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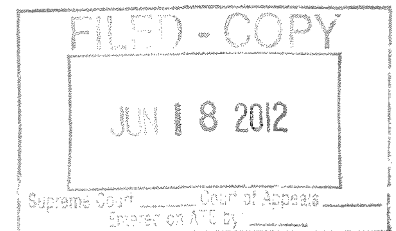
IN THE SUPREME COURT OF THE STATE OF IDAHO

SILICON INTERNATIONAL ORE, LLC, Plaintiff-Appellant, vs. MONSANTO COMPANY and WASHINGTON GROUP INTERNATIONAL, INC., Defendants-Respondents.	**Supreme Court Docket No. 39409-2011**



RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Caribou County
Honorable Mitchell W. Brown, District Judge, Presiding

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vs.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves a claim by Appellant Silicon International Ore, LLC ("SIO") that it was entitled to purchase silica sand in perpetuity from a quartzite mine owned by Respondent Monsanto Company ("Monsanto"). When it was denied access to this silica sand, SIO sought damages through this litigation.

As against Monsanto, SIO claimed entitlement to this alleged perpetual right to purchase silica sand based on a number of alternative theories.[1] First, SIO alleged that Monsanto verbally agreed to this perpetual arrangement.[2] Alternatively, SIO alleged that Monsanto was estopped from denying it access to the silica sand based upon equitable estoppel and quasi-estoppel.

Monsanto filed for summary judgment, arguing that no verbal agreement was ever reached between the parties and that any verbal agreement was unenforceable because it violated the statute of frauds set forth in I.C. § 28-2-201(1) and because its essential terms were vague, indefinite and uncertain. Monsanto also argued that SIO's causes of action for equitable estoppel or quasi-estoppel should be dismissed.

After the district court granted summary judgment in favor of Monsanto, SIO appealed.

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[1] In this litigation, SIO also asserted claims against Respondent Washington Group International, Inc. Those claims will not be addressed in this brief.

[2] Throughout the Appellant's Opening Brief, SIO refers to this as "the contract" without properly clarifying that it was alleged to be only a "verbal" agreement.

II. STATEMENT OF THE FACTS

A. Operation of Quartzite Mine by WGI under First Quartzite Agreement

Monsanto through its wholly owned subsidiary P4 Production owns a quartzite mine near Soda Springs, Idaho.[3] Since 1988, Monsanto has contracted with Respondent Washington Group International, Inc. ("WGI") to operate this quartzite mine.[4] WGI operated the quartzite mine under a Quartzite Agreement executed between it and Monsanto (hereinafter "First Quartzite Agreement").[5]

Quartzite is commonly known as silica.[6] WGI's operation of this quartzite mine generated silica that was too small to be used in Monsanto's manufacturing process.[7] This byproduct is commonly referred to as silica sand.[8]

B. Written Contracts for Sale of Processed Silica Sand to SIO

In early 2000, SIO contacted Monsanto expressing an interest in acquiring silica sand.[9] Monsanto and WGI jointly met with SIO to discuss SIO's proposal and business plan to market silica sand for use in such things as playgrounds, golf courses, asphalt, grout and stucco.[10]

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[3] R. Vol. 2, pp. 138, 145.

[4] *Id.* at pp. 138, 145-202. Note that the record contains a Quartzite Agreement executed in 1993 between Monsanto and WGI (fka Conda Mining Inc.). *Id.* at pp. 139, 145. The first page of this 1993 Quartzite Agreement indicates that WGI had been operating the quartzite mine since 1988. *Id.* at p. 145.

[5] *Id.* at pp. 145-202. Please note that this was not the "First" Quartzite Agreement between Monsanto and WGI. *See* footnote 4. The term "First" is used in this brief with regard to this Quartzite Agreement merely for purposes of contrasting it with a subsequent Quartzite Agreement discussed later in this brief.

[6] *Id.* at p. 138.

[7] *Id.* at pp. 138-39.

[8] *Id.*

On May 3, 2000, after initial discussions and completion of feasibility studies, SIO delivered a proposed contract to Monsanto.[11] The proposed contract was drafted by SIO.[12] The terms of the proposed contract required (1) that SIO would purchase the silica sand directly from Monsanto; (2) that Monsanto would at its expense provide SIO with a building and the land necessary to process the silica sand; (3) that SIO would purchase a minimum of 500 tons of silica sand in the first year and more in the following years; and (4) that the agreement would remain effective for twenty (20) years.[13]

Monsanto did not execute SIO's proposed contract.[14] Although it was amenable to making silica sand available to SIO, Monsanto was not interested in doing so under the proposed terms. Among other terms Monsanto would not accept, Monsanto was not interested in selling the silica sand directly to SIO which would effectively bypass WGI, who at that time had been operating the quartzite mine for over twelve (12) years.[15]

Therefore, it was decided that SIO should contract directly with WGI instead of Monsanto to acquire the silica sand.[16] This required the execution of an addendum to the First

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[9] *Id.* at p. 140.
[10] *Id.* at pp. 140, 197.
[11] *Id.* at pp. 140, 236-38. The proposed contract identified "Solutia Inc." as the seller of the silica sand. Monsanto was operating the quartzite mine under that name at that time. *Id.*
[12] *Id.* at p. 140.
[13] *Id.* at pp. 140, 236-38.
[14] *Id.* at p. 140.
[15] *Id.*
[16] *Id.* at pp. 140, 240.

Quartzite Agreement between Monsanto and WGI, the execution of a contract between WGI and SIO, and the execution of a Confidentiality Agreement.

On November 29, 2000, Monsanto and WGI executed an Addendum to Quartzite Agreement (hereinafter "First Addendum") pursuant to which (1) WGI was authorized to construct and operate a silica sand processing facility at the quartzite mine to be used to process and bag silica sand; and (2) WGI was required to pay Monsanto $13.00 per ton of "finished" silica sand "sold by [WGI] to a third party."[17] The addendum provided that WGI "anticipate[d] entering into one or more contracts with [SIO] related to ... the sale of the processed silica sand."[18]

Two days later on December 1, 2000, SIO and WGI executed a Master Agreement pursuant to which (1) WGI agreed to provide "a portion of the silica sand within its control" to SIO; (2) SIO agreed to pay for the construction of a processing plant for the silica sand; (3) SIO agreed to also pay WGI to operate the processing plant to dry, screen, and bag the silica sand; (4) SIO agreed to also pay WGI an additional $13.00 per ton for the processed silica sand; and (5) WGI agreed to load the bagged silica sand onto trucks provided by SIO.[19] Pursuant to paragraph 7 of the Master Agreement, title to the silica sand passed to SIO upon delivery of the silica sand by WGI.[20] Lastly, by its own terms, the Master Agreement was effective for a period of only

[17] *Id.* at pp. 174-75.
[18] *Id.* at p. 175.
[19] *Id.* at pp. 204-13.
[20] *Id.* at p. 206.

five (5) years, unless otherwise agreed in writing by the parties.[21] Because the Master Agreement contemplated the transfer of title to the silica sand for a price, it clearly contemplated that WGI would be selling processed silica sand to SIO.[22]

On December 19, 2000, Monsanto and SIO executed a Confidentiality Agreement wherein they both agreed to keep confidential all information obtained from the other concerning their respective business operations.[23]

On this same day, December 19, 2000, Robert Sullivan, who had signed the Master Agreement on behalf of SIO,[24] sent a letter to Monsanto in which he expressed his satisfaction with the Master Agreement and stated, "we are pleased that the intent seems to be a long-term relationship."[25] Whatever Mr. Sullivan may have intended by this statement, the Master Agreement, which he had signed only eighteen (18) days previously, clearly provided that the relationship was for only a five-year period. As a matter of law, Mr. Sullivan's letter did not extend the Master Agreement beyond that five-year period.

