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IN THE SUPREME COURT OF THE STATE OF IDAHO

EDGED IN STONE, INC., Plaintiff/Appellant, v. NORTHWEST POWER SYSTEMS, LLC, Defendant/Respondent, and CATERPILLAR, INC., and PERKINS ENGINES, INC., Defendants.	Supreme Court Docket No. 40463-2012 Bannock Co. Case No. CV-2010-4923-OC

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District of the State of Idaho in and for the

County of Bannock, Honorable Mitchell W. Brown, District Judge, Presiding.

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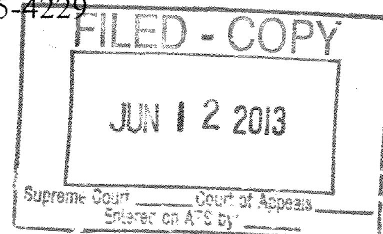

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal of the district court's grant of summary judgment in favor of Defendant/Respondent Northwest Power Systems, LLC ("Northwest") against Plaintiff/Appellant Edged In Stone, Inc. ("EIS"). The judgment dismissed EIS's claims of breach of contract and unjust enrichment related to a contract between EIS and Northwest to inspect, diagnose and replace the engine of a Skid Steer EIS owned. EIS and its president, Preston George ("George"), alleged that Northwest, breached its contract with EIS. EIS maintained this position despite Mr. George's admission that he not only requested Northwest's owner, Mark Adams' ("Adams") to examine the engine of EIS's skid steer, but also authorized Mr. Adams to replace the engine. EIS further contended that, despite Mr. George's admissions that he and EIS did not pay a cent to Northwest or Mr. Adams for their service and replacement of the engine, Northwest was, somehow, unjustly enriched. Additionally, EIS admitted its contract with Northwest was for Northwest to inspect and diagnose the problem with the Skid, and EIS never disputed Northwest/Mr. Adams properly did this.

The district court correctly concluded that there was no genuine issue of material fact Northwest did not breach any service contract it had with EIS, as EIS, through Mr. George, by his own admission, authorized Northwest to replace the skid steer's engine. Further, the district court also correctly concluded that EIS could not prove any facts to support its unjust enrichment claim, as Mr. George admitted neither he nor EIS conferred any benefit to Northwest, and, moreover, never paid anything to Northwest for its replacement of the engine.

B. COURSE OF THE PROCEEDINGS.

On November 30, 2010, EIS filed its initial complaint, naming Caterpillar, Inc. ("Caterpillar") and Perkins Engines, Inc. ("Perkins") as defendants. R., Vol. I, pp. 1-8[1]. Caterpillar and Perkins filed their answer on February 26, 2011. Subsequent thereto, EIS filed, improperly, its first amended complaint, without seeking leave of court pursuant to I.R.C.P. 15. R., Vol. I., pp. 49-50. The district court later granted EIS's motion to amend its complaint. *Id.* In its amended complaint, EIS added Northwest as a party, asserting claims for breach of contract, breach of warranty, breach of implied covenant of good faith and fair dealing, negligence and unjust enrichment. R., Vol. I., pp. 40-48.

On November 4, 2011, a hearing was held on Northwest's Motion to Dismiss multiple counts of the Plaintiff's Complaint. R., Vol. I, pp.60-61. The Court granted the Motion to Dismiss Count II, Breach of Warranty, Count III, Breach of Contract, and Count IV Breach of Implied Covenant of Good Faith and Fair Dealing of EIS's first amended complaint. Thereafter, the only remaining claims asserted by Plaintiff against Northwest were breach of contract for the diagnosis and potential warranty repair and service of the Skid, breach of contract for installing an engine Northwest did not have permission to install, negligence and unjust enrichment. R., Vol. I., p. 63. Between February 15, 2012 and May 23, 2012, discovery depositions of Mr. George, Mr. Adams and EIS's employee, Scott Webb, were taken. R., Vol. I, pp. 97-200; Vol. II, pp.201-401; Vol. III, pp. 402-517; 619-649.

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[1] EIS stipulated to dismiss Caterpillar and Perkins. R., Vol. I, pp. 94-96; Vol. III, pp. 574-576.

On July 5, 2012, Northwest filed its Motion for Summary Judgment requesting dismissal of EIS's complaint against it. R., Vol. I, pp. 97-200; Vol. II, pp. 201-401; Vol. III, pp. 402-534. Northwest asserted EIS's breach of warranty claim lacked any factual foundation, as it did not confer any warranty to EIS and Mr. George admitted EIS had no warranty claim. R., Vol. III, pp. 526-27. Northwest further asserted that EIS's breach of contract claim lacked merit as its agents, Messrs. George and Webb authorized Northwest to replace the engine. R., Vol. III, p. 527. Northwest also asserted the economic loss rule barred EIS's negligence claim, and that its unjust enrichment claim was barred as Mr. George admitted EIS did not confer or give any benefit to Northwest. R., Vol. III, pp. 528-533.

On July 20, 2012, EIS filed its opposition to Northwest's summary judgment motion. EIS acknowledged and admitted Northwest was entitled to summary judgment on EIS's breach of warranty and negligence claims. R., Vol. III, p.545, 551; Tr., p.9, l.17-p.10, l.20. EIS disputed summary judgment as to its breach of contract, breach of covenant of good faith and fair dealing, breach of implied warranty and unjust enrichment claims. R., Vol. III, pp. 545-552.

On September 6, 2012, the district court issued its Order on Northwest Power Systems,LLC's Motion for Summary Judgment granting Northwest's motion for summary judgment. The district court concluded that no genuine issues of material fact existed in the record sufficient to allow EIS's breach of contract and unjust enrichment claims to proceed to a jury trial. R., Vol. III, pp. 577-578. On September 24, 2012, the district court issued its Judgment for Dismissal, dismissing EIS's claims against Northwest. R., Vol. III, pp.604-606. The district court

further concluded that Northwest was the prevailing party, and directed it to file its memorandum of costs and attorney's fees. *Id.* Northwest filed its memorandum of costs and attorney's fees, without any objection from EIS, and the district court entered its Judgment on October 9, 2012, awarding Northwest costs and attorney's fees in the amount of $14,991.50.

On October 26, 2012, EIS filed its Notice of Appeal. R., Vol. III, pp. 611-15. EIS has not filed a bond on appeal.

