IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and IDAHO HUMAN RIGHTS COMMISSION, Intervenor Plaintiff, v. THE BURRITO SHOPPE LLC, d/b/a SQUEEZERS GIANT BURGERS, Defendant and Intervenor Defendant.	Case No. CV 05-329-S-LMB **ORDER**

Currently pending before the Court are Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) or, in the Alternative, Motion for Summary Judgment under Federal Rule of Civil Procedure 56 (Docket No. 37) and Defendant's Motion for Enlargement of Time (Docket No. 38).[1] In the interest of avoiding delay and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Court will address and resolve these motions without a hearing. Therefore, having carefully reviewed the record and otherwise being fully advised, the Court enters the following order.

[1] Also pending is Plaintiff's Motion to Amend Complaints and Join Second Defendant (Docket No. 43), which will be addressed at a later date.

I.

BACKGROUND

This is an action by the Equal Employment Opportunity Commission ("EEOC") and the Idaho Human Rights Commission ("IHRC") (collectively, "Plaintiffs") against The Burrito Shoppe LLC, dba Squeezers Giant Burgers ("Defendant"). The EEOC filed its Complaint (Docket No. 1) on August 19, 2005. The EEOC alleges that Defendant violated Title VII of the Civil Rights Act by discriminating against female employees on the basis of sex. *Complaint of EEOC*, pp. 1–2 (Docket No. 1). According to the EEOC, Audrey Powers, a female employee of Defendant, was sexually harassed at work in violation of 42 U.S.C. § 2000e-2(a). *Id.* at ¶ 7. The EEOC alleges that this harassment "deprive[d] Ms. Powers and a class of similarly situated females of equal employment opportunities." *Id.* at ¶ 8.

On February 1, 2006, the Court granted the IHRC's Motion to Intervene as a plaintiff in this action. *Order Granting Motion to Intervene*, p. 1 (Docket No. 28). The IHRC alleges that Defendant violated the Idaho Human Rights Act, Idaho Code § 67-5901 *et seq.*, by maintaining a workplace "permeated with unwelcome sexual conduct." *Complaint of IHRC*, ¶ 12 (Docket No. 29). Specific allegations against Defendant include the following: that Ms. Powers was touched on her breasts and buttocks, that she was subjected to sexually charged conversations and called sexually suggestive names, and that James Dorsey ("Dorsey"), the sole member of the defendant limited liability company, exposed his penis in the workplace. *Id.*

On March 6, 2006, Dorsey filed articles of dissolution with the Idaho Secretary of State, dissolving his limited liability company, The Burrito Shoppe, LLC. *Ex. A to Affidavit of David Hammons*, p. 5 (Docket No. 40). That same day, Dorsey cancelled the assumed business name "Squeezers Giant Burgers." *Ex. B to Affidavit of David Hammons*, p. 7 (Docket No. 40). Also

on March 6, 2006, Dorsey filed articles of incorporation for Allied Food Services, Inc., *Ex. D to Affidavit of David Hammons*, p. 11 (Docket No. 40), and filed a certificate of an assumed business name for the new corporation, continuing to use the word "Squeezers." *Ex. E to Affidavit of David Hammons*, p. 13 (Docket No. 40). Allied Food Services, Inc., dba Squeezers, continues to operate in the same location as did The Burrito Shoppe, LLC, dba Squeezers Giant Burgers. *Exs. B, D, E, and F to Affidavit of David Hammons* (Docket No. 40).

II.

DEFENDANT'S MOTION TO DISMISS

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.,* 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in a plaintiff's complaint. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754–55 (9th Cir. 1994).

A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45 (1957). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Defendant moves to dismiss this action, asserting that Idaho law does not allow a plaintiff to maintain against a dissolved limited liability company an action pending at the time of dissolution. *Memorandum in Support of Defendant's Motion to Dismiss/Motion for Summary Judgment*, pp. 8–14 (Docket No. 39). Defendant argues that there is no Idaho statute "allow[ing]

a legal action to survive" against a dissolved limited liability company and that, therefore, Defendant cannot be sued. *Id.* at p. 13.

