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IN THE SUPREME COURT OF THE STATE OF IDAHO

<table>
<tr><td>FRONTIER DEVELOPMENT GROUP, LLC
Plaintiff/Respondent,

v.

LOUIS CARAVELLA and PATRICIA CARAVELLA,

Defendants/Appellants.</td><td>Docket No. 40581-2012

APPELLANTS' REPLY BRIEF

Appeal from Teton County Case No. CV-09-068</td></tr>
<tr><td>LOUIS CARAVELLA and PATRICIA CARAVELLA,

Counterclaimants/Appellants,

v.

FRONTIER DEVELOPMENT GROUP, LLC, and MICHAEL HORN,

Counterdefendants/Respondents.</td><td></td></tr>
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Appeal from District Court of the Seventh Judicial District for Teton County
Honorable Gregory W. Moeller, presiding

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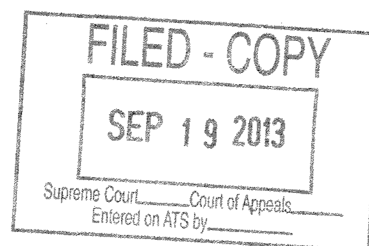

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I. INTRODUCTION

The Record discloses that Respondent Michael Horn ("Horn") was a "fly-by-night" contractor who arrived in Teton County as a semi-retired airline and Air Force pilot. Horn formed Frontier Development Group, LLC ("FDG"), registered an assumed business name as "Open Range Homes," and held himself out as "the best builder" in the area— all despite not having any actual experience in construction. Horn built a total of nine homes over a few short years, which were built entirely by subcontractors. When the Appellants Louis and Patricia Caravella ("Caravellas") began to litigate with Horn, he moved to Florida where he resumed his career as a pilot. The condition and quality of the work performed on the home purchased by the Caravellas fully established Horn's absolute incompetence. (Findings #92-112, Conclusions #39.) After engaging in such conduct, Horn seeks to hide behind the LLC he created for the purpose of engaging in the work he had no business conducting.

II. STATEMENT OF FACTS

Throughout his opening brief, Horn points to bits of evidence that are contrary to the findings of fact made by the Court. Caravellas are compelled to address such contentions by contrasting Horn's assertions to this Court with the district court's actual findings and/or citations to the Record.

1. The initial owner of the property for whom Horn started construction on the home was Rick Myers ("Myers), a non-party to this action. Mr. Myers never testified at a trial or deposition in this matter. Horn cites to "Defendants' Exhibit HHHH" for the assertion that Myers directed FDG to reduced "numerous construction line items and transfer funds to other areas of the

Project," and that the modifications were approved by First Horizon. Horn's assertion is problematic because the simple citation to "Exhibit HHHH" is wholly inadequate to direct the Court to any specific evidence. Exhibit HHHH consists of the deposition transcript of First Horizon's representative, Theresa Nichols (Exhibit HHHH-1), as well as a vast number of exhibit pages (Exhibit HHHH-2). Second, the district court expressly found with regard to this issue that despite Horn's assertion of those "facts," there was no evidence to support any such transfers or approval from First Horizon except for about $7,000 worth of cabinets. (Findings #12-25, 52 and 55.)

2. Horn cites his own testimony regarding changes to the construction plans, but the district court expressly found his testimony to be predicated upon hearsay and did not give it much, if any, weight. (Findings #51-55.) Further, the district court expressly found that Horn and the Caravellas agreed that the home would be constructed in accordance with the original written plans, not the modified plans that Horn attributed to Myers. (Findings #55.)

3. Horn asserts that when construction ended for Myers all the building materials that had been delivered but not yet installed was left on the property, but Horn fails to cite the Record om support of his assertion. The district court expressly found to the contrary, that Horn had billed for and was paid tens of thousands of dollars for work and materials that were not completed or installed, nor later found on the property. (Findings #12-25, 137.) At trial, Horn claimed that the funds for nearly all those items of work and materials had been shifted to other portions of the project, but the records submitted to the bank clearly showed that, with one exception regarding cabinets mentioned above, no such reapportionment occurred. (Findings #12-25.) Horn points out

that there were no findings regarding whether Myers, First Horizon or any of the subcontractors had reclaimed or sold uninstalled materials after construction halted, however, that there was no evidence that any of those things had occurred and thus no possibility for such a Finding. Indeed, it would not have been proper for any subcontractors to reclaim any items, because the evidence at trial was that all the subcontractors were paid in full. The only mechanics lien arising from the work done for Myers was belatedly filed by Horn, apparently once he knew the Caravellas' later purchase of the property would immediately pay his wrongful lien out of the closing funds. (Def's Ex. ZZZ.)