C. STATEMENT OF FACTS

1. Contract between EIS and Northwest.

In October, 2007, EIS bought a Compact Power 500 Series Boxer 526 DX Mini Skid Loader ("Skid") with a Perkins diesel engine from Rocky Mountain Machinery in Blackfoot, Idaho. R., Vol. I, p. 41. In May, 2009, Mr. Webb, an employee of EIS, spoke with Mr. George about problems with the Skid. Apparently, the Skid did not idle or run correctly. R., p. 103 (*Deposition transcript of Scott Webb) p. 8, ll. 11-19)*; R., Vol. I, p. 131 (*Deposition transcript of Joseph Preston George, p. 28, ll. 17-20*). Thereafter, Messrs. George and Webb discussed taking the Skid to Northwest's shop in Boise and Mr. George authorized Mr. Webb to take the Skid to Northwest. R., Vol. I, p. 104(*Webb Depo. p. 9, ll. 16-22;, p. 10, l. 5-p. 11,l. 10*). Thereafter, Mr. Webb spoke with Mr. Adams and discussed bringing the Skid to Northwest's shop in Boise. Mr. Webb took the Skid to Boise, using Mr. George's truck and trailer. R., Vol. I., pp.104-105 (*Webb Depo., p. 10, l. 9-p. 13,*

l. 7); R., Vol. III, p.625 (*Deposition transcript of Mark Adams, p. 22, l. 21 to p. 23, l.14*).[2] Mr. Webb told Mr. Adams that Mr. George wanted the engine fixed. Mr. Adams told Mr. Webb he needed to find out what was wrong first and he would let them know. R., Vol. I,pp. 104-105 (*Webb Depo., p. 12, l. 17-p. 14, l. 1*); R., Vol. III, p. 625 (*Adams Depo., p. 23, l. 25-p. 24, l. 6*).

After receiving approval from Messrs. George and Webb, Mr. Adams looked at the engine and contacted Mr. Webb, telling him the engine was dusted, it was not a warranty issue, and the engine had to be replaced. R.,Vol. III, pp. 625 (*Adams Depo, p. 23, l.25-p. 24, l.16; p. 37, l. 12-p. 40, l. 3; Exhibits 1 and 2 attached thereto*). Both Mr. Adams and Mr. Webb testified consistently about this. Both testified that Mr. Webb informed Mr. George the engine was dusted, was not covered under warranty, and needed to be replaced. Mr. George, after learning this, authorized Mr. Adams to replace the engine. R., Vol. I, p.105 (*Webb Depo., p. 14, l. 11- p. 16, l. 14)* R., Vol. III, p.p.625-626 (*Adams Depo., p. 24, l. 7-p. 26, l. 11*). Mr. Adams also sent Mr. Webb the bid, which Mr. Webb presented to Mr. George, and Mr. George gave approval to fix the Skid. R., Vol. I, p.107(*Webb Depo., p. 22, l. 2-p. 23,l. 23*).

2

In its opening brief, EIS makes reference to Mr. Adams' deposition as "taken 5/23/2012, augmented 3/15/2013." Appellate Brief, pp. 6-7. EIS's reference to Mr. Adams' deposition being "augmented" is confusing, as its reference suggests Mr. Adams' deposition testimony was augmented or changed. To the extent EIS posits that contention, it is incorrect. When Northwest filed its summary judgment motion, its supporting affidavits did not have a complete copy of Mr. Adams' deposition. At the hearing on summary judgment, Northwest's counsel provided the district court with a complete copy. Tr., p. 18, l.21-p.19, l.10. The initial clerk's record did not reflect that Northwest filed the entire transcript. As a result, Northwest requested augmentation of the clerk's record, to ensure the record reflected that the entire transcript of Mr. Adams' deposition testimony was contained in the record. R., Vol. III, pp.617-649.

Mr. George admitted, in his deposition testimony, supposedly believing, without actually knowing, the engine was under warranty, that he authorized replacement of the engine. R., Vol. I, p. 156 (*George Depo., p. 129, ll.17-22*). Mr. George also admitted that he never told Northwest or Mr. Adams that Mr. Webb was not authorized to tell them to fix the Skid and that Mr. Webb was an employee working for EIS at the time Mr. Webb was dealing with Northwest and Mr. Adams. R., Vol. I, p. 153 (*George Depo., p. 116, ll.8 p. 117,* l.*2).*

Further, Mr. George testified that he was not limiting Mr. Webb's authority to have Mr. Adams replace the engine. R., Vol. I, p. 172(*George Depo., p. 192, ll. 7-11; p. 194, ll. 3-7*). Mr. Webb testified Mr. George never told him **not** to have Mr. Adams fix the Skid. Mr. Webb testified:

> Q. But when you were going through this issue with the Boxer skid steer, Preston [George] never said don't have them fix this, I can't afford to pay for it?
>
> A. Absolutely not.
>
> Q. When you talked with Mr. Adams, you understood that the Boxer skid steer was going to be fixed, and there was going to be a charge associated with it?
>
> A. Until he called and said that, I had no idea that that was–I thought it was just going to get fixed and I was going to go pick it up so the boys could get back to work. **I never blind-sided Preston. I was very honest. . . .I mean, I was very detailed in how I presented things to Preston as far as even drawing pictures. I never blind-sided him. Every conversation I had on the telephone with anything that had anything to do with that business, I either took notes or spoke to him while he was I the room while I was on the phone. Never once did I ever try to just surprise him with a bill.**
>
> Q. **And you went through that same process with Preston as it related to getting this Boxer skid steer fixed?**
>
> A. **Yes.**
>
> **Q. And Preston [George] authorized you to say, yeah, go ahead and get it fixed?**

A. **I can safely say yes because I know that–I mean, it's not my decision. It's not my piece of equipment, so I would need some kind of higher-up authorization in order to make a decision like that. Knowing how I am personally, I wouldn't have made that decision on my own. I know that we had several conversations. And I think at one point, he thought it was bullshit that he had to pay for something, but it needed to be fixed because it was a critical piece of equipment.**

R., Vol. I, p. 106 (*Webb Depo., p.18, l. 6 to p.19, l. 22*) [Emphasis supplied]. Mr. Webb also testified that after he presented Mr. George with the estimate from Mr. Adams, Mr. George made it clear not to do anything until he gave his approval. R., Vol. I, p.110 (*Webb Depo,. p. 33, ll. 5-11; p. 34, ll. 3-18*). Mr. George gave his approval, even after knowing that the engine was not covered under warranty. R., Vol. I, p.110 (*Webb Depo., p. 35, l.19-p. 36, l. 21*). Mr. George admitted he knew there was no warranty from Northwest on the engine, testifying as follows:

Q. Would you agree that Edged in Stone and Northwest power have no contract that deals with a warranty claim, in other words, Northwest Power was not the manufacturer of the motor; correct?
A. I would agree.
***
Q. When you bought this piece of equipment Northwest Power made no warranty to you whatsoever in regard to the engine?
A. Correct.
Q. Did Northwest Power ever verbally give you a warranty in regard to this engine?
A. Northwest Power did not warranty the engine.
Q. And there is nothing in writing that Northwest Power would give a warranty to you on this engine?
A. That is correct.
Q. So in Count II of your complaint you claim that Northwest Power breached a warranty. What warranty did Northwest Power breach?

