. The only mention of “prejudice” by ITB in its Reply to Defendants’ Response to Motion to Strike Business Damages, is in passing and in the context of *defendants* arguing prejudice against ITB. Reply to Defs.’ Resp. to Mot. to Strike Business Damages 10.

As set forth above, the standard on appeal of this decision is the abuse of discretion standard. This is now referred to as a four-part standard by the Idaho Supreme Court: “Whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life, Inc.*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018). Certainly, this Court perceives this motion to strike business damages as a matter committed to its discretion. This Court feels it is acting within the boundaries of that discretion, is acting within the legal standards of the applicable statutes and case law, and reached its decision in an exercise of reason.

For the reasons described above, the ITB’s Motion to Strike Business Damages is denied.

IV. CONCLUSION AND ORDER

Based on the above, the ITB’s Motion to Strike Business Damages must be denied.

IT IS HEREBY ORDERED the plaintiff ITB’s Motion to Strike Business Damages is **DENIED**.

Entered this 9th day of June, 2020.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 9th day of June, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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By 
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