4. Horn cites his own testimony (Tr. Vol. I, p. 246-47) that another contractor worked on the property to get the house into a saleable stage. The testimony he cites, however, is based upon the same type of hearsay otherwise rejected by the district court, as discussed above. (Tr. Vol. I, p. 246:24-247:13.) Horn's personal observations of the supposed work by the other contractors lacks any specificity, merely stating that "we saw people over there performing work." (Id. at 247:13-16.) The only specific work later described by Horn was that the other contractor "did some Tyvek work," and explained that Tyvek was missing "due to high winds and exposure to elements that that house suffered during that time period." (Id. at p. 248:23-249:7.)

5. Horn points out that the property had passed the first two inspections, and asserts "it was determined that the property was structurally sound." The inspection records show only minimal inspections of the concrete footings and the "first half" of the foundation. (Pl's Ex. 2.) There were never any defects found in the concrete subcontractor's work, although the building contractor (Horn/FDG) had failed to properly secure the house to the foundation and failed to

properly utilize the foundation to support the center of the home, resulting in significant sagging of the interior floor. (Findings #95-96; Tr. Vol. II, p. 684:17-685:16, 692:17-693:4.)

6. Horn misstates the district court's Finding #47. It does not state that Mr. Caravella had "extensive background in the professional world of real estate," nor does it state that he had a "wide range of experience in managing construction projects." In its entirety, Finding #47 states:

> Dr. Caravella testified to having significant knowledge and experience working with builders and contractors on construction management issues. He testified about prior projects, including a commercial/professional building related to his medical practice. The Court finds that Dr. Caravella's experience makes him a more sophisticated purchaser than the average homebuyer. (Emphases added.)

7. Horn refers to an email marked as Plaintiff's Exhibit 16, but he fails to disclose to the Court that Exhibit 16 ultimately was not admitted into evidence. (Tr. Vol. I, pp. 265-269.) A significant discussion regarding the status of Exhibit 16 is provided in the arguments below. In short, Horn failed to provide the proper foundation for Exhibit 16 and it is of no evidentiary value.

8. Horn points out that the purchase and sale agreement between Caravellas and Myers indicate that Caravellas were purchasing the property "as is." Horn fails to point out, however, that the district court expressly found that the "as is" clause had no application to the builder's liability for construction defects, and thus had no bearing whatsoever on the claims against Horn and FDG. (Conclusions #37.)

9. Horn cites to page 40 of Mr. Caravellas' deposition, (Pl's Ex. 97), and asserts that Caravella had relied on his own expertise in performing the inspection of the subject property. In

reality, the testimony from his deposition clearly states that Caravellas relied on Horn's opinions. (Id. at p. 39:23-40:9.) The district court expressly concluded that "the record is clear that the Caravellas relied heavily upon Horn's representations as to the condition of the home. In lieu of bringing in an outside inspector, Caravellas relied upon the builder [Horn] who would be completing the home to confirm its condition." (Conclusions #37, p. 354.) The Court's finding is supported by the Caravellas' testimony. (Tr. Vol I., p. 37:6-17;Tr. Vol. II, pp. 884:6-15, 887:10-25, 893:3-5, 896:7-897:5.)

10. Horn asserts that the parties had agreed to a "cost plus arrangement with a 12% fee for Horn's services," and that Horn was authorized to phase the project however he wanted. This description, however, is similar to Horn's version of the agreement that was wholly rejected in the court's findings and conclusions. The court expressly found that it was a fixed price contract that was to be completed in specific phases. (Findings # 57, 60 and 61;Conclusions #26.) The district court cited several references to the Record in support of its Findings. Since these facts are critical to the Caravellas award of damages against FDG for breach of contract, they cannot be disturbed on appeal because Horn has not appealed from that judgment.

11. Horn claims that the district court never found that he had done anything improper with regard to Myers and First Horizon, but that simply is not true. The court found multiple instances of billing for work and material that was never installed or completed, (Findings #12-25), and expressly declared that "FDG and Horn's prior dealings with Myers and First Horizon also show a pattern of billing for materials that were never used in constructing the home." (Findings #137).