The cases cited by Defendant, all involving corporations, stand for the proposition that, in order for an action against a corporation to survive after the corporation has dissolved, a state statute must provide for such survival. *See Gossman v. Greatland Directional Drilling, Inc.*, 973 P.2d 93, 95 (Alaska 1999); *Pac. Scene, Inc. v. Penasquitos, Inc.*, 46 Cal. 3d 407, 410 (Cal. 1988); *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 95–96 (N.D. Iowa 1968); *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 250–51 (N.D. Ohio 1965). The Court agrees that this is the general rule applied to corporations. *See Okla. Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 260 (1927) ("It is well settled that at common law . . . a corporation which has been dissolved is as if it did not exist . . . ."); *Monolith Portland Midwest Co. v. Reconstruction Fin. Corp.*, 282 F.2d 439, 443 (9th Cir. 1960) ("[W]e start with the basic premise that in the absence of statute an action by or against a corporation abates when the corporation goes out of existence.").

The Court concludes that this same rule should apply to limited liability companies. Limited liability companies, like corporations, are creatures of state law, owing their existence entirely to the framework provided by the state legislature. Consequently, whether a limited liability company survives, post-dissolution, for the purpose of retaining liability for illegal, pre-dissolution actions is a question of state statutory law. If the Idaho Code provides for the enforcement of pre-dissolution claims against a dissolved limited liability company, then Defendant remains an entity against which legal action on such claims may be maintained.

The Idaho Limited Liability Company Act was enacted as Chapter 6 of Title 53 of the Idaho Code. Once a limited liability company is dissolved, "its affairs *shall* be wound up." Idaho Code § 53-642 (emphasis added). As is evident from this language, the process of

winding up a dissolved limited liability company is mandatory. The dissolved limited liability company continues to exist for the purpose of winding up, and section 53-644 specifically sets forth the different actions that the company has the power to undertake, even after dissolution:

> The persons winding up the business or affairs of the limited liability company may, in the name of, and for and on behalf of, the limited liability company:
>
> (a) *Prosecute and defend suits*;
> (b) Settle and close the business of the limited liability company;
> (c) Dispose of and transfer the property of the limited liability company;
> (d) Discharge the liabilities of the limited liability company; and
> (e) Distribute to the members any remaining assets of the limited liability company.

Idaho Code § 53-644(2) (emphasis added). Therefore, the limited liability company continues to exist, after dissolution, for the purpose of prosecuting or defending legal actions. While this language grants the company the *power* to defend a lawsuit, it does not indicate whether the company necessarily remains potentially liable for its pre-dissolution actions.[2] The answer to that question must be found in other statutes.

Two sections relating to claims against a dissolved limited liability company apply to the Court's analysis. First, section 53-648 deals with claims that are known to a dissolved limited liability company. This section provides a procedure by which the dissolved limited liability company may dispose of such claims. If the company notifies known claimants of the

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[2] Pointing to the word "may" in section 53-644, Defendant contends that, although a dissolved limited liability company can choose to defend a pending action, it is not required to continue as a defendant. *Response to Plaintiff's Opposition to Defendant's Motion to Dismiss*, p. 3 (Docket No. 48). It is true that one connotation of the word "may" is that the actors have discretion to do the action. However, the word "may" in section 53-644 cannot mean this, because other actions listed in section 53-644(2) are mandatory.

For example, section 53-644 states that the company "may" discharge its liabilities to creditors. However, section 53-646 states that the company "shall" distribute its assets to creditors to satisfy its debts before making any other distribution. Idaho Code § 53-646(1). The use of the word "shall" indicates that a dissolved limited liability company does not enjoy the discretion to choose not to distribute its assets to satisfy its liabilities. Because the company must satisfy its debts after dissolution, section 53-644 cannot mean that all the listed actions in that statute are discretionary. The statute grants the company the ability to do such actions, but it says nothing about whether such actions are discretionary or mandatory.

dissolution and provides a deadline for mailing such claims to the company, and if a claimant does not either deliver a claim or file suit after a claim is rejected, that claim is barred and cannot be asserted against the company. Idaho Code § 53-648(1)-(3). Section 53-648's definition of "claim" does not include "a contingent liability or claim based on an event occurring after the effective date of dissolution." Idaho Code § 53-648(4).

