

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

|                               |   |                           |
|-------------------------------|---|---------------------------|
| BILL MILLENKAMP and SUSIE     | ) |                           |
| MILLENKAMP, husband and wife, | ) | Case No. CIV 03-439-S-EJL |
| d/b/a MILLENKAMP CATTLE,      | ) |                           |
|                               | ) |                           |
| Plaintiffs,                   | ) | MEMORANDUM DECISION       |
| v.                            | ) | AND ORDER                 |
|                               | ) |                           |
| DAVISCO FOODS                 | ) |                           |
| INTERNATIONAL, INC., a        | ) |                           |
| a Minnesota Corporation; and  | ) |                           |
| CARGILL INCORPORATED, a       | ) |                           |
| Delaware Corporation,         | ) |                           |
|                               | ) |                           |
| Defendants.                   | ) |                           |
|                               | ) |                           |

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Pending before the Court in the above entitled matter are each of the parties' respective motions for reconsideration of the Court's order on summary judgment and . The parties have filed their responsive briefing and the matters are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

**Standard of Law**

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider. However, the Ninth Circuit has stated that motions to reconsider

should be treated as motions to alter or amend under Federal Rule of Civil Procedure 59(e). Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984). The scope and purpose of such a motion have been analyzed as follows:

Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. (Citations omitted). These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. (Citations omitted). Moreover they cannot be used to argue a case under a new legal theory. (Citations omitted).

Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986);

Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.

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[A] rehash of the arguments previously presented affords no basis for a revision of the Court's order.

Illinois Central Gulf Railroad Company, v. Tabor Grain Company, 488 F.Supp. 110, 122 (N.D. Ill. 1980).

Where Rule 59(e) motions are merely being pursued “as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under Rule 59(e)” and must therefore be dismissed. Davis v. Lukhard, 106 F.R.D. 317, 318 (E.D. Va. 1984). See also, Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983) (“Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought -- rightly or wrongly.”). The Ninth Circuit has identified three reasons sufficient to warrant a court’s reconsideration of a prior order: (1) an intervening change

in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Upon demonstration of one of these three grounds, the movant must then come forward with “facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” Donaldson v. Liberty Mut. Ins. Co., 947 F. Supp. 429, 430 (D. Haw. 1996).

### **Discussion**

1) Davisco Motion to Reconsider:

Defendant Davisco Foods International, Inc. (“Davisco”) has filed its motion for reconsideration and/or clarification of the Court’s ruling regarding the Plaintiffs’ express and implied warranty claims. In particular the motion states that “the Court may have inadvertently considered Davisco’s motion for summary judgment as a motion for partial summary judgment” in that the order did not address the motion for summary judgment as to the breach of warranty claims. As such, Davisco now asks the Court to consider and dismiss Plaintiffs’ remaining warranty claims because the causation element is lacking. To this end, Davisco relies on the previously filed motion regarding destruction or spoliation of evidence and motions to strike affidavits and deposition testimony. Plaintiffs assert the motion incorporate Davisco’s motion to strike challenging the credibility but not admissibility of Plaintiffs’ expert witness.

The claims remaining after summary judgment are breach of express warranty and breach of implied warranty of fitness for a particular purpose. The evidence and testimony going to the causation issue was hotly contested in the parties’ briefing on the motion for summary judgment. Unlike the negligence claims, the Court cannot find as a

matter of law that these claims should not go forward. Following the decision on the motions for summary judgment, the Court ruled upon Davisco's motion for sanctions for spoliation of evidence. (Dkt. No. 108). While ultimately denying the motion for sanctions, the Court noted that Plaintiffs have the burden of proving their allegations by a preponderance of the evidence to which Davisco will be able to challenge by way of cross examination and other methods. Because these claims present questions of fact which must be left for a jury, the Court denies Davisco's motion for summary judgment as to the breach of warranty claims.

2) Plaintiffs' Motion to Reconsider:

Plaintiffs' motion to reconsider asks the Court to review its determination dismissing the negligence claims finding that the lost cattle were economic damages rather than property damages. Citing to a recent Idaho Supreme Court case, Blahd v. Smith, 108 P.3d 996 (Idaho 2005), they argue the lost cattle here are neither the subject of the transaction nor the subject of the law suit. Because the cattle are property and can be recovered in a negligence claim, Plaintiffs ask the Court to reinstate their negligence claims for trial. Davisco opposes the motion, noting it is untimely, and that the arguments should have been raised in response to the motion for summary judgment.

On the motion for summary judgment Plaintiffs did not argue the cattle were property damage but, instead, economic loss which fell under the special relationship or unique circumstances exceptions to the economic loss rule. The Court concluded that neither exception applied and, therefore, the cattle were economic loss not recoverable through a negligence claim; granting Davisco summary judgment as to Plaintiffs' negligence claims. In arriving at this conclusion the Court analyzed and discussed the

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Blahd case. Plaintiffs seek to now argue the cattle were property damage pursuant to the reasoning in Blahd and thus recoverable under negligence. Having reviewed the parties' arguments and the Court's previous order, the Court denies the motion. The motion is procedurally defective in that it is untimely<sup>1</sup> and seeks to raise a new argument which could have and should have been raised in response to the motion for summary judgment. Davisco clearly raised the argument regarding property versus economic damage in their opening memorandum on summary judgment. Plaintiffs argued the cattle were economic losses falling within an exception to the rule. The parties' arguments here again evidence the disagreement as to what is the "subject of the transaction/lawsuit;" either the feed or the lost cattle. The Court considered these arguments in ruling on the motion for summary judgment. Because no newly discovered law or facts have been presented here, the Court denies the motion to reconsider.

3) Davisco's Motion to Extend Time:

Davisco has recently filed a motion to extend time to allow them to file pretrial motions, including motions in limine, through December 16, 2005. The trial date in this matter has been continued several times and is currently set for January 17, 2006. The Court finds the interests of justice warrant extending the time for filing only motions in limine for both parties to December 16, 2005. As such, Davisco's motion in limine is under advisement until such time as the parties have filed responsive briefing or until the time for filing such briefing has expired.

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Any motion made pursuant to Rule 59(e) must be made within ten days. Motions raised pursuant to Rule 60 must be made within a reasonable time. The Court's order was issued on June 20, 2005. Plaintiff did not file their motion for reconsideration until July 13, 2005, some twenty plus days after the order was issued.

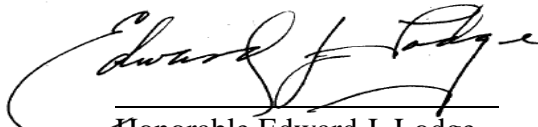
**ORDER**

Based on the foregoing and being fully advised in the premises, the Court **HEREBY ORDERS** as follows:

- 1) Defendant Davisco's Motion for Reconsideration (Dkt. No. 91) is **DENIED**.
- 2) Plaintiffs' Motion for Reconsideration (Dkt. No. 97) is **DENIED**.
- 3) Defendant Davisco's Motion for Extension of Time to File Motion in Limine (Dkt. No. 114) is **GRANTED**. The Court has the Motion in Limine (Dkt. No. 116) **UNDER ADVISEMENT**.



DATED: **December 1, 2005**

  
Honorable Edward J. Lodge  
U. S. District Judge