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[21] *Id.* at p. 207. It is undisputed that the parties never agreed in writing to extend this five-year period.
[22] *Id.* at p. 206. SIO's contention that the Master Agreement did not provide for the "sale" of silica sand is erroneous. *See* Appellant's Opening Brief at 7. Article 2 of the Uniform Commercial Code defines a "sale" as "the passing of title from the seller to the buyer for a price." I.C. § 28-2-106(1). This is exactly what the terms of the Master Agreement provided.
[23] *Id.* at pp. 216-216 (Note that the Confidentiality Agreement consists of two pages. Both pages are labeled by the record clerk as page "216").
[24] *Id.* at p. 210.
[25] R. Vol. 3, p. 449.

C. Execution of the Second Quartzite Agreement and Second Addendum

The First Quartzite Agreement was by its terms to expire at the end of 2002.[26] Monsanto and WGI decided to renew their First Quartzite Agreement prior to its expiration. Accordingly, on September 24, 2001, Monsanto and WGI executed a new Quartzite Agreement for an additional seven (7) year period (hereinafter "Second Quartzite Agreement").[27] Pursuant to its terms, the Second Quartzite Agreement terminated and replaced the First Quartzite Agreement.[28]

On March 1, 2002, Monsanto and WGI executed a new Addendum to Quartzite Agreement (hereinafter "Second Addendum") which terminated and replaced the First Addendum.[29] The terms of the Second Addendum were materially identical to the terms of the First Addendum, except that the Second Addendum provided (1) that WGI would pay Monsanto between $3.00 to $13.00 per ton of processed silica sand based upon particle size which was either "sold by SIO" or "used by [WGI] itself"; and (2) that "[t]itle to the silica sand sold by SIO shall pass directly from [Monsanto] to SIO upon processing ... subject to payment."[30] The Second Addendum also provided that Monsanto would with certain conditions "make available sufficient feed sand to allow SIO to sell up to 25,000 tons per year of product sand."[31]

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[26] R. Vol. 2, p. 149.
[27] *Id.* at pp. 177-202.
[28] *Id.* at p. 177.
[29] *Id.* at pp. 194-97.
[30] *Id.*
[31] *Id.* at p. 197.

D. SIO's Business Operation under the Master Agreement

Sometime after executing the Master Agreement with WGI on December 1, 2000, SIO set up its operations in the quartzite mine.[32] In conformance with the terms of the Master Agreement, SIO purchased processed silica sand directly from WGI and in returned tendered the agreed upon price per ton to WGI.[33] At no time did SIO ever tender any payments directly to Monsanto.[34]

SIO's business was commercially unsuccessful. Its own records reveal that it failed to make any profit during any year of its operation.[35] SIO's yearly operating loss was between ($97,598) and ($132,525).[36]

Although the Master Agreement between WGI and SIO expired by its terms on December 1, 2005, WGI continued selling processed silica sand to SIO for an additional two years.[37] However, by letter dated December 28, 2007, WGI notified SIO that it would no longer be providing processed silica sand to SIO after the year end.[38]

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[32] *Id.* at p. 140; R. Vol. 3, p. 360.
[33] R. Vol. 2, pp. 140-41.
[34] *Id.* at p. 141.
[35] R. Vol. 3, pp. 296-301, 339-40.
[36] *Id.*
[37] R. Vol. 2, pp. 141, 207. Although the Master Agreement between WGI and SIO expired by its own terms on December 1, 2005, the Second Addendum between WGI and Monsanto reference sand availability and payments through the end of 2007. R. Vol. 2, p. 197. This would explain why WGI was able to sell silica sand to SIO through the end of 2007 despite the expiration of the Master Agreement.
[38] *Id.* at p. 218.

After various discussions and emails, Monsanto delivered a letter to SIO advising SIO that it would be permitted to continue processing and bagging silica sand through April 29, 2008.[39] Monsanto advised that it would not provide any additional silica sand to SIO after that date.[40] Thereafter, SIO dismantled its operations in the quartzite mine and removed its buildings and equipment.[41] After SIO dismantled its operations, Monsanto and WGI have not operated a silica sand processing business in the quartzite mine.[42]

III. COURSE OF PROCEEDINGS

On December 31, 2009, SIO filed a Complaint against Monsanto and WGI seeking damages for what it believed was a violation of its alleged right to continue purchasing processed silica sand from the quartzite mine.[43] Despite having not made any profit in seven (7) years, SIO sought to recover $4,729,000 for damages allegedly incurred through October 2011, an additional $991,401 in prejudgment interest, and an additional $25,607,000 for alleged future lost profits.[44]

Ignoring Monsanto's refusal to execute SIO's draft contract and also the written contract between itself and WGI, SIO alleged in its Complaint that SIO and Monsanto had entered into a *separate* verbal agreement with Monsanto for the purchase and sale of the very *same* silica sand

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[39] *Id.* at p. 231.
[40] *Id.*
[41] *Id.* at p. 141.
[42] *Id.*
[43] R. Vol. 1, pp. 1-20.
[44] R. Vol. 3, pp. 409-14; R. Vol. 4, pp. 664-68.

it had entered into a written agreement to acquire from WGI.[45] SIO claimed that this alleged *separate* and *duplicative* verbal agreement consisted of the following terms:

(1) Monsanto agreed that it would furnish SIO with "certain agreed-upon quantities" of silica sand and allow SIO to process that silica sand;[46]

(2) SIO agreed that it would pay Monsanto in "agreed-upon amounts" for the silica sand, would comply with all applicable environmental, safety and control regulations, and would comply with limitations imposed by Monsanto with regard to markets in which SIO would sell the processed silica sand;[47]

(3) Monsanto agreed that SIO would be entitled to receive silica sand *indefinitely*[48] so long as SIO did not breach any of the aforementioned terms;[49] and

(4) Monsanto agreed that it "would not abruptly terminate its agreement within a few years after SIO had commenced its business."[50]

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[45] R. Vol. 1, pp. 1-20.
[46] R. Vol. 1, pp. 3-4 (Complaint at ¶11); R. Vol. 3, pp. 438-46 (Affidavit of Todd Sullivan at ¶4).
[47] *Id.*
[48] In paragraphs 27 and 28 of the Complaint, SIO alleges that the duration of the verbal agreement was "*perpetual*" and "*open-ended*." R. Vol. 1, p. 7 (italics added). Notwithstanding, SIO appears to have change its position on appeal by arguing that "[t]he evidence before the district court on summary judgment was that Monsanto, like SIO, contemplated a long-term relationship—not necessarily perpetual…of something more than seven years." Appellant's Opening Brief at p. 24.
[49] R. Vol. 1, pp. 3-4 (Complaint at ¶11); R. Vol. 3, pp. 438-46 (Affidavit of Todd Sullivan at ¶4).

SIO claimed that this alleged verbal agreement remained enforceable separate and apart from its subsequently executed Master Agreement with WGI.[51] Even though the Master Agreement was rightfully terminated by WGI after expiration of its five-year term and SIO does not challenge that fact on appeal, SIO claims that the alleged verbal agreement with Monsanto remains *separately* enforceable – *indefinitely.*

Based upon the alleged the verbal agreement, SIO asserted four causes of action against Monsanto: (a) breach of the alleged verbal agreement with Monsanto; (b) breach of the implied covenant of good faith and fair dealing under the verbal agreement; (c) equitable estoppel, and (d) quasi-estoppel.[52] On February 26, 2010, Monsanto filed its Answer, generally denying SIO's claims and asserting certain affirmative defenses including a defense based upon the statute of frauds set forth in I.C. § 28-2-201(1).[53]

On January 25, 2011, Monsanto filed a Motion for Summary Judgment, arguing (1) that the verbal contract alleged by SIO was unenforceable under the statute of frauds set forth in I.C.