A. **I'm not sure which warranties that it would be referring to that Northwest Power breached.**

Q. **And we can agree that there is no written or oral warranty between Northwest Power and you, your warranty for the engine was with Cat and with Perkins.**

A. **I would agree.**

Q. **So is it fair to say that there really isn't a warranty claim that Northwest Power breached with you?**

A. **That's my opinion.**

Q. **That there really isn't a warranty claim that Northwest Power breached, we are agreeing on that?**

A. **Yes.**

R., Vol. I, p.173 (*George Depo., p. 197, l.23- p. 199, l. 10*) [Emphasis supplied].

Mr. Webb then relayed Mr. George's approval to fix the engine to Mr. Adams. R., Vol. I, p. 111 (*Webb Depo., p.37, ll. 5-7*). Mr. Webb further testified that Mr. George determined that since Northwest had the engine, it could get it fixed quickly, Mr. George made the decision to approve having it fixed. R., Vol. I, p.111 (*Webb Depo., p. 37, ll. 19-24*). Mr. Webb informed Mr. George of the estimate and amount to repair the Skid, the initial bid of $3,000 to the final amount of $4,385, and there was no disagreement between Mr. George and Mr. Webb over the handling of replacing the Skid's engine. R., Vol. I, pp.104-112;121 (*Webb Depo., p. 40, ll. 13-16; p. 42, l.10-p. 43, l. 1*; *Exhibit 1 attached thereto*).

Mr. Adams replaced the engine, called EIS, and told them it was finished. EIS then said they would come get the Skid, but never did. R. Vol. III, p.627; 630-31 (*Adams Depo., p. 30, ll. 10-13; p. 44, l. 13-p. 45, l. 9*). EIS told Mr. Adams they would not pay for his work or the new engine and told him to take the new engine out, which Mr. Adams did. R., Vol. I, p. 174 (*George Depo., p.*

202,ll.1-21); R., Vol III, p.630 (*Adams Depo., p. 44, l. 18-p. 45, l. 9*). Mr. Adams never sold the engine–he sent the new engine to Perkins and kept the Skid and its old engine, telling EIS they could come get it, which EIS has not done. R., Vol. I, p. 172 (*George Depo.., p.195, l. 19-25*); R., Vol. III, pp. 630-31 (*Adams Depo., p. 45, l. 24-p. 46, l.* 8).

2. Summary judgment.

In its decision granting summary judgment to Northwest, the district court correctly found no genuine issues of material fact existed in the record on EIS's contract or unjust enrichment claims. R., Vol. III, pp. 577-78. The district court found there was no genuine issue of material fact that EIS and Mr. George voluntarily placed Mr. Webb, their agent, in such a position that Northwest and Mr. Adams, who were of ordinary prudence and conversant with business usages and nature of a particular business, that they were justified in believing Mr. Webb was acting pursuant to existing authority. R., Vol. III, p. 596-598. The district court rejected EIS's contention that Northwest and Mr. Adams were required to contact Mr. George directly to ascertain whether Mr. Webb had authority to deal with them. R., Vol. III, pp. 594-95. The district court reasoned that it had addressed the identical issue in another case, whether a necessary element of apparent authority was to establish that the party asserting apparent authority inquired with the principal about the agent's authority, and if no inquiry was made, the principal cannot be liable for the actions of the agent. *Id.* The district court rejected the "inquiry rule" as being necessary to establish apparent authority, reasoning:

> While it is true that both *Hausam* and *Podolan* appear to state such a rule, such a rule, in the context of apparent authority is counter-intuitive to this Court. If the duty of a plaintiff is as described by [the adverse party] and as

> described by Justice[sic] Walters in *Hausam* and *Podolan*, then a plaintiff is charged with a duty to inquire of the principal in those cases where the external circumstances would cause a reasonable person to believe that apparent authority existed, thereby creating actual authority. This cannot be the law.

R., Vol. III, p. 595. The district court further reasoned:

> The Court would note that the *Podolan* decision, as authority for this statement of the law, cites to a 1926 Idaho Supreme Court decision, *Chamberlain v. Amalgamated Sugar Co.,* 42 Idaho 604, 247 P.12 (1926) (*Chamberlain*). Although this decision of the Idaho Supreme Court has never been expressly overruled, it has also never been cited by the Idaho Supreme Court in any of its pronouncements on apparent authority. Moreover, even in its more recent pronouncements on apparent authority, the Supreme Court has never cited to *Chamberlain, Hausam*, or *Podolan* as authority for this proposition of law. Therefore, this Court will reach the somewhat bold conclusion that *Chamberlain* has been implicitly overruled by subsequent pronouncements of the Idaho Supreme Court on apparent authority. Based upon this conclusion, the Court will adhere to the Idaho Supreme Court's more recent pronouncements on this issue as contained in *Bailey* and its progeny. *See* also *Bales v. General Ins. Co. of America,* 53 Idaho 327,___, 24 P.2d 57,60 (1933). In this case, the Idaho Supreme Court held, contrary to the decisions in *Chamberlain, Podolan,* and *Hausam*, that "a person who is clothed with power to act for them at all is treated as clothed with authority to bind them as to all matters within the scope of his real or apparent authority, and persons dealing with him in that capacity are not bound to go beyond the apparent authority conferred upon him, and inquire whether in fact he is authorized to do a particular act. It is enough if the act is within the scope of his apparent authority. 2 Wood, Ins.§ 408, and authorities there cited.

R., Vol. III, p. 595.

The district court then found that apparent authority existed, noting that: (1) Mr. George initially contacted Northwest to have the Skid delivered to it for diagnosis; (2) that Mr. George did not place any limitation on Northwest or Mr. Adams that they were to only deal with Mr. George or

that Mr. Webb was not authorized to be EIS's or Mr. George's contact person or act on their behalf; (3) that Mr. George sent Mr. Webb from Pocatello to Boise with the Skid, entrusting Mr. Webb with a valuable piece of equipment ($40,000 value), to deliver the Skid to Northwest; (4) that there was nothing in the record to suggest Mr. Webb left Mr. Adams with a card for Mr. George, nor any instructions, written or oral, advising Northwest or Mr. Adams to only deal with Mr. George or his wife; (5) that it was undisputed that Mr. Adams contacted Mr. Webb, told him the engine was dusted and needed to be replaced and not covered by any warranty; (6) that it was undisputed that Mr. Webb advised Mr. Adams he would discuss the matter with his superior and advise Northwest how EIS wished to proceed; and (7) that it was undisputed that Mr. Webb did get back to Mr. Adams and advised him that his superior at EIS authorized replacement of the engine. R., Vol. III, pp. 596-98.

