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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LOKAN & ASSOCIATES, INC. d/b/a OPTI STAFFING GROUP,

Appellant,

v.

AMERICAN BEEF PROCESSING, LLC

Respondent

BRIEF OF APPELLANT

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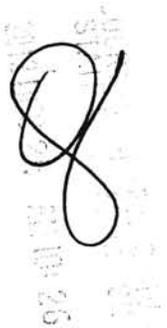
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COMES NOW Appellant, LOKAN & ASSOCIATES, INC. d/b/a OPTI STAFFING GROUP, by and through its attorneys of record, SMITH ALLING, P.S. and Kelly DeLaat-Maher, and submits appellant's brief on appeal as follows:

I. ASSIGNMENTS OF ERROR

A. The trial court erred in granting Defendant's Motion for Summary Judgment on September 7, 2012.

B. The trial court erred in denying Plaintiff's Motion for Summary Judgment on September 7, 2012.

II. ISSUES PRESENTED

A. Did Respondent breach its contract with Opti when the contract provides for the only contingency being the placement of an employee with the client, and payment is due upon an offer being made to that employee? (Assignment of Error A and B)

B. Is the Addendum an unenforceable modification of the Service Charge Schedule as it was not supported by independent consideration? (Assignment of Error A and B)

C. Is receipt of outside funding a condition precedent or contingency that had to be met before Respondent was obligated to perform? (Assignment of Error A and B)

D. Does enforcement of the condition precedent result in a forfeiture, rendering the condition unenforceable? (Assignment of Error A and B)

E. Is the Addendum only applicable to employee Danny Anderson? (Assignment of Error A and B)

III. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Opti is engaged in the private recruiting business, operating in Alaska, Washington, Oregon, and Illinois. CP 32. Opti carries on the business of obtaining positions or employment for job candidates and searching out candidates to become employees for its clients or customers. *Id.* American Beef Processing, LLC (hereinafter “Respondent” or “ABP”) is a Delaware limited liability company which has offices in Oregon and Washington. CP 1, 14.

Opti was retained by ABP to refer candidates to fill ABP’s open positions. CP 33. On October 6, 2009, Tony Garwood signed Opti’s Service Charge Schedule on behalf of ABP. *Id.* The Service Charge Schedule provides that the charge owed to Opti for services provided is based upon 20% of the hired employee’s first year salary. CP 33, 38. Payment is contingent upon hiring a candidate that was referred to the client through Opti’s efforts. *Id.* The schedule further specifically

provides that “the service charge is due and payable on the day our services are rendered, allowing five (5) days from the date of invoice.” *Id.* Services are considered rendered when an offer of employment is made and the candidate accepts the offer. *Id.* Finally, the Service Charge Schedule provides that the acceptance of referrals from Opti is conclusive evidence of the acceptance of the schedule of service charges, terms and conditions, unless the parties have a signed written modification. *Id.*

Respondent argued below that Opti’s services are solely contingency based. CP 55. Opti’s fees are only contingent upon the client hiring the candidate presented for the executive recruiting portion of their business. CP 38, 70. Nowhere in Opti’s standard contract does it state that fees are contingent upon the client’s financial ability to pay. CP 38.

After the Service Charge Schedule was executed, Opti subsequently referred candidate Danny Anderson to ABP for the position of Packaging Engineering Manager. CP 33. Danny was offered a position with ABP, which was accepted. *Id.* Opti issued an invoice to ABP for Danny’s placement in the amount of \$18,000. CP 33, 40. The invoice is dated October 6, 2009, with a due date, pursuant to an agreement between the parties, of November 23, 2009. CP 33-34; 40, 105. The understanding that fees were not due until that date was further evidenced by an e-mail

acknowledging that date from Tony Garwood on October 6, 2009. CP 105.