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[50] R. Vol. 1, p. 5 (Complaint at ¶17); R. Vol. 3, p. 440 (Affidavit of Todd Sullivan at ¶8). It should be noted that SIO incorrectly suggests on page 15 of its Opening Brief that there are additional terms in the alleged verbal agreement whereby Monsanto agreed (1) to permit SIO to build, operate and access a silica sand processing plant, and (2) to furnish sand "in quantities sufficient for [SIO] to meet its business need." SIO claims that these additional terms are supported by the record at pages R. 438-39 and 443-46. However, a review of those pages from the record readily reveals that these additional alleged terms are neither mentioned nor supported. Therefore, they should be disregarded for purposes of this appeal.
[51] R. Vol. 1, pp. 1-20 (Complaint).
[52] *Id.* SIO also asserted certain causes of action against WGI. Those causes of action will not be addressed in this brief.
[53] *Id.* at p. 36.

§ 28-2-201(1); (2) that the verbal agreement alleged by SIO was unenforceable because the terms as alleged were vague, indefinite and uncertain; (3) that SIO could not prove damages because it never generated a profit; (4) that SIO did not have the proper corporate status to file the lawsuit; and (5) that SIO's causes of action for equitable estoppel or quasi-estoppel should be dismissed.[54] On April 29, 2011, SIO filed an Opposition to the Motion for Summary Judgment.[55] On May 6, 2011, Monsanto filed a Reply.[56]

In support of its Opposition to the Motion for Summary Judgment, SIO filed an Affidavit of Todd Sullivan.[57] In paragraph 6 of the affidavit, Mr. Sullivan testifies about statements contained within an email dated March 14, 2008 that he purportedly received from Mr. Hart years after Mr. Hart's employment with Monsanto had ended (hereinafter "Hart's 3/14/2008 email").[58] A copy of the email was attached to the affidavit.[59] On May 6, 2011, Monsanto filed a Motion to Strike from this affidavit any reference to statements made in Hart's 3/14/2008 email on the basis that they constituted inadmissible hearsay.[60] On May 13, 2011, SIO filed an

[54] *Id.* at pp. 79-97; R. Vol. 5, pp. 724-38.
[55] R. Vol. 3, pp. 357-89.
[56] R. Vol. 5, pp. 724-38.
[57] R. Vol. 3, p. 439.
[58] *Id.*
[59] *Id.* at pp. 447-48.
[60] R. Vol. 5, pp. 752-60. Monsanto's Motion to Strike also sought to exclude other emails mentioned in affidavits filed by SIO in opposition to summary judgment. The district court denied the motion with regard to those other emails. Monsanto does not challenge that decision on appeal.

Opposition to the Motion to Strike, arguing that the email was not hearsay and alternatively was admissible under the residual hearsay exception found in I.R.E. 803(24).[61]

On May 13, 2011, a hearing on Monsanto's Motion for Summary Judgment and Motion to Strike was held.[62] At the conclusion of the hearing, the district court took the matter under advisement.[63]

On September 21, 2011, the district court entered its Memorandum Decision and Order, granting the Motion to Strike with regard to Hart's 3/14/2008 email and granting summary judgment in favor of Monsanto. With regard to the Motion to Strike, the district court granted the motion and excluded from Mr. Sullivan's affidavit the reference to Hart's 3/14/2008 email on the basis that it constituted hearsay which did not fit within the residual hearsay exception of I.R.E 803(24).[64]

With regard to the Motion for Summary Judgment, the district court dismissed SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing on the basis that the underlying verbal agreement as alleged by SIO was unenforceable pursuant to the statute of frauds in I.C. § 28-2-201(1).[65] The district court also granted summary judgment as to SIO's causes of action for equitable estoppel and quasi-estoppel on the basis that the underlying verbal agreement which SIO sought to enforce under

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[61] *Id.* at pp. 761-70.
[62] *Id.* at pp. 771-72.
[63] *Id.*
[64] *Id.* at pp. 782-83.
[65] *Id.* at pp. 786-89.

those theories was unenforceable because its essential terms were vague, indefinite and uncertain.[66]

On October 7, 2011, the district court entered Judgment in accordance with its Memorandum Decision and Order.[67] On November 18, 2011, SIO filed its Notice of Appeal.[68]

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[66] *Id.* at pp. 789-92.
[67] *Id.* at pp. 799-801.
[68] *Id.* at pp. 802-07.

ISSUES PRESENTED ON APPEAL

1. Whether the district court properly granted summary judgment as to SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing on the basis that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1)?

2. Whether the district court's grant of summary judgment as to SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing can be affirmed on the alternative ground that the alleged verbal agreement was enforceable due to its essential terms being vague, indefinite and uncertain?

3. Whether the district court properly considered Monsanto's motion for summary judgment with regard to SIO's causes of action for equitable estoppel and quasi-estoppel?

4. Whether the district court properly granted summary judgment as to SIO's cause of action for equitable estoppel?

5. Whether the district court properly granted summary judgment as to SIO's cause of action for quasi-estoppel?

6. Whether the district court's grant of Monsanto's Motion to Strike with regard to Hart's 3/14/2008 email should be affirmed?

7. Whether Monsanto is entitled to attorney fees and costs on appeal?

STANDARD OF REVIEW

I. SUMMARY JUDGMENT

The Idaho Supreme Court "reviews appeals from an order of summary judgment *de novo*." *Stonebrook Constr., LLC v. Chase Home Finance, LLC*, 2012 Idaho LEXIS 106, Docket No. 37868 (Idaho Sup. Ct. April 26, 2012). A trial court's grant of summary judgment is reviewed under the same standard applied by the trial court. *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Under this standard, a reviewing court will construe all disputed facts and make all reasonable inferences in favor of the nonmoving party. *Sprinkler Irr. Co. v. John Deere Ins. Co.*, 139 Idaho 691, 695-96, 85 P.3d 667, 671-72 (2004). Where "the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

II. MOTION TO STRIKE

"The admissibility of evidence under I.R.C.P. 56(e) is a threshold question the trial court must analyze before applying the rules governing motions for summary judgment." *Herrera v. Estay*, 146 Idaho 674, 680, 201 P.3d 647, 654 (2009). "The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible." *Id.* "The admission of evidence is committed to the discretion

of the trial court." *Id.* This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Shane v. Blair*, 139 Idaho 126, 128, 75 P.3d 180, 182 (2003). Thus, this Court considers whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason. *Herrera*, 146 Idaho at 680, 201 P.3d at 654.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO SIO'S CAUSES OF ACTION FOR BREACH OF THE ALLEGED VERBAL AGREEMENT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ON THE BASIS THAT THE ALLEGED VERBAL AGREEMENT WAS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS IN I.C. § 28-2-201(1).

SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing are both contingent upon the enforceability of the alleged verbal agreement with Monsanto. On summary judgment, the district court concluded that the verbal agreement was unenforceable under the statute of frauds set forth in I.C. § 28-2-201(1), which provides in pertinent part the following:

> [A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

The district court found that no genuine issues of material fact existed with regard to the fact that the alleged verbal agreement was "a contract for the sale of goods for the price of $500 or more"

and that no document signed by Monsanto existed which evidenced the alleged agreement.[69] Based upon those findings, the district court concluded that the verbal agreement was unenforceable under I.C. § 28-2-201(1). The conclusion of the district court should be affirmed.