As to EIS's unjust enrichment claim, the district court also correctly concluded that there was no genuine issue of material fact EIS did not put forth facts sufficient to meet the elements of that claim. R., Vol. III, p. 600.

II. ISSUES ON APPEAL

1. Did the district court correctly concluded there was no genuine issue of material fact Mr. Webb had apparent authority on behalf of EIS and Mr. George authorizing Mr. Adams to replace the engine, where the undisputed record showed that Mr. George admitted he did not inform Northwest or Mr. Adams they could only deal with him, did not limit Mr. Webb's authority to act for EIS/Mr. George, and where Mr. George admitted he authorized replacement of the engine?

2. Is there a genuine issue of material fact whether the agreement between EIS and Northwest was a service agreement, capable of being performed within one year and that EIS is equitably estopped, barring application of the Statute of Frauds?

3. Did EIS waive its appeal of dismissal of its unjust enrichment and breach of implied covenant of good faith and fair dealing claims, where EIS failed to raise the issue, cite to authority and present argument of those claims in its Opening Brief?

4. Is Northwest entitled to attorney's fees and costs on appeal, pursuant to Idaho Code §§ 12-120(3), 12-121 and Idaho Appellate Rules 40 and 41?

III. STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment "shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995). In making this determination, a court should liberally construe the record in favor of the party opposing the motion and draw all reasonable inferences and conclusions in that party's favor. *Smith,* 128 Idaho at 718, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). Based on the evidence, if reasonable persons could reach differing conclusions or draw conflicting inferences, summary judgment must be denied. *Id.* (citing *Harris v. Department of Health and Welfare,* 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). However,

if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)).

Further, when a defendant moves for summary judgment, asserting there is no genuine issue of material fact as to an element of a plaintiff's case, the plaintiff "must establish the existence of an issue of fact regarding that element." *Zimmerman v. Volkswagen of America, Inc.,* 128 Idaho 851, 854, 920 P.2d 67, 70 (1996). Moreover, the non-moving party "has the burden of presenting sufficient evidence to establish a triable issue which arises from the facts, and a genuine issue of fact is not created by a mere scintilla of evidence." *Jarman v. Hale,* 122 Idaho 952, 955-956, 842 P.2d 288, 291-292 (Ct. App. 1992) (internal citations omitted). "If the moving party fails to challenge an element or fails to present evidence establishing the absence of genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the nonmoving party is not required to respond with supporting evidence." *Smith, supra,* 128 Idaho at 719, 918 P.2d at 588 (citing *Thomson*, 126 Idaho at 530, 887 P.2d at 1038)). Further, "a nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial, requires the entry of summary judgment. *Jarman, supra,* 122 Idaho at 955-956, 842 P.2d at 291-292. (Internal citations omitted). Thus, where the non-moving party fails, by way of affidavit or deposition, to make a sufficient showing to establish an essential element to its case, "there can be no 'genuine issue as to any material fact,' since a complete failure

of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

In this matter, EIS failed to meet its burden on summary judgment, as it failed to make a sufficient showing to establish the existence of the elements of its claims.

IV. ARGUMENT

A. THE DISTRICT COURT CORRECTLY DISMISSED EIS'S BREACH OF CONTRACT CLAIMS , AS THERE IS NO GENUINE ISSUE OF MATERIAL FACT MR. GEORGE HELD MR. WEBB OUT AS HAVING APPARENT AUTHORITY TO ACT ON HIS AND EIS'S BEHALF, AND THAT MR. GEORGE AUTHORIZED NORTHWEST TO REPLACE THE ENGINE.

1. The District Court correctly held EIS and Mr. George held Mr. Webb out as having apparent authority to authorize the work performed by Northwest.

There is no factual dispute that EIS and Mr. George cloaked their employee and agent, Mr. Webb with apparent authority to authorize Mr. Adams to replace the engine. It has long been settled that apparent authority exists "when a principal voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of the particular business, is justified in believing that the agent is acting pursuant to existing authority." *Clark v. Gneiting*, 95 Idaho 10, 11-12, 501 P.2d 278, 279-80 (1972); *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985) (*citing, Clark, supra*). Apparent authority is sufficient to bind a principal to a contract entered into by an agent with a third party, as long as the agent acted within the course and scope of authority delegated by the principal. *Clark, supra,* 95 Idaho, at 11-12, 501 P.2d at 279-80; *Bailey, supra,* 109 Idaho at 498, 708 P.2d at 903. There is no legitimate dispute that Mr. George held

Mr. Webb out to be an agent authorized to act pursuant to EIS's and Mr. George's authority, and, likewise, Mr. Webb had their authority to tell Mr. Adams to replace the engine. Mr. Webb followed George's command.

EIS cites to Idaho Court of Appeals case law[3] to support its position that apparent authority does not exist unless the party asserting apparent authority inquires of the principal to ascertain the nature of the agent's authority. While EIS cites to both *Clark* and *Bailey,* in those cases, this Court did not cite to *Chamberlain* or the alleged "inquiry rule" that the party asserting agency is required to inquire with the principal. This Court's precedent does not refer to **any requirement that an inquiry has to be made with the principal.** Moreover, EIS fails to cite to any Idaho Supreme Court case, after *Chamberlain,* requiring that the party asserting agency must inquire with the principal as to the agent's authority. A review of this Court's precedent is to the contrary.