Section 53-649 allows the enforcement of any claim "not barred under section 53-648(3)." A non-barred claim "may be enforced" by the claimant against the dissolved limited liability company "to the extent of any undistributed assets." Idaho Code § 53-649(1). In addition, if the assets "have been distributed in liquidation," the claimant may, to a certain extent, enforce the claim against a member of the company. Idaho Code § 53-649(2). Because section 53-649 provides for the enforcement of all non-barred claims against a dissolved limited liability company and because the Plaintiffs may prove that their claims are not barred, this action survives Defendant's dissolution.

Defendant attempts to cast Plaintiffs' claims as unenforceable by calling the current lawsuit a "contingent liability" and an "unknown liability which is extinguished upon dissolution," without citing any legal authority. *Memorandum in Support of Motion to Dismiss/Motion for Summary Judgment*, p. 13 (Docket No. 39). However, the Court cannot determine, from the face of the Complaint, whether Plaintiffs' claims are known, unknown, contingent, or something else; therefore, the Court cannot grant the motion to dismiss on this basis. Moreover, it is difficult to imagine how Defendant could characterize Plaintiffs' claims for damages as anything but known claims: Defendant was served with notice of the suit and even engaged in defending the case prior to dissolution. The fact that the amounts of Plaintiffs' claims, if any, have not yet been established does not transform them into unknown claims.

Section 53-648 speaks of "known *claims*," not "claims of which the amount has already been determined."

Even if Plaintiffs' claims could be appropriately classified as unknown, there is little support for Defendant's contention that unknown or contingent liabilities are extinguished upon dissolution. Section 53-648(3) bars known claims as long as the requirements of section 53-648(3) are met. Contingent liabilities and claims based on post-dissolution events are excluded *only* from section 53-648's definition of "claim," not the definition of "claim" as found in any other section. Idaho Code § 53-648(4). Therefore, such claims are not subject to being barred under section 53-648(3), but they continue to be "claims" that may be enforced under section 53-649. *Compare* Idaho Code § 53-648(4), *with* Idaho Code § 53-649.

For purposes of the pending motion, all Plaintiffs need to prove in order to support their claims and preclude dismissal is that those claims are not barred under section 53-648(3). If Plaintiffs can meet that burden, they may maintain this legal action against Defendant or, subject to the limitations set forth in section 53-649, its sole member, Dorsey. Therefore, Plaintiffs have stated claims upon which relief can be granted, and Defendant's Motion to Dismiss (Docket No. 37) is denied.

III.

DEFENDANT'S ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Motions for summary judgment are governed by Federal Rule of Civil Procedure 56, which provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The initial burden is on the moving party to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983); Fed. R. Civ. P. 56(c). If the moving party meets its initial burden, the nonmoving party must "produce 'specific facts showing that there remains a genuine factual issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Steckl*, 703 F.2d at 393 (quoting *Ruffin v. County of L.A.*, 607 F.2d 1276, 1280 (9th Cir. 1979)).

In reviewing the record, Defendant has not met its initial burden to show that it is entitled to judgment as a matter of law. As explained above, Defendant remains a proper defendant in this action because the Idaho Code allows a claimant to enforce non-barred claims against the company or its members, even after a defendant limited liability company's dissolution. In addition, there has not been sufficient discovery or evidence placed in the record for the Court to find or conclude that there exists no genuine issue of material fact. Therefore, Defendant's Alternative Motion for Summary Judgment is denied without prejudice.

IV.

MOTION FOR ENLARGEMENT OF TIME

On April 3, 2006, the day Defendant filed its Motion to Dismiss (Docket No. 37), Defendant filed a Motion for Enlargement of Time (Docket No. 38), essentially seeking to stay discovery and "all other matters in the case" until the Court ruled on Defendant's Motion to Dismiss (Docket No. 37). Having denied the Motion to Dismiss (Docket No. 37), Defendant's Motion for Enlargement of Time (Docket No. 83) is moot and thus denied.

V.

ORDER

In accordance with the foregoing, IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss, F.R.C.P., Rule 12(b)(6) or in the Alternative Motion for Summary Judgment, F.R.C.P. Rule 56 (Docket No. 37) is DENIED.

2. Defendant's Motion for Enlargement of Time (Docket No. 38) is DENIED.

DATED: **August 8, 2006**.

Honorable Larry M. Boyle
Chief U. S. Magistrate Judge