III. ARGUMENT

A. STANDARD OF REVIEW

Horn incorrectly states the standard of review as to all the issues on appeal. While the fraud claims against Horn must be proven by clear and convincing evidence, the claims regarding his liability as the agent for an undisclosed principal and to pierce the corporate veil must be proven only by a preponderance of the evidence. This Court recently explained the standard in such cases:

> We review a district court's bench trial decisions to determine "whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Independence Lead Mines v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). This Court will set aside findings of fact only when clearly erroneous. *Id.* We will not disturb findings supported by substantial and competent evidence, "even if the evidence is conflicting." *Id.* "It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 484, 50 P.3d 975, 979 (2002). We, therefore, liberally construe a trial court's findings "in favor of the judgment entered." *Id.* (internal quotation marks omitted). When it comes to matters of law, however, we are not bound by the trial court's conclusions; this Court is free to "draw its own conclusions from the facts presented." *Id.*

Harris, Inc. v. Foxhollow Constr. & Trucking, 151 Idaho 761, 768 (Idaho 2011).

B. HORN IS PERSONALLY LIABLE BECAUSE HE ENTERED THE CONTRACT WITH CARAVELLAS AS THE AGENT FOR AN UNDISCLOSED PRINCIPAL

1. Horn Relies on a Document That Ultimately *Was Not Admitted into Evidence*.

Horn relies heavily on Plaintiff's Exhibit 16 throughout his brief, citing references to "Open Range Homes," as well as with regard to $20,000 allegedly owed by Myers to Horn. Such reliance is improper, however, because Exhibit 16 ultimately was not admitted into evidence. At trial,

Caravellas objected to the admission of Exhibit 16, because it had not been previously produced in discovery. (Tr. Vol. I, p. 265:18-23.) Ultimately, the district court *conditionally* admitted Exhibit 16 subject to Horn/FDG's ability to establish by the end of trial that the document was produced in discovery. (Id. at p. 266-269.) The district court clearly explained: "If by the end of trial you can't establish that, *then it will no longer be admitted.*" (Id. at 266:13-18) (emphasis added); (*See also*, Id. at 269:5-7 ("Exhibit 16 is provisionally admitted subject to verification that it was provided in discovery.").) Importantly, there was no later mention of Exhibit 16 at trial and Horn/FDG never provided any verification that the document had been produced in discovery. Even on the third day of trial, when the parties stipulated to admission of several exhibits, there was no reference made to the contested Exhibit 16. (Tr. Vol. II, p. 669:13-672:7.)

Therefore, under the district court's ruling on the evidence, Exhibit 16 was "no longer admitted," and thus cannot be used to support or challenge any findings of fact. The exclusion of Exhibit 16 from evidence adequately explains why the district court made no reference to Exhibit 16 in its decision. More telling is the fact that Horn/FDG did not make a single reference to Exhibit 16 in their written closing argument or proposed findings and conclusions, despite its overt reference to Open Range Homes.

Furthermore, there was no evidence that the Caravellas ever received the email contained in Exhibit 16, and Caravellas dispute the authenticity of the document. The document is purported to be an email addressed to Mark Griese, the realtor with whom the Caravellas were working.

Caravellas purportedly received the email as a "cc" in the email to Griese.[1] A simple comparison of the Exhibit 16 email with every other email submitted into evidence by Horn/FDG shows a key distinction that demonstrates a lack of authenticity. The email heading indicates that it was from "Michael Horn [builder@openrangehomes.com]," but merely indicates that it was sent to "Louis Caravella." In every other email submitted by Plaintiffs, comprising at least 70 separate exhibits, (Pl's Exhibits 10-14, 18-33, 35-40, 42-81 and 85-87), the headings for email correspondence between the Caravellas and Horn either expressly include the Caravellas' full email address, "twoiz4u@msn.com," or they show Louis Caravella's name in single-quotation marks, i.e., 'Louis Caravella', indicating that it was an assigned name for an actual email address. The email in Exhibit 16 is the only one in all of Horn/FDG's multitude of email exhibits that lacks either the single-quotation marks or a full reference to the actual email address. Not only was the document never produced in discovery, raising more doubt as to its authenticity, it amazingly and conveniently touches on nearly every factual point needed to plug the holes in Horn/FDG's case against the Caravellas, as demonstrated by the numerous citations to Exhibit 16 in their appellate brief.