In *Hayward v. Yost* this Court did not cite to *Chamberlain* nor did it espouse or cite to any "inquiry rule." There, this Court held that declarations of an agent outside the presence of his principal are incompetent to prove agency, unless an agency has been established by independent evidence, in which case the declarations are admissible as corroborative evidence. *Id.,* 72 Idaho 415, 428, 242 P.2d 971, 979 (1952) (*citing Cupples v. Stanfield*, 35 Idaho 466, 207 P.326 (1922). In *John Scowcroft & Sons Co. v. Roselle,* 77 Idaho 142, 146, 289 P.2d 612, 623 (1955), this Court cited to the rule that apparent authority exits where the principal places his agent in such a position that a

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[3] *Podolan v. Idaho Legal Aid Serv., Inc.*, 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993); *Hausam v. Schnabl*, 126 Idaho 569, 887 P.2d 1076 (Ct. App. 1995).

person of ordinary prudence, conversant with the business usages and the nature of the particular business, is justified in believing that the agent is acting pursuant to existing authority, and that the principal is bound by the acts of his agent acting within the scope of his apparent authority. This was the same rule followed by this Court in *Clark,* and *Bailey, supra.* This Court in *Roselle* did not reference *Chamberlain* or an "inquiry rule." Subsequent to *Roselle*, this Court, in *Clements v. Jungert*, 90 Idaho 143, 408 P.2d 810, 814 (1965) likewise did not cite to *Chamberlain* or any requirement to inquire with the principal. There, this Court cited to the long adopted rule of apparent authority cited to by this Court in *Roselle, Clark*, and *Bailey, supra.*

Similarly, in *Killinger v. Iest,* 91 Idaho 571,575, 428 P.2d 490, 494 (1967) (*citing, Hayward, supra*) this Court, while it did cite to *Chamberlain*, never enunciated or followed the "inquiry rule." Rather, this Court there issued a holding, like the holding in *Hayward, supra,* as to the admissibility of an agent's declarations, reasoning an agent's declarations were admissible to prove an agency existed if the agent's statements were corroborated by independent evidence. *Id.,* 91 Idaho at 575, 428 P.2d at 494. In *Idaho Title Co. v. American States Ins. Co.*,96 Idaho 465, 468, 531 P.2d 227, 230 (1975), this Court did not cite to *Chamberlain*, or any "inquiry rule," but held that with apparent authority, the party asserting agency has to use reasonable diligence to ascertain the agent's authority. Further, in *Gissel v. Idaho*, 111 Idaho 725, 728, 727 P.2d 1153, 1156 (1986) this Court did not cite to *Chamberlain* or any "inquiry rule," to establish apparent authority, but cited to the apparent authority rule stated in *Roselle, Clark*, and *Bailey, supra.*

Applying the aforementioned precedent to this case, the undisputed record shows that Mr. George gave every indication he and EIS cloaked Mr. Webb with apparent authority. EIS and Mr. George did not dispute that he contacted Northwest and had Mr. Webb deliver the Skid to Northwest. R., Vol. I, pp.151-52 (*George Depo., p. 111, l.23-p. 112, l.20.* Mr. George admitted he never told Mr. Adams or anyone at Northwest that Mr. Webb did not have the authority to tell them to fix the engine or that Mr. Webb's authority was limited to delivering or picking up the Skid. R., Vol. I., p. 172 (*George Depo., p. 192, l.7-p. 194, l. 7*). It is undisputed that Mr. George entrusted Mr. Webb to deliver the Skid, a valuable piece of equipment worth $40,000. R., Vol. I, p. 193.

Moreover, EIS did not put forth any facts in the record to showing that Mr. George or Mr. Webb left Mr. Adams with a card or note to contact or deal only with Mr. George or his wife. Likewise, the record is also void of any evidence that Mr. George instructed Mr. Adams that he and Northwest could only deal with him or his wife. It is further undisputed that Mr. Adams called Mr. Webb and advised him the engine was dusted, needed to be replaced, and that it was not covered under warranty. R., Vol. III, p. 625 (*Adams Depo., p 23, l.25-p.24, l.16*); R., Vol. III, p. 628; 642-645 (*Adams Depo., p. 37, l.12-p. 40, l.3; Exhibits 1 & 2 attached thereto*). Furthermore, EIS did not dispute that Mr. Webb told Mr. Adams he would discuss the matter with Mr. George, and advise Mr. Adams how Mr. George/EIS wanted to proceed. R., Vol. I, p.105 *(Webb Depo., p. 14,l.11-p.16, l.14)*; R., Vol. III, p. 625-26 (*Adams Depo., p. 24, l.7-p. 26, l.11*). It is also undisputed that Mr. Webb did get back in touch with Mr. Adams and told him Mr. George authorized replacement of the engine. R., Vol. I, p.105 *(Webb Depo., p. 14,l.11-p.16, l.14*).

The record shows, without any legitimate dispute, that Mr. George cloaked Mr. Webb with apparent authority. Mr. George expressly authorized Mr. Webb to deliver the Skid, never told Mr. Adams that Mr. Webb was not his agent, or that he was to only deal with Mr. George and not Mr. Webb. As a result, this Court should affirm the district court's entry of summary judgment.

2. There is no factual dispute that when George authorized Adams to replace the engine, he knew the engine was not covered under warranty.

There is no genuine issue of material fact that EIS, through its agents, Mr. George and Mr. Webb, requested and gave their permission to Mr. Adams to replace the engine in the Skid. EIS asserts Mr. George did not know until after the engine was replaced that it was not covered under warranty. This is entirely belied by the unequivocal testimony of Mr. Webb. Mr. Webb told Mr. Adams that Mr. George wanted the engine fixed. Mr. Adams told Mr. Webb he needed to find out what was wrong first and he would let them know. R., Vol. I, p.104-105 *(Webb Depo., p. 12, l. 17-p. 14, l. 1);* R., Vol. III, p.625 *(Adams Depo. p. 23, l. 25-p. 24, l. 6)*. After receiving approval from Mr. George and Mr. Webb, Mr. Adams looked at the engine and contacted Mr. Webb, telling him the engine was dusted, it was not a warranty issue, and the engine had to be replaced. R., Vol. III, pp. 625; 628-29; 642-45*(Adams Depo..p. 23, l.25-p. 24, l.16; p. 37, l. 12-p. 40, l. 3; Exhibits 1 and 2 attached thereto)*. Both Mr. Adams and Mr. Webb testified that Mr. Webb informed Mr. George the engine was dusted, was not covered under warranty, and needed to be replaced. Mr. George, after learning this, authorized Mr. Adams to replace the engine. R., Vol. I, p. 105 (*Webb Depo., p. 14, l. 11- p. 16, l. 14*); R., Vol III, 625 (*Adams Depo., p. 24, l. 7-p. 26, l. 11*). Mr. Adams also sent Mr.