Payment was not made on November 23, 2009. CP 34. The parties subsequently entered into an Addendum, which bears the date of November 24, 2009. CP 34, 42. That Addendum, signed by Tony Garwood as president of ABP, and by Stuart Lee as a branch manager for Opti, provides in pertinent part as follows:

In consideration of American Beef Processing's *delayed receipt of federal funds*, and services rendered by Opti Staffing Group for the recruitment and identification of Danny Anderson for the Plastic Engineering position with American Beef Processing, *Opti Staffing Group will extend our initially agreed upon payment terms to be payable upon American Beef Processing's receipt of said funds.* Services have been rendered and payment is due at the time funding is received regardless of candidates start date and or execution of originally agreed terms pertaining to Opti Staffing Group's "One time replacement guarantee."

It is our understanding that Danny Anderson is to begin employment on December 1st, 2009, and for purposes of the replacement guarantee this will be the effective date. All terms of the originally agreed guarantee terms will apply.

Id (emphasis added). Opti did not receive additional funds or consideration for the Addendum dated November 24, 2009. CP 34. Payment has not been made for the placement of Mr. Anderson to date. *Id*. ABP has further never received its anticipated funding. CP 51; see *Dep. of Anthony and Julie Garwood* 32:15-20.

Subsequently, Opti referred an additional candidate to ABP for placement, Kevin Bailey. CP 34. Opti issued an invoice to ABP dated January 8, 2010 for Mr. Bailey's placement in the position of Mechanical Fluids Engineer in the amount of \$17,500. CP 34, 44. The parties did not enter into any addendum for delay in payment for placement of Mr. Bailey. CP 35. Payment for Mr. Bailey's placement was not received. *Id.*

B. PROCEDURAL BACKGROUND

Opti filed suit in April, 2011, for breach of contract, unjust enrichment, promissory estoppel, and past due account. CP 1-13. Defendant filed an answer denying the allegations of Opti's complaint, raising the defense that payment was conditioned upon Defendant's own receipt of funds from an outside source. CP 15. Both parties filed competing Motions for Summary Judgment which were heard on September 7, 2012. In support of their motion, Defendant submitted the Declarations of Caryn Binder Lee, a former employee of Opti who was responsible for placing the candidates with Defendant. CP 67-68; 119. Ms. Binder Lee stated in her Declaration that the addendum was meant to operate to allow Defendant to hire employees and ensure that Defendant was not responsible for payment until outside funding was received. CP 68. Respondent argued that Opti's right to payment in the situation presented was contingent upon two occurrences: that candidates were

successfully placed, and that funding was received by Respondent, thereby allowing it to pay its obligation. Following argument, the court denied Opti's Motion for Summary Judgment, and granted ABP's Motion, thereby dismissing the case. CP 122-123. Opti timely filed this appeal. CP 124-127.

IV. ARGUMENT

A. STANDARD OF REVIEW

On review of an order for summary judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

On an appeal, the appellate court must engage in the same inquiry as the trial court, “. . . construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v. City of Seattle*, 148 Wn.App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellested v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716 (1993)). Summary judgment is proper “if reasonable persons could reach

but one conclusion from the evidence presented.” *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Here, the court improperly concluded that a condition precedent existed as to Appellant’s right to payment for services, thereby granting summary judgment in Defendant’s favor. To the contrary, Summary Judgment was appropriate under the facts presented in Appellant’s favor, as Defendant accepted services but failed to pay for them within a reasonable amount of time.

B. RESPONDENT BREACHED THE CONTRACT BETWEEN THE PARTIES BY FAILING TO PAY FOR THE SERVICES RENDERED

“[T]he essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and any failure of any of them to perform constitutes in law, a breach of contract.” *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939). For a contract to exist, there must be an offer, acceptance, and consideration. *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 36, 959 P.2d 1104 (1998). A contract is created if there is an agreement made between competent parties who express definite assent, and there is sufficient consideration in the form required by law. Washington Practice, 25, Contract Law and Practice, citing *Tuition Plan v. Zicari*, 70 Misc.2d 918, 335 N.Y.S.2d 95 (N.Y. Dist. Ct. 1972).

Here, the contract at issue is the Opti Staffing Group Service Charge Schedule, signed by Tony Garwood on October 6, 2009. CP 38. The contract provides that the charge is based upon a percentage of the gross yearly salary to be earned by the candidate employed, and that the payment is due on the day services are rendered. In this case, the parties specifically negotiated a fee of 20% of the gross yearly salary. The contract further provides that the service is rendered when the **client** makes an offer of employment that is accepted by the candidate.