2. Horn Had the Burden at Trial to Establish that the Limited Liability Company was Disclosed to Caravellas Before Entering Into the Contract.

a. The District Court Improperly Applied the Burden of Proof.

The district court erred in focusing upon a lack of evidence that Horn actively attempted to hide FDG's role in the transaction. Rather, the court should have focused upon whether Horn had

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[1] Mr. Griese was not called as a witness at trial, and thus never confirmed that he ever received the email, either.

actively attempted to <u>disclose</u> FDG's role. In his response brief, Horn wholly ignores and presents no opposing argument against this important aspects of the Caravellas' argument.

Horn's assertion that he was acting as an agent for a disclosed principal is an unpleaded affirmative defense for which he bore the burden of proof at trial. *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (Idaho 1977); *Marco Distributing, Inc. v. Biehl*, 97 Idaho 853, 858, 555 P.2d 393, 398 (1976).

Further, it is well settled that the burden is on the agent to adequately disclose the principal's role in the transaction prior to entering into the contract if he wishes to avoid personal liability, not the duty of the other party to discover the principal's role. *See, e.g.,* Restatement (Third) *Agency* § 6.03, cmt. 3 ("The third party is not subject to a duty to discover the principal's existence or identity; the responsibility is the agent's if the agent wishes to avoid personal liability on the contract."); *Interlode Constructors v. Bryant*, 132 Idaho 443, 446-447, 974 P.2d 89, 93 (Ct. App. 1999) ("[T]he managing officer of a corporation, even though acting for the company, becomes liable as a principal where he deals with one ignorant of the company's existence and of his relation to it and fails to inform the latter of the facts."); *General Motors Acceptance Corp. v. Turner Ins. Agency, Inc.*, 96 Idaho 691, 697, 535 P.2d 664, 670 (1975) ("A principal is 'disclosed' if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity."); *Western Seeds v. Bartu*, 109 Idaho 70, 71, 704 P.2d 974, 975 (Ct. App. 1985) ("An agent contracting with someone else is liable as a party to the contract unless he discloses, at or before the time of entering into the contract, the agency relationship and the identity of the

principal."); *Welch v. Laraway*, 2010 Bankr. LEXIS 3041, at 10 (Bankr. D. Idaho Sept. 13, 2010) (Attached to Caravellas' Opening Brief as Addendum 1) ("The party asserting agency as a defense to personal liability on a contract bears the burden of showing that the principal was adequately disclosed.").

Therefore, as an affirmative defense, Horn had the burden to prove that he disclosed to the Caravellas "at or before the time of entering into the contract" that he was acting on behalf of FDG, and the Caravellas had no duty to discover the existence of FDG as the true contracting party. The district court erred in switching the burden of proof to Caravellas by focusing on the lack of evidence that Horn had actively attempted to hide FDG's connection to the agreement. Because the burden was on Horn, and there was no evidence that Horn made any attempt to disclose FDG's role to the Caravellas, Horn made no adequate disclosure and should be found personally liable.

b. The District Court Erred by Relying upon Horn's Email Address, Signage at the Job Site and Subsequent Invoices in Concluding That FDG Was Properly Disclosed.

There are three facts cited by the district court and Horn regarding whether FDG's connection was disclosed to the Caravellas: Horn's email address, signage at the job site, and subsequent invoices emailed to the Caravellas after the contract was made and work had begun. Only the email address and signage at the job site existed before the contract was entered.

i. Subsequent Invoices From FDG.

The subsequent invoices are irrelevant to whether or not FDG was disclosed "at or before the time of entering into the contract," because they were not delivered until after work had begun under

the contract. *Western Seeds*, 109 Idaho at 71, 704 P.2d at 975; *General Motors Acceptance Corp.*, 96 Idaho at 697, 535 P.2d at 670. Thus, the invoices from FDG do not relieve Horn as the agent from liability under the contract.