Webb the bid, which Mr. Webb presented to Mr. George, and, thereafter, Mr. George gave approval to fix the Skid. R., Vol. I, p. 107 (*Webb Depo., p. 22, l. 7-p. 23,l. 23*). Mr. Webb testified:

> Q. But when you were going through this issue with the Boxer skid steer, Preston [George] never said don't have them fix this, I can't afford to pay for it?
>
> A. Absolutely not.
>
> Q. When you talked with Mr. Adams, you understood that the Boxer skid steer was going to be fixed, and there was going to be a charge associated with it?
>
> A. Until he called and said that, I had no idea that that was–I thought it was just going to get fixed and I was going to go pick it up so the boys could get back to work. **I never blind-sided Preston. I was very honest. . . .I mean, I was very detailed in how I presented things to Preston as far as even drawing pictures. I never blind-sided him. Every conversation I had on the telephone with anything that had anything to do with that business, I either took notes or spoke to him while he was I the room while I was on the phone. Never once did I ever try to just surprise him with a bill.**
>
> Q. And you went through that same process with Preston as it related to getting this Boxer skid steer fixed?
>
> A. Yes.
>
> **Q. And Preston [George] authorized you to say, yeah, go ahead and get it fixed?**
>
> **A. I can safely say yes** because I know that–I mean, it's not my decision. It's not my piece of equipment, so I would need some kind of higher-up authorization in order to make a decision like that. Knowing how I am personally, I wouldn't have made that decision on my own. I know that we had several conversations. And I think at one point, he thought it was bullshit that he had to pay for something, but it needed to be fixed because it was a critical piece of equipment.

R., Vol. I, p. 106 (*Webb Depo.., p.18, l. 6 to p.19, l. 22*) [Emphasis supplied]. Mr. Webb further testified:

> Q. Right. And that's what I wanted to walk through with you briefly. So at some point **Mr. Adams gave you a bid on what it would cost to get the machine fixed?**

A. Yes.

Q. **That was all presented to Preston?**

A. Yes.

Q. **Preston gave the approval to get it fixed, either to Mr. Adams himself or to you?**

A. **Yes.**

R., Vol. I, p. 107 (*Webb Depo, p. 23, ll.18-23*) (Emphasis supplied). Mr. Webb further testified that after he presented Mr. George with the estimate from Mr. Adams, Mr. George made it clear not to do anything until he gave his approval. R., Vol. I, p. 110 (*Webb Depo., p. 33, ll. 5-11; p. 34, ll. 3-18*). Mr. George gave his approval, even after knowing that the engine was not covered under warranty, and Mr. Webb relayed Mr. George's approval to Mr. Adams. R., Vol. I, p. 110-11(*Webb Depo., p. 35, l.19-p. 36, l. 21; p.37, ll. 5-7*). Mr. Webb further testified that Mr. George determined that since Northwest had the engine, and could get it fixed quickly, Mr. George made the decision to have it fixed. R., Vol. I, p. 111 (*Webb Depo., p. 37, ll. 19-24*). Mr. Webb informed Mr. George of the estimated amount to repair the Skid, the initial bid of $3,000 to the final amount of $4,385, and there was no disagreement between Mr. George and Mr. Webb over the handling or replacing the Skid's engine. R., Vol. I, p.111-12; 121 (*Webb Depo., p. 40, ll. 13-16; p. 42, l.10-p. 43, l. 1*; *Exhibit 1 attached thereto*). Mr. Adams replaced the engine, called EIS, telling them it was finished. EIS then said they would come get the Skid, but never did. R., Vol. III, 627, 630 (*Adams Depo., p. 30, ll. 10-13; p. 44, l. 13-p. 45, l. 9*).

EIS contends that Mr. George did authorize replacement of the engine, but only if it was warrantied. R., Vol. I, p. 156 (*George Depo.,p. 129, ll. 17-19*). However, Mr. George admitted that

at the time Mr. Adams had the Skid, Mr. George did not know if the engine was covered under warranty, only assumed it was, and that Northwest was to either put a new engine in or repair the engine when he delivered it to Northwest. R., Vol. I., p. 174 (*George Depo., p.200, ll.10-23*). Mr. George further admitted that he never told Mr. Adams that if the engine was not covered by a warranty, he was not going to pay for it, and that the contract was to have Mr. Adams/Northwest fix or replace the engine. R., Vol. I., p. 174 (*George Depo., p. 200, l.24-p. 7*).

EIS interjects subterfuge by contending, based on pure speculation, that Mr. Webb is open to a "potential" lawsuit from EIS.[4] This unfounded position is irrelevant to the issues in this case, and is a matter between EIS and Mr. Webb. The Court should not be distracted by the simple fact that Mr. Webb, through George's authorization and approval, notified Adams to replace the engine. R., Vol. I, p. 105 (*Webb Depo., ,p. 14, l. 11- p. 16, l. 14*; R., Vol. I, p. 105-107; p. 110 (*Webb Depo., p.18, l. 6 to p.19, l. 22; p. 22, l. 7-p. 23,l. 23; p. 33, ll. 5-11; p. 34, ll. 3-18; Id., p. 35, l.19-p. 36, l. 21*). Mr. George admitted he never told Mr. Adams or anyone at Northwest that Mr. Webb did not have the authority to tell them to fix the engine.R., Vol. I, p.172(*George Depo., p. 192,l.7-p. 194, l. 7*). Mr. George also admitted that he never told Adams that if the engine was not covered by any warranty, he would not pay for it. R., Vol. I, p. 174 (*George Depo., p. 200, l.24-p.201, l.4*).

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Appellate Brief, p. 13.

3. **Alternatively, since EIS admitted the agreement was to inspect the engine, and did not put forth any evidence that Northwest or Mr. Adams breached that agreement, summary judgment must be affirmed.**

EIS admitted that the agreement between it and Northwest was to have Mr. Adams inspect the engine. At oral argument at the hearing on the summary judgment motion, EIS's counsel admitted to this:

> Mr. Henrie: We are claiming that there is **a contract for the inspection** of the machine to see if there was any authorized warranty repair that could be made.
> ***
> The thing is, our contract that we have asserted **was a contract for labor for the inspection of the engine**, but we never asserted that there was a contract for the sale of goods.[Emphasis supplied].

Tr., p. 32, ll.8-10; p. 33, ll. 11-14.

EIS put forth no evidence in the record disputing that Northwest fulfilled the agreement. There is no genuine issue of material fact disputing that Mr. Adams determined what was wrong with the engine, i.e. that EIS failed to properly maintain it, which caused the engine to fail, and that it was not covered under any warranty. EIS posited no facts to establish that Northwest or Mr. Adams breached the agreement by not inspecting the engine and determining what was wrong with it.

In its Opening Brief, EIS contends it performed "daily staunch" maintenance on the engine."[5] This is belied by the record.[6] There was no daily maintenance of the Skid. R., Vol.I, p. 200. EIS's

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Appellate Brief, p.5.