Opti issued an invoice for the placement of Danny Anderson, dated October 6, 2009, presumably the day that an offer was made by ABP and accepted by Mr. Anderson. CP 40. However, Mr. Anderson's start date was not until December 1, 2009. By agreement, Opti delayed the required payment for placing Mr. Anderson until November 23, 2009, as reflected in the invoice and e-mail from Mr. Garwood. CP 40, 105. The invoice total for Mr. Anderson's placement was \$18,000, and there is no dispute that the amount remains unpaid.

Opti subsequently placed Kevin Bailey with ABP, and issued an invoice for that placement on January 8, 2010. CP 44. The due date therein was January 15, 2010. Payment has not been received to date for that invoice, for a total owed of \$17,500.

There is no dispute that Opti provided the services in the form of placement of candidates that were employed by ABP. There is further no dispute as to the amount of the fees under the service charge schedule signed by ABP. Finally, there is no dispute that ABP has not paid any of the charges incurred. The due dates listed on the invoices have long passed, and Respondent ABP is in breach of contract. Summary Judgment for Opti in that regard should have been granted.

C. MODIFICATION OF THE SERVICE CHARGE SCHEDULE WAS NOT SUPPORTED BY CONSIDERATION

ABP argued that the payments under the service charge schedule were not due, pursuant to the addendum signed by Mr. Garwood on behalf of ABP, and Stuart Lee, a branch manager with Opti at the time. CP 42. However, the Addendum was dated and signed well after the October 6, 2009 Service Charge Schedule was signed, and therefore modifies the terms of that contract.

It is well established in Washington that a modification of an existing contract must be supported by new consideration. In *Boardman v. Dorsett*, 38 Wn.App. 338, 685 P.2d 615 (1984), the court clearly and unequivocally stated that "...a subsequent agreement modifying an existing contract must be supported by new consideration independent of the consideration involved in the original agreement." *Id.* at 341. Therein,

the court determined that the Dorsetts' withholding of money for the purchase price of a home for repairs not required by the earnest money agreement was insufficient consideration to support modification of the agreement. *Id.*

Similarly, in *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.2d 791 (2004), the court addressed whether there was adequate consideration when an employer requested an employee execute a noncompetition agreement several years after he was hired. Therein, the court determined as follows:

Independent, additional, consideration is required for the valid formation of a modification or subsequent agreement. There is no consideration when "one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract." *Banchero*, 83 Wn.2d at 273, 517 P.2d 955 (citing 15 Walter H.E. Jaeger, *Williston on Contracts* § 1826 at 487 (3d ed.1972)). Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information. *Schneller*, 176 Wn. at 118-19, 28 P.2d 273. Independent consideration involves new promises or obligations previously not required of the parties.

Labriola, 152 Wn.2d at 834.

Here, the parties signed a Service Charge Schedule which provided that payment was due within five (5) days of offer to and acceptance by a candidate. CP 38. That Schedule bears a date of October 6, 2009. The Addendum dated November 24, 2009 modifies the payment terms of the

October 6 Service Charge Schedule. CP 42. As a modification of that contract, it must be supported by independent consideration. In deposition, Mr. Garwood testified that he did not offer Opti any additional monies or interest in order to induce Opti to sign the Addendum, and that they were not to receive any additional consideration. CP 52, *Dep. of Anthony and Julie Garwood* at 56:24-25; 57:1-11. Because there is no independent consideration to support the Addendum, it is not valid. Summary Judgment in Respondent's favor should not have been granted on a modification that was not supported by independent consideration.

D. OUTSIDE FUNDING TO ABP WAS NOT A CONDITION PRECEDENT FOR PAYMENT TO OPTI

ABP argued that Opti was not entitled to *any* compensation because ABP did not receive its expected financing, and receipt of financing was essentially a condition precedent to any payment to Opti. Specifically, Respondent stated that payment to Opti was contingent upon receipt of funding from an outside source. CP 55, 56.