The district court incorrectly found and concluded that because the Caravellas continued to pay FDG's invoices, they "essentially acquiesced to the arrangement," and that the Caravellas "could have terminated the relationship early on because the project was clearly intended to be divided into separate and distinct phases." (Findings #162, p. 347; Conclusions #59, p. 359.) This finding fails to account for the court's other specific findings that no part of the approved first phase was ever completed. The parties agreed that Horn needed to repair the structural issues and complete the exterior of the home to enclose and protect it from weather "as soon as possible" for the first phase. (Findings #57, p. 329.) Caravellas initially authorized Horn to complete the "structural framing, ridge vents (roof) and exterior stone for $50,000," and to complete the "exterior wrap and pre-stained siding for $35,000. (Findings #58, p. 329.) Importantly, the court expressly found that none of those tasks were ever completed. (Findings #66-67, 70, 71 and 73, p. 330-31.) Thus, not a single part of the initial "separate and distinct phase" was ever completed, and Horn clearly remained liable as the contracting party.

ii. Email address and signage.

The only facts identified by the district court or Horn that allegedly support a finding that FDG had been adequately disclosed to the Caravellas before entering into the agreement were Horn's email address and signage at the job site. (Findings #161-63; Conclusion #59.) At most, those

indicators of FDG's role were merely available for the Caravellas to discover before the contract was formed. As argued above, the Caravellas had no duty to discover FDG's role, rather, Horn had a duty to disclose it. While Mr. Caravella testified that he was aware —at least by the time of the trial— that the email address through which he had corresponded with Horn was "builder@openrangehomes.com," there was no evidence that Mr. Caravella ever paid any attention to the email address at that time. There also was no evidence that Mr. Caravella discerned— solely from the email address— that Horn was acting as an agent for FDG. Mr. Caravella consistently testified that he believed he was sending emails to Mr. Horn. (Tr. Vol I., pp. 59:24-61:21, and 88:18-21.) As argued in the Caravellas' opening brief, and unopposed by Horn in his brief, the use of a particular email domain name cannot be sufficient notice that the sender of the email is acting as an agent for any business operating under the same name, just as a person using an "msn.com" or "yahoo.com" address does not imply an agency relationship with MSN or Yahoo. This is particularly true in light of the agent's burden to adequately disclose the principal. In this case, the email address did not even include the actual name of the company, but only an assumed business name, making it even more difficult for the Caravellas to discover FDG's role.

Neither the signage on the jobsite nor any clear picture of the signage was ever introduced into evidence. Horn testified, however, that the sign was placed on the job site when he began work for Myers in 2006. Horn described what was on the sign: "That particular sign said *Open Range* ***Custom*** *Homes*, but then gave ***my*** *phone number and e-mail address*, which was

builder@openrangehomes.com. " (Tr. Vol. I, pp. 235:18-236:13) (emphases added).[2] Horn confirmed that the same sign, was left on the property until December 2008. (*Id.* at p. 237:12-18.) Thus, the name on the sign is not the same name that is registered with the Idaho Secretary of State as an assumed business name for FDG. The assumed business name filed by FDG is "Open Range Homes"; it is <u>not</u> "Open Range <u>Custom</u> Homes." (Pl's Exhibit 90.) The Idaho Assumed Business Names Act requires that "[a] separate certificate of assumed business name **must be filed for each assumed business name** a person uses." Idaho Code § 53-504(2) (emphasis added).[3] Therefore, the name on the sign—which is directly connected with the email address and phone number used by Horn—fails to provide any notice of a connection with FDG.

Even if the Caravellas "should have" seen the sign, as the district court concluded, (Findings #161), they could not have made a connection between "Open Range <u>Custom</u> Homes" and FDG. Additionally, if the Caravellas had seen the sign, they could reasonably have concluded that the email address used by Horn was associated with "Open Range Custom Homes" rather than the

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[2] A partially-legible picture of the sign is included under Tab 9 of Exhibit HHHH-2, designated by bates-stamp as page FHHL-000063. The words "Open Range" are partially visible. The next line down on the sign is illegible, yet appears to be longer than only the word "Homes," and could be long enough to state "Custom Homes." The house is not in the background, so it is impossible to determine its location. Since the picture was taken during the Myers project, it does not indicate the sign's condition when the Caravellas visited the property.

[3] The term "person" includes a formally organized or registered entity. Idaho Code § 53-503(5). The term "Formally organized or registered entity" includes limited liability companies. Idaho Code § 53-503(2).

assumed business name for FDG. This discrepancy serves only to increase Horn's obligation to affirmatively disclose the role of FDG.