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EIS makes another unfounded contention in its brief, asserting, solely by way of its unverified complaint (R., Vol. I, pp.40-48), it suffered "tremendous losses." Appellate Brief, p. 7. EIS has not put forth any evidence to support its claim it suffered tremendous losses. Mr. George testified

own records show on only 6 occasions over a two year period did EIS do any maintenance with the Skid. R., Vol. I, pp. 145-46 (*George Depo., pp. 81, l.20-p.90, l.16*). Mr. Webb testified he never did any mechanical maintenance of the Skid. R., Vol. I., p. 109(*Webb Depo., p.32, ll.9-14*. As to the outer air filter, Mr. George admitted it was never changed but only cleaned four times over a two year period. R., Vol. I, p. 145, 200 (*George Depo., p. 87, ll.7-10*). Further, EIS did not submit any expert testimony in the record disputing that Mr. Adams inspected the engine and found what was wrong with it. There is no dispute in the record on this. Futher, the record establishes EIS did not examine, nor did it have any of its experts examine, the engine. Regardless, the Court should not be mislead by EIS's subterfuge. EIS admitted the agreement was for Northwest to inspect and diagnose the problem. The record is undisputed that Northwest performed the contract. Thus, Northwest was properly granted summary judgment.

B. THE STATUTE OF FRAUDS DOES NOT APPLY.

EIS alleges that Northwest's contract is barred by the Statute of Frauds. This argument lacks any merit for several reasons. As the record undeniably shows, Northwest has not asserted any counterclaim for breach of contract against EIS. Also, as previously stated, EIS asserted a service agreement, for inspection and diagnoses, existed between it and Northwest.[7] It is well-settled the

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EIS's taxes showed no profit, and that it was losing money, from 2007-2009, before it bought the Skid. R., Vol. I, p.165 (*George Depo., p. 166, l.4-p.167, l.15*). It is also noteworthy to point out that Mr. George's deposition was continued, as EIS had not produced all of the documents establishing its alleged damages. R., Vol. I, pp.164 (*George Depo., p. 161, ll.2-10; p. 209, l.18-p.210, l.7*).

[7] R., Vol. I, p. 46, ¶¶ 67-68.

Statute of Frauds applies to the sale of goods, and does not apply to service agreements, which is what existed here. Further, the Statute of Frauds is inapplicable, as the agreement was capable of being performed within a year. Finally, EIS is barred from asserting the Statute of Frauds by equitable estoppel, given the record is not disputed Northwest, again, performed its end of the agreement.

1. The UCC Statute of Frauds is inapplicable, as the agreement between Northwest an EIS was a service agreement.

EIS claims Idaho's UCC SOF, Idaho Code §§ 28-2-201(1) and (2) apply, yet admit that the contract was a **service agreement**, not a sale of goods. By that admission, EIS's Statute of Fraud claim is barred. Again, there is no factual dispute this was a service agreement, and not an agreement for the sale of goods.

It is well-settled that the UCC does not apply to service agreements. The Idaho Uniform Commercial Code ("UCC"), Article 2, only applies to the sale of goods, and does not apply to the provision of services. Idaho Code § 28-2-102 states:

> 28-2-102. Scope -- Certain security and other transactions excluded from this chapter. Unless the context otherwise requires, **this chapter applies to transactions in goods** it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. [Emphasis supplied].

In applying Article 2 of the UCC to a contract for services, this Court has held that when a contract involves a mixture of both goods and services, a court should look to see which component

predominates the contract. If the predominant factor was goods, the UCC applies. If the predominant factor is services, the UCC does not apply:

> The Court of Appeals in *Pittsley v. Houser*, 125 Idaho 820, 822, 875 P.2d 232, 234 (Ct. App. 1994), focused on the applicability of the UCC to hybrid transactions. The court held that the trial court must look at the predominant factor of the transaction to determine if the UCC applies. *Id.* **The test for inclusion or exclusion is not whether they 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 of 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.* (citations omitted). This Court agrees with the Court of Appeals' analysis and holds that the predominant factor test should be used to determine whether the UCC applies to transactions involving the sale of both goods and services. [Emphasis supplied].

Fox v. Mt. W. Elec., 137 Idaho 703, 710, 52 P.3d 848, 855 (2002).

There is absolutely nothing in the record to support EIS's position that its contract with Northwest was anything other than a service agreement. There is no factual basis in the record showing Northwest was purchasing the Skid or an engine from EIS, or that EIS was selling or buying the Skid or engine from Northwest. To the contrary, the contract was for Northwest's services to inspect, diagnose the problem and replace the engine. EIS characterized the agreement as "a substantial **service** bill . . . ."[8] Moreover, at oral argument, EIS's counsel argued that the contract was a service agreement, when he stated:

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Amended Complaint, ¶¶ *67-68* [emphasis supplied].

> The thing is, our contract that we have asserted **was a contract for labor for the inspection of the engine, but we never asserted that there was a contract for the sale of goods.**
> ***
> **There was a contract here for service, not for sale of an engine."**

Tr., p. 33, ll.11-14; p.35, ll.14-15 [Emphasis supplied]. As a result, the Court should give no consideration or credence to EIS's position as to the Statute of Frauds. The agreement was a service agreement, barring application of the Statute of Frauds.

2. The agreement does not come within Idaho Code § 9-905.

Additionally, the Statute of Frauds, pursuant to Idaho Code § 9-905, does not apply here. Section 9-905 provides:

> In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> 1.An agreement that by its terms is not to be performed within a year from the making thereof.
> 2.A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section 9-506, Idaho Code.
> 3.An agreement made upon consideration of marriage, other than a mutual promise to marry.
> 4.An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.
> 5.A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.

This is not a case involving a guaranty for debt, marriage, real property or an extension of credit for $50,000 or more. It is also not an agreement that was not to be performed within a year. Clearly, section 9-905 does not apply.

3. EIS's Statute of Frauds claim is barred by equitable estoppel.

In addition, equitable estoppel bars application of the Statute of Frauds, given Northwest's undisputed performance of the contract. Equitable estoppel applies where an agreement is complete, definite and certain in all its material terms, or contain provisions that are capable in themselves of being reduced to certainty. *Lettunich v. Key Bank Nat'l Assoc.,* 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005). Further, "[a] party who is induced to rely on an oral agreement and who changes position to his own detriment cannot be defrauded by [one] who interposes the Statute of Frauds to declare the agreement invalid." *Mikesell v. Newworld Development Corp*, 122 Idaho 868, 874, 840 P.2d 1090, 1096 (Ct. App. 1992) (*quoting, Roundy v. Waner,* 98 Idaho 625, 628-29, 570 P.2d 862, 865-66 (1977)). Here, EIS sent the Skid to Mr. Adams, told him to determine what was wrong with it and told him to fix it. In reliance upon EIS's statements, Mr. Adams determined the engine was damaged from improper maintenance and informed EIS/Mr. Webb. EIS/Mr. George then authorized Mr. Adams to replace the engine, which he did. Mr. Adams then sent invoices reflecting the work he performed. Thus, EIS is estopped from asserting any application of the Statute of Frauds.