A condition precedent is an event occurring after the making of a valid contract which must occur before a right to immediate performance arises. *Koller v. Flerchinger*, 73 Wn.2d 857, 860, 441 P.2d 126 (1968); *Silverdale Hotel v. Lomas & Nettleton Co.*, 36 Wn.App. 762, 770, 677 P.2d 773 (1984). Whether a provision in a contract is a condition, the

nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances. *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). Where it is doubtful whether words create a promise (contractual obligation) or an express condition, the court should interpret them as creating a promise. *Id.*

An intent to create a condition is often revealed by such phrases and words as “provided that,” “on condition,” “when,” “so that,” “while,” “as soon as,” and “after.” *Vogt v. Hovander*, 27 Wn. App. 168, 178, 616 P.2d 660, 666 (1979) (citing to *Ross v. Harding*, 64 Wn.2d 231, 237, 391 P.2d 526 (1964)). Here, the addendum relied upon by Respondent nowhere states phrases that reveal an intention to create a condition, but rather states that funding has been delayed, that services have been rendered, and that payment will be made upon receipt of the funding. It should further be strongly noted that conditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain. *Ashburn v. Safeco Ins. Co. of America*, 642 Wn.App. 692, 713 P.2d 742 (1986).

The factual situation presented is remarkably similar to that presented in *O'Brien & Gere Eng'rs. Inc. v. Taleghani*, 540 F. Supp. 1114

(E.D. Pa. 1982), *aff'd*, 707 F.2d 1394 (3d Cir. 1983). Therein, the plaintiff engineers sued the defendant to recover contract damages for engineering services rendered by the plaintiff to the defendant. *Id.* at 1115. A letter agreement between the parties read as follows: “Taleghani-Daftary [‘T-D’] agrees to make payments to O'Brien & Gere Engineers, Inc. in the amount of said \$157,755.19 within fifteen days of the availability of funds....” *Id.* The defendant urged that funds were “available” within the meaning of this language only when T-D had sufficient funds to pay the debt as a result of receiving payment from the Iranian government. *Id.* at 1115-1116. Implicit in the defendant's argument was the contention that the availability of funds from the Iranian government was a *condition* upon the obligation of the defendant to pay. *Id.* at 1116. Because funds never became available from the Iranian government, the defendant asserted that it was excused from paying the plaintiff for its consulting services. *Id.* at 1115.

Similarly here, Respondent argues that payment to Opti is contingent upon its receipt of anticipated funding. Because it never received funding, and presumably now never will, Respondent asserts they are excused from payment for the services.

Citing to the Restatement (Second) of Contracts, the *Taleghani* court held that contrary to the argument of a condition precedent, the

agreement between the parties was an unconditional obligation. It further stated that the language regarding payment from the Iranian government merely fixed the *time* when that unconditional obligation would be definitively paid. *Id.* at 1117. Specifically, the court referenced illustrations to Restatement (Second) of Contracts § 227 as being particularly helpful in explaining its reasoning:

1. A, a general contractor, contracts with B, a subcontractor, for the plumbing work on a construction project. B is to receive \$100,000, “no part of which shall be due until five days after Owner shall have paid Contractor therefore.” B does the plumbing work, but the owner becomes insolvent and fails to pay A. A is under a duty to pay B after a reasonable time.

2. A, a mining company, hires B, an engineer, to help reopen one of its mines for “\$10,000 to be payable as soon as the mine is in successful operation.” \$10,000 is a reasonable compensation for B's service. B performs the required services, but the attempt to reopen the mine is unsuccessful and A abandons it. A is under a duty to pay B \$10,000 after the passage of a reasonable time.

Id. at 1117 (*citing* Restatement § 227, at 176). Ultimately, the court held that “[t]he failure of the time selected to arrive does not excuse the defendant's performance.” *Id.* Thus, the court determined that the defendant was responsible to pay the *full amount* of the contract to the plaintiff *within a reasonable time*. *Id.* “Two and a half years have passed since that time. This clearly exceeds the reasonable time within which the

parties contemplated that the defendant would fulfill his obligation.” *Id.* As a result, the court deemed the obligation immediately due.