Furthermore, as addressed in Caravellas' opening brief, there was no evidence regarding where the sign was placed, how big it was, or whether it was even legible after being out in the elements for nearly two years. The partially-legible picture referenced in footnote 2, *supra*, clearly shows that the sign was not located in front of the house. Horn has presented no argument nor identified any such facts in the Record. The Caravellas testified that they did not see the sign. (Findings #45.) Testimony concerning the mere existence of a sign on the property (which they have no duty to look for) is insufficient evidence to satisfy Horn's burden to prove his unpleaded affirmative defense that FDG's role was adequately disclosed to Caravellas. *See Welch v. Laraway*, 2010 Bankr. LEXIS 3041 (Bankr. D. Idaho Sept. 13, 2010) (holding that identifying the name of the company on plans and specifications given to the buyers, and posting of the company's contractor license in the office visited by the buyers, was insufficient to establish notice that the buyers were dealing with a corporation, rather than the company's owner.)

C. THE DISTRICT COURT SHOULD HAVE CONCLUDED THAT FDG WAS AN "ALTER EGO" OF HORN AND "PIERCED THE CORPORATE VEIL"

Horn seeks to hide behind the fiction of an LLC he created for the purpose of engaging in the work he had no business conducting. He asserts that his purchase of two forklifts, only one of which was still owned when he did the work for Caravellas, was adequate capitalization for the LLC. The LLC owned no other assets. (Exhibit DDDD, Horn Deposition, P. 230, L. 11-19.) There was no evidence regarding the forklift's value or whether it was subject to a lien.

Horn argues there was no evidence that he co-mingled funds with FDG, and misconstrues the actual testimony on the issue. Horn's testimony demonstrates that he simply used the company's income as his own, rather than receiving any kind of salary or distribution:

> Q- Did you pay yourself as the managing member from Frontier Development?
>
> A- *I did not receive a salary per se.* You'd have to clarify your question.
>
> Q- How did you -- did you cut separate checks from Frontier Development to pay yourself or did you just take dividends or how did you accomplish it?
>
> A- I didn't really take an income out of the company itself. It was just income coming in and then -- no, I didn't pay myself out of Frontier Development Group, no.
>
> Q- So you didn't cut a separate managing member's salary or anything like that? It's just whatever money came in and was left over at the end you -- was your income?
>
> A- Yes.

(Tr. Vol. II, P. 910, L. 1-23) (emphasis added). For these, and the reasons expressed in Caravellas' opening brief, Caravellas respectfully submit that there was a unity of interest between Horn and FDG that, under the circumstances, supports piercing of the corporate veil to establish Horn's personal liability to pay the Caravellas' judgment against FDG.

D. THE CARAVELLAS PROVED FRAUD BY CLEAR AND CONVINCING EVIDENCE

The district court concluded that the Caravellas proved eight of nine elements of fraud with regard to the following categories of misrepresentations:

a. the condition, quality and value of the Home and workmanship of the construction performed on the Home before they purchased it;
b. the progress and quality of work FDG performed on the project pursuant to his contract with them; and
c. the cost of materials used in the construction.

(Conclusions #42) (emphases added). The only element not found by the district court was the scienter element, "the speaker's knowledge of its falsity or ignorance of its truth." Despite Horn's contention that modern case law requires that scienter be proven only by "the speaker's knowledge of its falsity," the alternative means of proving scienter (the speaker's ignorance of its truth) has often been recognized by this Court. *See, e.g., Faw v. Greenwood,* 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980) (emphasis added). *Accord, e.g., Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000); and *Zuhlke v. Anderson Buick, Inc.*, 94 Idaho 634, 635, 496 P.2d 95, 96 (1972). "Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, or indicating a reckless disregard for the truth" are sufficient to establish the scienter element of fraud. *Parker v. Herron*, 30 Idaho 327, 331, 164 P. 1013, 1014 (1917). *See also, e.g., General Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 854, 979 P.2d 1207, 1212 (1999) (in punitive damages context, describing "reckless indifference to the rights of the other party" as fraud).

As cited in the Caravellas' opening brief, federal courts, other state courts, *Am Jur 2d* and the Restatements all provide for proof of the scienter element of fraud where the speaker makes a statement in reckless disregard for the truth, i.e., knowing that the speaker has no basis for the representation. For example, at 37 Am Jur 2d Fraud and Deceit § 120 (2012), it is explained that

> False statements that are made recklessly, without knowing or caring whether they are true or false, will support an action of fraud or deceit. Accordingly, the scienter or intent to deceive requirement, for purposes of a fraud claim, can be satisfied by a showing of recklessness. A representation is 'reckless' if it is made without any knowledge of the truth, or if the person making the representation knows that he or she does not have sufficient information or a basis to support it, or if the maker realizes that he or she does not know whether or not the statement is true.