Ultimately, EIS's Statute of Frauds claim is, without a doubt, specious, since it **admitted to the existence of a contract**. Again, EIS characterized the contract as "a substantial **service** bill . .

. ."[9] and its counsel argued that "[t]here was a contract here fo**service, not for sale of an engine."** Tr., p. 35, ll.14-15. For these reasons, this Court should affirm the grant of summary judgment.

C. EIS WAIVED ITS RIGHT TO APPEAL ITS CLAIMS OF BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND UNJUST ENRICHMENT.

While EIS asserted, in its Notice of Appeal, issues of whether the district court erred in dismissing its claims of breach of implied covenant of good faith and fair dealing and unjust enrichment[10], it did not raise them as issues, nor did it present argument or legal authority to support those issues in its opening brief. As a result, EIS waived those issues.

A party waives his issues or arguments on appeal, when such are not supported by legal authority or the record. *Bach v. Bagley,* 148 Idaho 784, 229 P.3d 1146 (2010). *See also, Kugler v. Drown,* 119 Idaho 687, 690, 809 P.2d 1166, 1169 (Ct. App. 1991) ("Error will not be presumed on appeal but must be affirmatively shown on the record by an appellant."), *citing*, *Rutter v. McLaughlin,* 101 Idaho 292, 293, 612 P.2d 135, 136 (1980)). More specifically, as this Court stated in *Bach*:

> **We will not consider an issue not "supported by argument and authority in the opening brief."** *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *see also Idaho App. R. 35(a)(6)* ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."). Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, **if the**

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[9] R., Vol. I, p.46 (*Amended Complaint,* ¶¶ *67-68*) [Emphasis supplied].

[10] R., Vol. III, pp. 611-615.

> **issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court.** *Inama v. Boise County ex rel. Bd. of Comm'rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing). **Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court.** *Randall v. Ganz,* 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). **A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue.** *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). **This Court will not search the record on appeal for error.** *Suitts v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). **Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived.** *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Bach, supra, 148 Idaho at 790-91, 229 P.3d at 1152-53[Bold emphasis added][Italics in original]. The Court in *Bach* then went on to hold it would not consider issues or argument submitted by the appellant, where the appellant's "convoluted briefing" was "lacking in coherence, citations to the record, citations of applicable authority, or comprehensible argument. . . ." *Id., supra,* 148 Idaho at 791, 229 P.3d at 1153.

In this matter, it is patently clear EIS waived its issues and argument as to whether the district court erred in dismissing EIS' breach of implied covenant of good faith and fair dealing and unjust enrichment claims. EIS did not present any argument or authority in its opening brief in support of its position the district court erred in dismissing those claims. As a result, this Court should affirm the district court's grant of summary judgment and dismissal of EIS's claims.

D. NORTHWEST, NOT EIS, IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Northwest is entitled to attorney's fees and costs under Idaho Code §§ 12-120(3) and 12-121 and Idaho Appellate Rules 40 and 41. Pursuant to Idaho Code § 12-120(3), should Northwest prevail on appeal, as it did below, since the gravamen of the lawsuit pertains to a contract for the purchase/sale of services and/or was a commercial transaction. *Garner v. Povey*, 151 Idaho 462, 470-473, 259 P.3d 608, 614-17 (2011). In addition, Idaho Code § 12-121 and I.A.R. 41 allow for the award of attorney's fees and costs in a civil action where a matter was defended frivolously, unreasonably and without foundation. *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Additionally, I.A.R. 40 allows for the award of costs to the prevailing party on appeal.

In this matter, EIS pleaded a breach of contract in its complaint, thereby invoking the application of section 12-120(3). However, Northwest, not EIS is entitled to attorney's fees and costs. There was no genuine issue of material fact EIS could not prove its breach of contract or unjust enrichment claims. This is supported by the fact that EIS failed to raise an issue of fact that it cloaked Mr. Webb with the apparent authority, without limiting that authority, to deal with Northwest and Mr. Adams. The records further shows Mr. George admitted he did not limit Mr. Webb's apparent authority, and never communicated to Northwest or Mr. Adams they were to only deal with him, not Mr. Webb. Furthermore, Mr. George admitted he authorized Northwest and Mr. Adams to replace the engine.

As to EIS's Statute of Frauds claim, again, by EIS/Mr.George's own admissions, a contract existed between them and Northwest and Mr. Adams, as they admitted they authorized the replacement of the engine. They also admitted it was a service agreement, not a sale of goods, thereby barring their Statute of Frauds claim.

Regarding EIS's breach of implied covenant of good faith and fair dealing and unjust enrichment claims, EIS waived its right to argue this on appeal by not supporting it with argument or citation to authority on appeal.

Finally, as EIS admits, the gravamen of this lawsuit is a contract for the purchase or sale of a service and/or a commercial transaction, for which § 12-120(3) mandates the award of attorney's fees and costs to the prevailing party. There was a service contract here, which Northwest fully performed at EIS's request. As to section 12-121 and I.A.R. 41, it is patently clear EIS has pursued this claim frivolously, unreasonably and without foundation, given its numerous admissions it authorized the replacement of the engine and never conferred any benefit on Northwest. Based upon the aforementioned statutes and rules, as well as I.A.R. 40, Northwest is entitled to an award of attorney's fees and costs on appeal.

V. CONCLUSION

Based on the foregoing, Defendant/Respondent Northwest Power Systems, LLC requests that the Court affirm the district court's grant of summary judgment to Northwest, dismissing Plaintiff/Appellant EIS's claims, in their entirety, with prejudice. Defendant/Respondent further requests the Court award it its attorney's fees and costs on appeal.

DATED this 11 day of June, 2013.

COOPER & LARSEN, CHARTERED

By______________________
REED W. LARSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of June, 2013, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Aaron N. Thompson Bryan N. Henrie May Rammell & Thompson P.O. Box 370 Pocatello, ID 83204-0370	[✓] [ ] [ ] [ ]	U.S. Mail/Postage Prepaid Hand Delivery Overnight Mail Facsimile / 234-2961