As stated, the situation here is essentially the same as the one in *Taleghani*. Like the letter contract at issue in *Taleghani*, the Addendum dated November 24, 2009, merely sets forth the date upon which an unconditional obligation became immediately due. Contrary to ABP’s argument, it is not a condition that must be fulfilled before ABP is required to pay. According to ABP, since anticipated federal funds have not been obtained, ABP is not obligated to pay for the services rendered by Opti. Under the reasoning of *Taleghani*, since funding was not obtained, Opti must be paid “within a reasonable time.” The court in *Taleghani* determined that the passage of two and a half years was more than a reasonable amount of time. Three years have passed since Opti placed candidates with ABP, and thus payment for those services should be immediately due. The court erred when it determined that payment was contingent upon receipt of those funds.

Similarly analogous, in *Jones Assocs., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 468, 704 P.2d 681 (1985), the plaintiff engineering firm entered into a professional services agreement with the defendant real estate developer. *Id.* at 463-64. Under the contract, the plaintiff was to obtain King County’s approval of the defendant’s short plat application

(among other things). *Id.* at 464. King County's approval of the short plat application was never obtained. *Id.* The defendant refused to pay the plaintiff, arguing that the following clause was a condition precedent that had not been satisfied: "Engineer shall be responsible for obtaining King County approval for all platting as set forth above." *Id.* at 465.

The court rejected the defendant's argument, holding that the parties' conduct and other parts of the contract indicated intent that the engineering firm's assumption of responsibility for obtaining county approval of the short plat application was a duty under contract between them, not a condition precedent to payment. *Id.* at 468. The court placed a great deal of importance on the fact that "the relevant provision's language in the second typewritten paragraph under 'Scope of Services' does not expressly indicate that if King County approval was not obtained, Eastside would not be responsible for any costs whatsoever." *Id.* at 467.

Respondents argued that Opti cannot rely upon cases dealing with contractors and engineers, such as the situations raised in *Taleghani* and *Jones*, since the type of services performed are different than engineering and construction work billed by the hour. CP 57. Instead, Respondent reasons that Opti's work is contingent upon placement of an employee, and therefore Opti's efforts in making connections with its clients and candidate placement is essentially less in value than that of an engineer or

contractor. CP 57. Respondent's argument not only is insulting, but ignores the basic fact that Opti did in fact provide services to it in the form of recruiting employees that Respondent did indeed hire.

Respondent's position further ignores the language of the very addendum upon which it relies. Specifically, the Addendum provides that "services have been rendered and payment is due..." CP 42. If ABP truly intended for the addendum to be a condition, they should have expressly stated payment is due "upon condition" of receipt of funds, or some similar language identified by Washington courts which demonstrates an intent to create a condition. Viewing the Service Charge Schedule and Addendum as a whole, there is no evidence indicating that the parties intended that ABP's anticipated financing operated as a condition. *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). This is further evidenced by the specific language in the addendum stating that services were rendered and payment is due.

It should be further noted that the court relied upon the Declarations of Tony Garwood and Caryn Binder Lee in making its determination in Respondent's favor. Extrinsic evidence is generally admissible to construe a written contract and to determine the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). However, parol evidence cannot add to, modify, or contradict the terms of

a fully integrated contract. *Id.* at 670. Thus, the Declarations of Ms. Lee or Mr. Garwood cannot be used to modify or contradict the clear terms of a fully integrated contract. That contract, along with the Addendum, nowhere express that payment was conditional upon an event that may or may not occur. Thus, the court's determination to the contrary is in error.

E. THE ADDENDUM AS A CONDITION PRECEDENT INVOLVES A FORFEITURE AND IS THUS UNENFORCEABLE

If the Addendum is considered a condition precedent, enforcing it involves a forfeiture or penalty. "Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial." *Kaufman Bros. Constr. v. Olney*, 29 Wn.App. 296, 300, 628 P.2d 838 (1981). Thus, assuming the Addendum is a condition, it should not have been enforced as such by the trial court in order to avoid a forfeiture.