Id. (footnotes omitted) (emphases added). The Caravellas proved facts, that were found by the district court, which demonstrate that Horn either knew his statements were false or, if not, that he obviously made the representations despite his "ignorance of its truth." *Faw v. Greenwood*, 101 Idaho at 389, 613 P.2d at 1340. Horn's indifference and reckless disregard for the actual truth requires a conclusion that he made misrepresentations to the Caravellas with "knowledge of its falsity or in ignorance of its truth." *Id.*

In their opening brief, the Caravellas identified numerous findings and conclusions made by the district court that establish the scienter element of fraud. Horn contends that the district court may have applied the wrong evidentiary standard, by asserting that the Caravellas had not proven the scienter element of fraud by a preponderance of the evidence, rather than by clear and convincing evidence. The findings and conclusions relied upon by the Caravellas are supported by the district court's citations to clear and convincing evidence in the Record. Because there is substantial competent evidence to support the finding, then there is substantial and competent evidence to support such finding by the clear and convincing evidence standard. *Sowards v. Rathbun*, 134 Idaho

702, 707, 8 P. 3d 1245, 1250 (2000); *Lindberg v. Roseth*, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002).

1. False Statements Regarding Value Condition, Quality and Workmanship

The district court's finding that Horn had represented to Caravellas that $800,000 worth of construction had been completed is supported by Exhibit A. On the second page of the Exhibit, Horn explains that Myers had purchased the lot for $400,000. On the third page of the Exhibit he again states that the lot was woth $400,000 and that "approximately $1.2M was expended on the project. Given the potential $800K purchase price, the $400K lot is free so to speak." This clearly establishes a representation of fact by Horn (the builder) that approximately $800,000 of construction was completed. If the "[t]ypical bild cost on a 6000 SF house is $1.5M," as Horn represented in the email found on page 2 of Exhibit A, then the Caravellas would only need to spend approximately $700,000 to complete the home if $800,000 had already been expended. The Caravellas' understanding of those facts was expressed in their email to Horn on March 21, 2008. (Def's Ex. D, p. 4.) Mr. Caravella wrote: "If I am essentially getting the lot for free . . . then the $799,000 that has already been spent on the house construction coupled with your $750,000 is over $1,550,000." (Id.) Horn did not correct the Caravellas' understanding of the amount expended on construction when he replied by email, rather he wrote: "Sure—$750K is a reasonable figure," essentially confirming the Caravellas' understanding. (Def's Ex. D, p. 2.) The value to the Caravellas was in the amount of construction already completed because it had a direct correlation to the cost of

completing the home as designed. If less than the amount represented was actually expended on construction, that would mean the Caravellas would have to pay even more to complete the home.

Horn asserts that his statements about the value of the home were only his opinion, not statements of fact. Horn's assertions about the amounts expended on the combination of construction and acquisition of the real property leave no room for opinion, and Horn's confirmation of the Caravellas' understanding regarding the amount expended on construction, in the context of the funds needed to complete construction, demonstrates that his statements were fact, not opinion.

Furthermore, "where actual value is known and false statements are knowingly made with intention to deceive, and do deceive the parties to whom they are made, such statements constitute actionable fraud. Such statements are not expressions of opinion but are statements of material facts." *Jordan v. Hunter*, 124 Idaho 899, 907 (Ct. App. 1993), citing *Fox v. Cosgrith*, 66 Idaho 371, 380, 159 P.2d 224, 227 (1945). "Thus, where a speaker gives an opinion when he is aware of facts incompatible with such opinion, the opinion may amount to a false statement of fact if made with the intention of deceiving or misleading." *Id.*, citing *Fox,* 66 Idaho at 380-81, 159 P.2d at 227-28; 37 Am. Jur. 2d *Fraud and Deceit* § 49. As previously argued, Horn had absolutely no basis for his contention that either $800,000 worth of construction was completed, since he was the contractor who did the previous work and had only been paid about $656,173. (Findings #12.) He also knew that around $87,000 of that amount was for work or materials that had never been performed or installed. (Findings 12-25.) Thus Horn's knowledge was wholly incompatible with any "opinion"

that $800,000 worth of construction had been completed, and clearly support the conclusion that Horn's statement was false.