A. The district court correctly found that the verbal agreement alleged by SIO was "a contract for the sale of goods" for purpose of Article 2 of the Idaho Uniform Commercial Code and I.C. § 28-2-201(1).

On appeal, SIO argues that the district court erred in finding that the alleged verbal agreement was "a contract for the sale of goods" for purposes of Article 2 of the Idaho Uniform Commercial Code and I.C. § 28-2-201(1). SIO's argument is without merit.

First, SIO argues that the verbal agreement was not "a contract for the sale of goods" solely because the verbal agreement included both "sale" and "non-sale" terms.[70] SIO admits that the verbal agreement involved the sale of goods by alleging Monsanto agreed to supply silica sand to SIO and SIO agreed to pay Monsanto for that silica sand.[71] SIO also admitted in its opposition to summary judgment that "SIO paid Monsanto directly in exchange for sand sold by Monsanto."[72] Notwithstanding this admission, SIO claims that the alleged verbal agreement was not "solely for the sale of goods."[73] SIO claims that, in addition to involving the sale of goods, the verbal agreement also included additional "non-sale" terms, such as: (1) SIO agreeing

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[69] R. Vol. 5, pp. 786-89.
[70] Appellant's Opening Brief at pp. 15-19.
[71] *Id.* at p. 15; *see also* R. Vol. 1, pp. 3-4 (Complaint).
[72] R. Vol. 3, p. 383 (underline added). SIO claims that it "paid Monsanto directly" is not supported by the record. The undisputed evidence in the record is that all payments made by SIO for silica sand were tendered to WGI and not to Monsanto. R. Vol. 2, pp. 140-41.
[73] *Id.*

to comply with all applicable environmental, safety and control regulations; (2) SIO agreeing to comply with restrictions on the markets in which SIO would sell the processed silica sand; (3) Monsanto agreeing to allow SIO to process the silica sand; and (4) Monsanto agreeing to provide silica sand to SIO indefinitely so long as SIO did not breach the terms of the alleged verbal agreement.[74] SIO appears to argue that the mixture of both "sale" and "non-sale" terms in the alleged verbal agreement automatically precludes it from being considered "a contract for the sale of goods" for purposes of Article 2 of the Idaho Uniform Commercial Code. SIO cites no case law supporting this position.

Second, SIO alternatively argues that the alleged verbal agreement is not "a contract for the sale of goods" because its "heart" is somehow not the sale of silica sand from Monsanto to SIO. SIO claims that "the SIO/Monsanto [verbal] contract does not, *at its heart*, concern the sale of sand" but is instead an agreement "permitting SIO to operate a business."[75] Based upon its belief that the "heart" of the alleged verbal agreement was not the sale of silica sand, SIO argues that the verbal agreement is therefore not "a contract for the sale of goods" for purposes of Article 2 of the Idaho Uniform Commercial Code.[76] Again, SIO cites no case law supporting this position.

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[74] Appellant's Opening Brief at pp. 15-16, 19. *See also* footnotes 48 and 50 above.
[75] *Id.* at p. 16 (italics added).
[76] *Id.*

For the following reasons, this Court should reject SIO's arguments that the alleged verbal agreement was not "a contract for the sale of goods" because it included "non-sale" terms, or alternatively, because its "heart" was not the sale of goods.

First, the verbal agreement as alleged by SIO can be construed as nothing more and nothing less than an alleged sale of silica sand with supplemental sale terms allowing for the processing and resale of that same silica sand. Thus, it cannot be disputed that the alleged agreement involves the sale of goods. "It is clear that if the underlying transaction to the contract involves the sale of goods, the UCC would apply." *Fox v. Mountain West Electric, Inc.*, 137 Idaho 703, 709, 52 P.3d 848, 854 (2002); *see also* I.C. § 28-2-102. Because the verbal agreement as alleged by SIO involves the sale of goods, there can be no question that it is "a contract for the sale of goods" subject to Article 2 and its statute of frauds in I.C. § 28-2-201(1). On this basis alone, SIO's arguments should be rejected.

Second, even if the alleged verbal agreement is construed to contain both "sale" and "non-sale" terms, SIO's arguments should still be rejected. The Idaho Supreme Court has had occasion to consider the application of Article 2 of the Idaho Uniform Commercial Code to contracts that involve both the "sale of goods" falling within the scope of Article 2 and other provisions which in isolation may not be subject to Article 2 of the Idaho Uniform Commercial Code. Such contracts are referred to as involving a "hybrid transaction." *Fox*, 137 Idaho at 709, 52 P.3d at 854; *see also Pittsley v. Houser,* 125 Idaho 820, 822, 875 P.2d 232, 234 (Ct. App. 1994). When presented with a hybrid transaction, the district court looks past the fact that there is a mix of "sale" terms and "non-sale" or "non-goods" terms and instead simply "look[s] at the

predominant factor of the transaction to determine if the UCC applies." *Fox*, 137 Idaho at 710, 52 P.3d at 855.

> The test for inclusion or exclusion [with regard to the UCC] is not whether [the terms] are mixed, but, granting that they are mixed, whether their **predominant factor**, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction for sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). This test essentially involves consideration of the contract in its entirety, **applying the UCC to the entire contract or not at all.**

Id. (quoting *Pittsley*, 125 Idaho at 822, 875 P.2d at 234)(emphasis added).[77]

The legal standard from the *Fox* case disposes of SIO's first argument that the alleged verbal agreement is automatically not "a contract for the sale of goods" because it includes both "sale" and "non-sale" terms. As stated in *Fox* and quoted above, "The test for inclusion or exclusion [within the Idaho UCC] is not whether [the terms] are mixed." *Fox*, 137 Idaho at 710, 52 P.3d at 855 (quoting *Pittsley*, 125 Idaho at 822, 875 P.2d at 234 (emphasis added). As a matter of law, a contract is not automatically precluded from the application of Article 2 of the Idaho Uniform Commercial Code simply because it may include both "sale" and "non-sale" terms.

The legal standard from the *Fox* case also disposes of SIO's second argument that the alleged verbal agreement is not "a contract for the sale of goods" because its "heart" was not the

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[77] This "predominant factor" test has been consistently applied by Idaho appellate courts whenever a single contract involves both the sale of "goods" within the scope of Article 2 and other terms that independently may not fall within the scope of Article 2. *See, e.g., Apple's Mobile Catering, LLC v. O'Dell*, 149 Idaho 211, 233 P.3d 142 (2010)(holding that UCC applied to entire contract even though goodwill is not a "good" within the scope of Article 2 because the predominant factor of the transaction was the sale of "goods" falling with the scope of Article 2).

sale of goods. Pursuant to the *Fox* case, the "predominant factor" test attempts to determine the "thrust" and primary "purpose" of the alleged verbal agreement by analyzing whether the sale of silica sand from Monsanto to SIO is merely incidental to the so-called "non-sale" terms or whether the so-called "non-sale" terms were incidental to the sale of silica sand.

The answer to this question is quite simple. The alleged sale of silica sand from Monsanto to SIO is at the core of the verbal agreement. Without silica sand, SIO would have no business. Indeed, SIO's entire business plan was to process and sell silica sand. In addition, none of the so-called "non-sale" terms would have had any application or purpose whatsoever if SIO did not purchase silica sand from Monsanto. The so-called "non-sale" terms alleged to be part of the verbal agreement are clearly "incidental" to SIO purchase of the silica sand from Monsanto. Therefore, the alleged sale of silica sand from Monsanto to SIO was as a matter of law the "predominant factor" of the verbal agreement as alleged by SIO.