Quoting the Restatement (Second) of Contracts § 227(1) (1981), the court in *Jones Assocs., Inc., supra*, stated:

In resolving doubts as to whether an event is made a condition of an obligor's duty, ... an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risks. . . If the event is within [the obligee's] control, he will often assume this risk [of forfeiture]. If it is not within his control, it is sufficiently unusual for him to assume the risk

that, in case of doubt, an interpretation is preferred under which the event is not a condition.

Id. at 469. Here, since obtaining financing for ABP was not within Opti's control, it is sufficiently unusual for it to assume the risk of forfeiture, despite Respondent's argument that it did exactly that. Where doubt exists, as in this case, the preferred interpretation is that the event of financing from an outside party was not a condition to payment to Opti. The court erred when it determined to the contrary.

F. THE ADDENDUM IS ONLY APPLICABLE TO EMPLOYEE DANNY ANDERSON

The trial court applied the condition precedent or "double contingency" argument to both the recruitment of employee Danny Anderson and Kevin Bailey. In doing so, the court committed error.

Assuming *arguendo* that the Addendum operates as a condition precedent to payment for services rendered, then by its very terms the Addendum should only have been applicable to services provided in the placement of Danny Anderson. The Addendum specifically provides in part:

In consideration of American Beef Processing's delayed receipts of federal funds and for services rendered by Opti Staffing Group for the recruitment and identification of Danny Anderson. . .Opti Staffing Group will extend our initially agreed upon payment terms to be payable upon American Beef Processing's receipt of said funds. . .

CP 42. The Addendum goes on to outline Danny's start date of December 1, 2009, and that Opti's replacement guarantee would begin as of that date.

Opti provided a second candidate and employee to ABP, Kevin Bailey, as evidenced by the invoice dated January 8, 2010. CP 44. The parties did not enter into any subsequent addenda for delays in payment for services provided by Opti to ABP in the placement of Mr. Bailey. CP 34-35. As such, the trial court should not have dismissed Opti's claims in relation to services provided for Kevin Bailey, and instead should have awarded Summary Judgment in Opti's favor on that issue.

V. CONCLUSION

The trial court committed errors of law when it awarded Summary Judgment in Respondent's favor rather than for Opti. It improperly determined that Opti's payment for services provided was contingent upon Respondent's receipt of funding from an outside source.

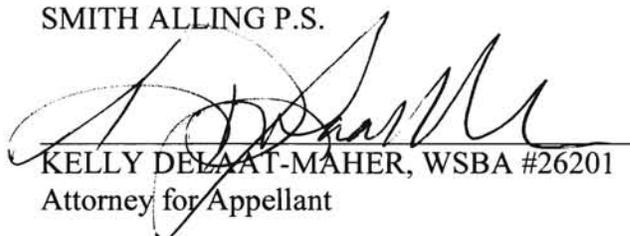
Based upon several factors, Opti requests that this court reverse the summary judgment erroneously awarded in Respondent's favor. First, Respondent breached the contract between the parties in its failure to pay for services rendered. Second, the Addendum upon which Respondent relies was not a valid modification of the contract between the parties as it lacked independent consideration. In the event that the Addendum is not

considered an invalid modification, it does not contain a condition precedent, but rather a date upon which an unconditional obligation became immediately due. Interpreting the addendum as setting a condition precedent to payment results in an impermissible forfeiture. Finally, even assuming the strained interpretation that the addendum did operate as a condition precedent, it did not, according to its very terms, apply to any employee other than Danny Anderson. Payment for Kevin Bailey's placement, at a minimum, are owed to Opti.

In addition to reversing Summary Judgment in Respondent's favor, Opti requests that the court remand for entry of Summary Judgment in its favor, to include prejudgment interest, as no material issues of fact exist warranting denial.

RESPECTFULLY SUBMITTED this 21 day of December, 2012.

SMITH ALLING P.S.



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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2012, I caused to be served a true and correct copy of [this] Brief of Appellant upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 21st day of December, 2012.



Joseph M. Salonga