"The question of whether goods or services predominate in a hybrid contract is one of fact", but, "where there are no genuine issues of material fact regarding the provisions of the alleged contract, the district court may resolve the issue as matter of law." *Allmand Assocs., Inc. v. Hercules Inc.,* 960 S. Supp. 1216, 1223 (E.D. Mich. 1997); *see also O'Donovan v. Burns*, 5 Mass. L. Rep. 317, *8 (Mass. Super. 1996)(same). This same approach appears to have been applied by appellate courts applying Idaho's Uniform Commercial Code. *See Fox v. Mountain West Electric, Inc.*, 137 Idaho 703, 52 P.3d 848 (2002); *Pittsley v. Houser*, 125 Idaho 820, 875 P.2d 232 (1994); *U.S. v. Twin Falls*, 806 F.2d 862 (9th Cir. 1986)(applying Idaho UCC). In this case for summary judgment purposes, there are no genuine issues of material fact regarding the

terms of the verbal agreement as alleged by SIO, if such a verbal agreement exists. Thus, the predominant factor question can be resolved as a matter of law. The district court was correct in doing so in this case.

Because the "predominant factor" of the alleged verbal agreement was the sale of silica sand, the *entire* verbal agreement as alleged by SIO is treated as a "contract for the sale of goods." *See Fox*, 137 Idaho at 710, 52 P.3d at 855. The district court therefore correctly determined that the alleged verbal agreement fell within the scope of Article 2 of the Idaho Uniform Commercial Code and its statute of frauds in I.C. § 28-2-201(1).

B. SIO has not challenged on appeal the district court's finding that the alleged verbal contract was for more than $500.

In finding that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1), the district court implicitly found that the verbal contract was for more than $500. *See Borah v. McCandless*, 147 Idaho 73, 79-80, 205 P.3d 1209, 1215-26 (2009)(affirming implicit findings of district court). SIO has never argued that the verbal agreement was for less than $500 and has waived any challenge to this finding by not raising it on appeal.

C. SIO has not challenged on appeal the district court's implicit finding that no document signed by Monsanto exists which evidences the alleged verbal agreement.

In finding that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1), the district court implicitly found that no document signed by Monsanto

exists which evidences the alleged verbal agreement.[78] *See Borah*, 147 Idaho at 79-80, 205 P.3d at 1215-26 (affirming implicit findings of district court). SIO has waived any challenge to this finding by not raising it on appeal. Even if SIO had raised the issue, the record is devoid of any such document.

D. SIO has not challenged on appeal the district court's finding that no exceptions apply to the application of the statute of frauds in I.C. § 28-2-201(1).

In finding that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1), the district court found that no exceptions to the statute of frauds applied in this case.[79] SIO has waived any challenge to this finding by not raising it on appeal.

E. The district court properly concluded that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1).

The district court properly found that the alleged verbal agreement was "a contract for the sale of goods", that it was for more than $500, that no document signed by Monsanto existed evidencing the alleged verbal agreement, and that no exceptions to the statute of frauds applied in this case. Based on these findings, the district court properly found that the alleged verbal agreement was unenforceable under the statute of frauds in I.C. § 28-2-201(1).

This Court should affirm the district court's finding that the alleged verbal agreement was unenforceable. SIO's causes of action for breach of the verbal agreement and for breach of the implied covenant of good faith and fair dealing are dependent upon an enforceable verbal

[78] R. Vol. 5, pp. 786-89.
[79] *Id.*

agreement. Because the verbal agreement was found to be unenforceable, this Court should also affirm the district court's grant of summary judgment in favor of Monsanto dismissing SIO's causes of action for breach of the verbal agreement and for breach of the implied covenant of good faith and fair dealing.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AS TO SIO'S CAUSES OF ACTION FOR BREACH OF THE ALLEGED VERBAL AGREEMENT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE ALLEGED VERBAL AGREEMENT WAS UNENFORCEABLE DUE TO ITS ESSENTIAL TERMS BEING VAGUE, INDEFINITE AND UNCERTAIN.

Notwithstanding the statute of frauds argument addressed above, the district court's dismissal on summary judgment of SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing can be affirmed on the alternative ground that the alleged verbal agreement was unenforceable due to its essential terms being vague, indefinite and uncertain.[80] *See Ewing v. DOT*, 147 Idaho 305, 306, 208 P.3d 287, 288 (2009)("Where an order of a lower court is correct, but is based upon an erroneous theory, the order will be affirmed upon the correct theory.").

"An agreement that is so vague, indefinite and uncertain that the intent of the parties cannot be ascertained is unenforceable, and the courts are left with no choice but to leave the parties as they found them." *Griffith v. Clear Lakes Trout Co., LLC*, 143 Idaho 733, 737, 152 P.3d 604, 609 (2007). "Vagueness of expression, indefiniteness and uncertainty as to any of the

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[80] Monsanto raised this argument below. *See* R. Vol. 1, pp. 90-92.

essential terms of an agreement, have often been held to prevent the creation of an enforceable contract." *Lawrence v. Jones*, 124 Idaho 748, 752, 864 P.2d 194, 198 (Ct. App. 1993)(quoting 1 Arthur L. Corbin, Corbin on Contracts § 4.1 (rev. ed. 1993)).

"To be enforceable, a contract must provide a price or a means of determining the price." *Bauchman-Kingston Partnership, LP v. Haroldsen*, 149 Idaho 87, 93, 233 P.3d 18, 24 (2008)(internal citations omitted); *see also Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 562, 585 P.2d 970, 972 (1978)("In the absence of an agreement between the parties regarding the amount to be paid ... there was a failure to agree on an essential term of the contract. Such an agreement is too indefinite to enforce."). In addition, under Article 2 of the Uniform Commercial Code, "the quantity of goods" is also an essential term of a contract. *See* I.C. § 28-2-201(1); *Mitchell v. Barendregt*, 120 Idaho 837, 845, 820 P.2d 707, 715 (Ct. App. 1991). The verbal agreement as alleged by SIO lacks both an essential price term and an essential quantity term. As to price, SIO alleges only that Monsanto would accept payment of "agreed-upon amounts."[81] As to quantity, SIO alleges only that Monsanto would provide "certain agreed-upon quantities."[82] The verbal agreement as alleged by SIO is unenforceable as a matter of law because its price and quantity terms as alleged by SIO are vague, indefinite and uncertain.

Under the facts of this particular case, the district court found that duration was also an essential terms of the alleged verbal agreement.[83] Terms "at issue in the negotiations" are

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[81] R. Vol. 1, pp. 3-4 (Complaint at ¶11); R. Vol. 3, pp. 438-46 (Affidavit of Todd Sullivan at ¶4).
[82] *Id.*
[83] R. Vol. 5, p. 789-91.

considered "essential terms to that particular agreement." *Ogden v. Griffth*, 149 Idaho 489, 496, 236 P.3d 1249, 1256 (2010). As alleged by SIO, duration was a critical term of the alleged verbal agreement and indeed forms the basis of SIO's causes of action. Thus, the district court properly considered whether the duration term as alleged by SIO was sufficiently certain and definite to be enforceable.

Although SIO's Complaint alleges that the duration of the verbal agreement was "perpetual" and "open-ended,"[84] SIO now appears to be arguing on appeal that "[t]he evidence before the district court on summary judgment was that Monsanto, like SIO, contemplated a long-term relationship—not necessarily perpetual...of something more than seven years."[85] SIO does not attempt to define "long-term relationship" other than to suggest that it may be somewhere between seven (7) years and something shy of forever. In other words, even SIO itself has no idea how long the alleged verbal agreement was to continue. This should be construed as an admission by SIO on appeal that the duration term as alleged by SIO is indeed vague, indefinite and uncertain.

The vagueness, indefiniteness and uncertainty of any one of the three essential terms of price, quantity and duration are fatal to the enforceability of the alleged verbal agreement. In this case, all three happen to be vague, indefinite and uncertain. Therefore, the verbal agreement as alleged by SIO is, as a matter of law, unenforceable because its alleged terms are "so vague, indefinite and uncertain that the intent of the parties cannot be ascertained." *Griffith*, 143 Idaho

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[84] R. Vol. 1, p. 7 (Complaint at ¶¶ 27-28).
[85] Appellant's Opening Brief at p. 24. *See also* footnote 48 above.

at 737, 152 P.3d at 609 (2007). The district court's dismissal of SIO's causes of action for breach of the alleged verbal agreement and breach of the implied covenant of good faith and fair dealing can be affirmed on the alternative ground that the alleged verbal agreement was unenforceable due to its essential terms being vague, indefinite and uncertain.

III. THE DISTRICT COURT PROPERLY CONSIDERED AND RULED ON MONSANTO'S MOTION FOR SUMMARY JUDGMENT AS TO SIO'S CAUSES OF ACTION FOR EQUITABLE ESTOPPEL AND QUASI-ESTOPPEL.

On appeal, SIO challenges the district court's dismissal on summary judgment of its causes of action for equitable estoppel and quasi-estoppel. SIO contends that Monsanto's initial summary judgment memorandum did not "articulate a basis for summary judgment on those claims"[86] of equitable estoppel and quasi-estoppel and that the district court should therefore not have granted summary judgment with regard to those causes of action.[87]

SIO sought to use the doctrines of equitable estoppel and quasi-estoppel as bars to the applicability of the statute of frauds in I.C. § 28-2-201(1). In other words, SIO was hoping to enforce the alleged verbal agreement under equitable estoppel or quasi-estoppel in the event that it was found unenforceable under the statute of frauds. However, the district court ultimately found that the alleged verbal agreement as too vague, indefinite and uncertain to enforce.[88] Given that the doctrines of equitable estoppel and quasi-estoppel are of no effect when dealing

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[86] Appellant's Opening Brief at p. 20.
[87] *Id.* at pp. 20-22.
[88] R. Vol. 5, pp. 789-92.

with a vague, indefinite, and uncertain agreement, dismissal of SIO's claims for equitable estoppel and quasi-estoppel was appropriate.

Under the law in Idaho, "a nonmoving party in a summary judgment motion need only respond to issues raised by the moving party." *State v. Rubbermaid Inc.*, 129 Idaho 353, 356, 924 P.2d 615, 618 (1996). SIO contends that Monsanto's initial summary judgment memorandum did not "articulate a basis for summary judgment on those claims" for equitable estoppel and quasi-estoppel.[89] SIO's contention is incorrect.

In its initial summary judgment memorandum, Monsanto argued at length that the essential terms of the verbal agreement alleged by SIO were too vague, indefinite and uncertain to be enforceable.[90] SIO was thereafter obligated to respond to that argument on summary judgment and in fact did respond to that argument in its response brief.[91] SIO should not be surprised that the district court granted summary judgment on that basis. Once the alleged verbal agreement is found unenforceable on the basis that its essential terms are vague, indefinite and uncertain, causes of action for equitable estoppel or quasi-estoppel are of no further effect. Consequently, the district court was correct in dismissing those causes of action.

Since Monsanto's initial summary judgment brief did in fact seek summary judgment on the basis that the alleged verbal agreement was unenforceable on the grounds that its essential terms were too vague, indefinite and uncertain to be enforceable, this Court should reject SIO's

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[89] Appellant's Opening Brief at p. 20.
[90] R. Vol. 1, pp. 90-92.
[91] R. Vol. 3, pp. 380-83.

contention that Monsanto's initial summary judgment memorandum did not "articulate a basis for summary judgment on those claims" for equitable estoppel and quasi-estoppel.[92] For this reason and the reasons discussed below, the district court's dismissal on summary judgment of SIO's causes of action for equitable estoppel and quasi-estoppel should be affirmed.

IV. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO SIO'S CAUSES OF ACTION FOR EQUITABLE ESTOPPEL.

On appeal, SIO challenges the district court's dismissal on summary judgment of its cause of action against Monsanto for equitable estoppel.[93] The elements of equitable estoppel are:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Ogden, 149 Idaho at 495, 236 P.3d at 1255. Equitable estoppel may upon satisfaction of its elements bar the application of the statute of frauds. *Id.* Although equitable estoppel may be a

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[92] Appellant's Opening Brief at p. 20.

[93] In dismissing the equitable estoppel cause of action, the district court suggested that the only alleged promise SIO was attempting to enforce through the application of equitable estoppel was the alleged promise that Monsanto "would not abruptly terminate its agreement within a few years after SIO had commenced its business." R. Vol. 5, p. 790-91. This is not entirely accurate. Through its equitable estoppel cause of action, SIO was attempting to enforce every term of the verbal agreement as they had been alleged by SIO in this case. *See, e.g.,* R. Vol. 1, pp. 11-14 (Complaint at ¶¶50-64 with particular emphasis on ¶¶51 and 56). In other words, SIO was attempting to use equitable estoppel as a bar to the statute of frauds with regard to the entire alleged verbal agreement.

bar to the application of the statute of frauds, the underlying representation (i.e. the verbal agreement) will nevertheless remain unenforceable if its essential terms are vague, indefinite and uncertain.[94] *Id.*; *see also Chapin v. Linden*, 144 Idaho 393, 396-97, 162 P.3d 772, 775-76 (2007).

As discussed above in Section II of this brief, the essential terms of price, quantity and duration of the verbal agreement as alleged by SIO are vague, indefinite and uncertain. The alleged verbal agreement is therefore unenforceable as a matter of law. *See Griffith*, 143 Idaho at 737, 152 P.3d at 609 (2007). The doctrine of equitable estoppel cannot save an alleged agreement that is otherwise unenforceable because its essential terms are vague, indefinite and uncertain. Therefore, the district court's dismissal of SIO's cause of action for equitable estoppel should be affirmed.

V. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO SIO'S CAUSE OF ACTION FOR QUASI-ESTOPPEL.

The district court dismissed SIO's cause of action for quasi-estoppel for the same reason that it dismissed it cause of action for equitable estoppel.[95] Quasi-estoppel "precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by

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[94] For this reason, it was unnecessary for the district court to consider the four elements of equitable estoppel. Although the district court discussed the first element, SIO incorrectly suggests that the district court made a "factual" determination concerning whether a representation made by Monsanto was "false." Rather, the district court merely found that the representation (i.e. the duration of the verbal agreement) was too indefinite to determine its falsity. Consequently, the district court concluded, "this Court, on the record before it on summary judgment, cannot find that there are disputed issues of material fact concerning whether this is a 'false representation.'" R. Vol. 5, p. 791.

[95] R. Vol. 5, pp. 791-92.

him or her ... where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit." *Garner v. Bartschi,* 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003). Although SIO is attempting to use the doctrine of quasi-estoppel to bar the application of the statute of frauds, the underlying representation (i.e. the verbal agreement) will nevertheless remain unenforceable if its essential terms are vague, indefinite and uncertain. *Id.*; *see also Chapin*, 144 Idaho at 396-97, 162 P.3d at 775-76. As discussed above, the alleged verbal agreement is unenforceable because its essential terms of price, quantity, and duration are vague, indefinite, and uncertain. The doctrine of quasi-estoppel cannot save an alleged agreement that is otherwise enforceable because its essential terms are vague, indefinite and uncertain. Therefore, the district court's dismissal of SIO's cause of action for quasi- estoppel should therefore be affirmed.

VI. THE DISTRICT COURT'S GRANT OF MONSANTO'S MOTION TO STRIKE WITH REGARD TO HART'S 3/14/2008 EMAIL SHOULD BE AFFIRMED.

In opposition to Monsanto's Motion for Summary Judgment, SIO submitted the Affidavit of Todd Sullivan.[96] Paragraph 6 of that affidavit stated:

> On or about March 13, 2008, I sent another email to Hart, asking him to confirm the accuracy of certain language I intended to include in correspondence to Monsanto. Hart responded on March 14, 2008, by noting that my proposed language "is a fair representation of our discussions and emails." A true and correct copy of this email chain, commencing with my March 13, 2008, email to Hart and culminating with Hart's March 14, 2008, response, is attached hereto as Exhibit B.[97]

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[96] R. Vol. 3, p. 437.
[97] *Id.* at pp. 439, 447-48.

The attached email from Todd Sullivan dated March 13, 2008, asked that Mr. Hart confirm whether he was "comfortable" with the following statement:

> In conversations and emails I have had with Mitch Hart, we both concur that an agreement exists between Monsanto and Silicon International Ore in that Monsanto represented to us that we would be allowed to continue to operate as long as it was mutually beneficial for us to do so. Meaning that we would be required to conform to all of Monsanto's environmental, safety and control regulations, provide Monsanto with royalty payments that would more than offset any costs Monsanto might incur from our operation, and allow Monsanto to reasonably control which markets we were able to sell to. Monsanto in turn assures us certain volumes of sand and allow us to continue to operate the business. Washington Group International was brought into the mix to help facilitate this agreement.[98]

The attached email from Mr. Hart dated March 14, 2008, stated: "Your statement below is a fair representation of our discussions and emails."[99] At the time of this email, Mr. Hart had for quite some time not been employed by Monsanto.[100]

Monsanto filed a Motion to Strike Hart's 3/14/2008 email and any reference to it on the basis that the alleged statements contained therein constituted inadmissible hearsay.[101] In

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[98] *Id.* at p. 448.
[99] *Id.* at p. 447.
[100] R. Vol. 2, p. 240. Mr. Hart was employed by Monsanto as a mining engineer from 1986 to 2005. *Id.* He was not a manager and did not have any authority to contract on behalf of Monsanto. *Id.* In 2008, approximately three years after he voluntarily left his employment with Monsanto, Mr. Hart was contacted by Mr. Sullivan, who was inquiring about his recollection of conversations that took place between SIO and Monsanto eight (8) years earlier in 2000. *Id.* at p. 241. In responding to Mr. Sullivan, Mr. Hart did not have the benefit of any files, notes or any of the written contracts to refresh his memory. *Id.* After reviewing those documents, Mr. Hart later testified, "To the extent that these emails sent by me in 2008 suggested that there was an agreement entered into between Monsanto and SIO in 2000 would be in error and a mistake of mine in 2008 when I was attempting to recollect conversations that occurred 8 years earlier in early 2000." *Id.*

response, SIO argued that Hart's 3/14/2008 email was not hearsay and was alternatively admissible under the residual hearsay exception found in I.R.E. 803(24).[102] The district court disagreed and granted Monsanto's Motion to Strike the reference in Mr. Sullivan's affidavit to Hart's 3/14/2008 email for purpose of summary judgment.[103]

The district court's grant of Monsanto's Motion to Strike with regard to Hart's 3/14/2008 email should be affirmed on two alternative grounds. First, it should be affirmed because the district court did not abuse its discretion in excluding the evidence. Second, it should be affirmed because the exclusion of Hart's 3/14/2008 email did not affect a substantial right.

A. The district court did not abuse its discretion in excluding Hart's 3/14/2008 email from its consideration on summary judgment.

SIO does not appear to challenge on appeal the district court's decision that the statement made in Hart's 3/14/2008 email was hearsay. Nevertheless, for the argument on appeal, it is important to understand why it is hearsay. It is hearsay because the substance of the email was offered through *the testimony of Mr. Sullivan.* Through his affidavit, Mr. Sullivan testifies concerning the substance of communications made by another person to prove the truth of the statement made in that communication. This is classic hearsay. *See* I.R.E. 801(c)("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

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[101] R. Vol. 5, pp. 752-59.
[102] *Id.* at pp. 761-70.
[103] *Id.* at pp. 781-86.

SIO argued below that Hart's 3/14/2008 email was admissible under the residual hearsay exception of I.R.E. 803(24).

> To be admissible under I.R.E. 803(24), the court must determine that (A) the statement has circumstantial guarantees of trustworthiness equivalent to those in Rules 803(1) to 803(23), (B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (D) the general purposes of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence. Further, (E) a statement may not be admitted under I.R.E. 803(24) unless its proponent gives the adverse party adequate notice and information regarding use of the statement.

State v. Hester, 114 Idaho 688, 697, 760 P.2d 27, 26 (1988). Among these five requirements, the district court relied only upon the third in rejecting SIO's argument for the application of Rule 803(24). Specifically, the district court found that Hart's 3/14/2008 email was not "more probative on the point for which it [was] offered than any other evidence which the proponent [could] procure through reasonable efforts"[104] because of the following finding:

> Both parties involved in this email exchange are available and have filed affidavits in support of this motion for summary judgment. Therefore, both of their testimonies can be reasonably be procured. Further, this Court concludes that their respective personal testimony on this issue is more probative than the hearsay e-mail chains.[105]

In other words, the district court found that Hart's 3/14/2008 email was not admissible through *Mr. Sullivan's testimony* under Rule 803(24) because *Mr. Hart's testimony* was freely available with regard to his 3/14/2008 email.

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[104] I.R.E. 803(24).
[105] R. Vol. 5, p. 783.

We know that Mr. Hart's testimony was freely available because SIO actually submitted Mr. Hart's own deposition testimony to the district court for summary judgment purposes.[106] A review of the deposition transcript shows that Hart's 3/14/2008 email was marked as Deposition Exhibit 24 and that Mr. Hart acknowledged that it was an email chain between himself and Mr. Sullivan.[107]

Although SIO submitted a copy of the deposition transcript to the district court for summary judgment purposes, SIO did not provide the district court with any of the exhibits to Mr. Hart's deposition. Had SIO submitted Deposition Exhibit 24 to the district court with the deposition transcript, Hart's 3/14/2008 email would have been admissible for purposes of summary judgment because it would have been submitted through *Mr. Hart's own testimony* procured through his deposition. However, SIO chose not to do so and instead chose to offer Hart's 3/14/2008 email through *Mr. Sullivan's testimony* -- thereby making it inadmissible hearsay evidence.

The district court's exclusion of Mr. Sullivan's hearsay testimony concerning the contents of Hart's 3/14/2008 email should be affirmed on appeal. The district court correctly found that Rule 803(24) was inapplicable because Mr. Sullivan's hearsay testimony was not nearly as probative concerning the contents of Hart's 3/14/2008 email as Mr. Hart's own deposition testimony would have been had a copy of Deposition Exhibit 24 been submitted to the district court.

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[106] *See* R. Vol. 4, pp. 501-26 (Transcript of Deposition of Mitchell J. Hart).
[107] R. Vol. 4, pp. 514-515 (Tr. p. 52:18 to 53:3).

Because the district court correctly concluded that Hart's 3/14/2008 email was fully available through an *admissible* evidentiary source which SIO had for some reason opted not to provide on summary judgment, the district court did not abuse its discretion in holding that Rule 803(24) was inapplicable and in excluding Mr. Sullivan's hearsay testimony concerning Hart's 3/14/2008 email for purposes of summary judgment. Therefore, this Court should affirm the district court's grant of Monsanto's Motion to Strike with regard to Hart's 3/14/2008 email.

B. The exclusion of Hart's 3/14/2008 email did not affect a substantial right.

In addition, the district court did not err in excluding Hart's 3/14/2008 email because its exclusion did not affect a substantial right. Idaho Rule of Evidence 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Idaho Rule of Civil Procedure 61 provides that "[t]he court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." In cases where "a trial court errs in admission or exclusion of evidence, we will grant a new trial only if the error affected a substantial right." *State ex rel. Winder v. Canyon Vista Family Ltd. P'ship*, 147 Idaho 718, 726, 228 P.3d 985, 993 (2010).

SIO argues that the exclusion of Hart's 3/14/2008 email "prejudices SIO's substantive rights" because the email was necessary to prove "the existence of a contract between SIO and

Monsanto" and the alleged terms of that contract.[108] SIO's argument is without merit. Exclusion of Hart's 3/14/2008 email did not affect SIO's substantial rights because its admission would not have altered the district court's findings or conclusion on summary judgment.

First, SIO argues that Hart's 3/14/2008 email was necessary to prove the existence of an alleged verbal agreement with Monsanto. This argument fails because the district court did in fact find that "[t]he evidence, viewed in a light most favorable to SIO, establishes that there was an oral contract between SIO and Monsanto."[109] The email was therefore not necessary for that purpose.

Second, SIO argues that Hart's 3/14/2008 email was necessary to prove the terms of the alleged verbal agreement with Monsanto. The alleged terms of the verbal agreement however were already in the record before the district court on summary judgment. Those alleged terms had been submitted in paragraph 4 of the Affidavit of Todd Sullivan.[110] The district court did not strike or exclude that paragraph from the affidavit.[111] The alleged terms of the verbal agreement delineated in paragraph 4 of the Affidavit of Todd Sullivan are identical to the alleged terms expressed in Hart's 3/14/2008 email. Thus, admission of Hart's 3/14/2008 email would not have

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[108] Appellant's Opening Brief at pp. 35-36. SIO specifically argues that the email was necessary to show "whether [the verbal agreement] was a mere contract for the sale of goods for $500 or more, or whether it was a broader and more unique agreement that involved not the payment for goods, but a royalty for sand sold." *Id.* at 36. By this it is assumed that SIO means that the email was necessary to prove the alleged terms of the verbal agreement.
[109] R. Vol. 5, p. 794.
[110] R. Vol. 3, pp. 438-39.
[111] R. Vol. 5, p. 786.

added any new facts to the record which the district court did not already possess and therefore would not have changed the district court's analysis.

It should be pointed out that, because the issue had been placed before the district court in the context of a summary judgment motion, the district court was required to accept as true the alleged terms of the verbal agreement as delineated in paragraph 4 of the Affidavit of Todd Sullivan. *See Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 412, 179 P.3d 1064, 1068 (2008)("For purposes of summary judgment, we must take as true Mackay's allegation that the contract was to last 'until retirement.'"); *Stanley v. Lennox Indus.*, 140 Idaho 785, 789, 102 P.3d 1104, 1108 (2004)("It is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage."). SIO has not argued on appeal that the district court failed to accept as true for purposes of summary judgment the alleged terms of the verbal agreement as delineated in paragraph 4 of the Affidavit of Todd Sullivan.[112] Given that the district court already possessed admissible evidence of the alleged terms of the verbal agreement and accepted it as true for purposes of summary judgment, admission of Hart's 3/14/2008 email would have added nothing and would not have altered the district court's analysis.

A review of the district court's analysis in its Memorandum Decision and Order[113] reveals that the district court accepted SIO's claim that a verbal agreement existed and SIO's alleged terms of that agreement. Notwithstanding, the district court concluded that the verbal

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[112] In fact, the district court explains in its decision that it fully understood that, on summary judgment, it was to accept as true admissible evidence in the record and was prohibited from weighing its credibility. R. Vol. 5, pp. 783-86.
[113] *Id.* at pp. 786-89, 794.

agreement was governed by Article 2 of the Idaho Uniform Commercial Code and subject to the statute of frauds in I.C. § 28-2-201(1). The statute of frauds in I.C. § 28-2-201(1) requires a writing signed by Monsanto. It is undisputed that Hart's 3/14/2008 email – even if it had been admitted – was not signed by Monsanto. Consequently, the statute of frauds would still have applied even if Hart's 3/14/2008 email had been admitted. Therefore, admission of the email would not have altered the district court's analysis with regard to the statute of frauds.

In addition, Hart's 3/14/2008 email would not have altered the district court's analysis with regard to its dismissal of SIO's causes of action for equitable estoppel and quasi-estoppel. As discussed above, dismissal of those causes of action was proper because the underlying verbal agreement was unenforceable to due vague, indefinite and uncertain terms. Hart's 3/14/2008 email would simply have reinforced the vague, indefinite and uncertain nature of those terms instead of clarifying them. Therefore, admission of the email would not have altered the analysis for dismissal of SIO's causes of action for equitable estoppel and quasi-estoppel.

Because the admission of Hart's 3/14/2008 email would not have added any facts to the record which the district court did not already possess and alternatively because admission of the email would not have changed in any respect the district court's analysis or conclusion, this Court should reject SIO's claim that exclusion of Hart's 3/14/2008 email affected its substantial rights.

For the aforementioned reasons, it is therefore respectfully requested that this Court affirm the district court's granting of Monsanto's Motion to Strike with regard to Hart's 3/14/2008 email.

VII. MONSANTO IS ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.

Pursuant to I.C. § 12-120(3), the prevailing party "in any action to recover in a commercial transaction" is entitled to an award of attorney fees. *O'Shea v. High Mark Dev., LLC*, 2012 Idaho LEXIS 112, Docket No. 37869 (Idaho Sup. Ct. April 26, 2012). Each of the four causes of action asserted by SIO against Monsanto seeks to enforce an alleged verbal agreement for the sale of silica sand. This alleged verbal agreement for the sale of silica sand constitutes a "commercial transaction" as defined in I.C. § 12-120(3) because it is a transaction not "for personal or household purposes." Therefore, it is requested pursuant to I.C. § 12-120(3) that this Court award attorney fees and costs to Monsanto in the event that it prevails on appeal.[114]

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court affirm the district court's grant of summary judgment dismissing all of SIO's causes of action against Monsanto. It is also requested that this Court affirm the district court's grant of Monsanto's Motion to Strike with regard to Hart's 3/14/2008 email. Lastly, it is requested that Monsanto be awarded its attorney fees and costs on appeal.

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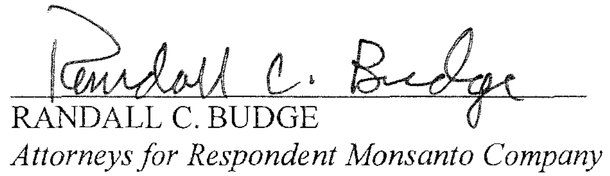
[114] SIO does not appeal the district court's award of attorney fees below based upon I.C. § 12-120(3). In addition, SIO does not request attorney fees on appeal and is therefore precluded from receiving such an award. *See Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 30, 137 P.3d 409, 416 (2006)(denying fees on appeal because the issue was not raised or argued in the briefing). *See also* I.A.R. 35(a)(5) and I.A.R. 41(a).

DATED this 14th day of June, 2012.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of June, 2012, I served two true and correct copies of the above and foregoing document to the following person(s) as follows:

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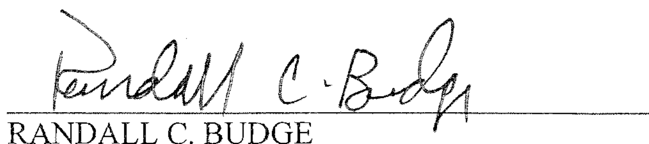

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