Horn further asserts that his assessment of the house as being in "good shape," "structurally sound," and a "great house," are statements of opinion, not fact. While asserting that something is a "great house" might be more of an opinion, an assertion that the house is "structurally sound" is more specific and implies knowledge on the part of the speaker regarding the actual structure of the home. The assertion that it is in "good shape" is similar. This is particularly true given the context of the statements, i.e., statements by the person who should be most knowledgeable on the topics, the builder who built the house. Unbeknownst to the Caravellas, however, Horn had no skill or knowledge upon which to base any opinion regarding the structural soundness of the house, and should not have represented anything regarding its condition. The fact that Horn made substantial efforts to convince the Caravellas that he was the best builder in the Teton Valley adds extra weight to his representation regarding the structural integrity of the home.

Horn argues there is no evidence that he was actually aware of the poor workmanship and quality of the home, being an incompetent "hands-off" contractor. Such lack of knowledge and skill should have dissuaded Horn from making any assertion regarding the condition of the home. His choice to portray himself as a skilled, knowledgeable builder and to make representations of fact without having any actual knowledge renders his representations fraudulent.

Horn further asserts that the district court made no finding that the Caravellas relied upon his representations after they personally visited the property, but that is incorrect. (*See* Findings #32,

43; Conclusions #37, 42.) These findings and conclusion are supported by the evidence. (Tr. Vol I., p. 37:6-17;Tr. Vol. II, pp. 884:6-15, 887:10-25, 893:3-5, 896:7-897:5.)

Horn also argues there was no express finding that Caravellas actually relied on Horn's statements regarding value, but the court did conclude that such reliance was made. (Conclusions #42.) This conclusion is supported by the Record. (Tr. Vol I., p. 37:6-17;Tr. Vol. II, pp. 884:6-15, 887:10-25, 893:3-5, 896:7-897:5.)

Horn asserts that he had "zero financial interest in the transaction." This statement ignores, of course, the fact that his wife was the listing real estate agent who would receive a substantial commission from the sale of an $800,000 property. It further ignores the fact that he filed a lien for $23,000 on the property within 1 ½ hours after the counteroffer was signed and sent to the Caravellas. (Def's Ex. ZZZ.) Horn had the additional incentive in the likelihood that he, as the original builder who was discussing the home with the Caravellas, would be given the contract to finish the home.

2. False Statements Regarding Progress and Quality of the Work.

Horn's arguments regarding a lack of any "meeting of the minds" and his other assertions regarding the terms of the contract are contrary to those found by the district court, and thus are not properly raised as an issue on appeal. The district court concluded that a fixed price contract existed to complete specific items of work, that FDG had breached the contract, and awarded damages to the Caravellas. Horn's argument would require a reversal of the breach of contract damages awarded to Caravellas, and thus cannot be raised absent a cross-appeal.

Horn misstates the district court's findings regarding the completion of the stonework, flashing, ridge vents' and siding, asserting that the court found those items had been completed according to changes Myers had made to the plans. None of those findings, however, state that the work had been so completed, but merely state that Horn had made such claims. (Findings #66, 67 and 71.) Importantly, the district court expressly found that the parties had agreed to construct the home according to the written plans, (Findings #55), and found Horn's assertions regarding changes purportedly made by Myers to be hearsay and lacking in credibility. (Findings #51-55.) Horn's argument regarding garage doors are contradicted by the district court's findings, and he does not support his assertions with any citations to the Record.

3. False Statements Regarding Billing for Work Performed.

Horn further misstates the district court's Finding of Fact #64 by asserting that the Caravellas had continually adjusted the authorized work and increased the contract price to over $124,000. There is no mention of that figure anywhere in Finding #64 nor any other Finding. Importantly, the Court found that none of the authorized work was ever completed. Ultimately, the district court found that even if the Caravellas had owed Horn nearly $20,000 for the defective, unauthorized concrete work, and over $16,000 for unauthorized garage doors, the *most* the Caravellas *could* possibly have owed Horn was $126,646. (Findings #82, 128 and131.) The court, however, found that those amounts were not owed by the Caravellas and granted them damages for the full amount charged for the concrete and for a substantial portion of the amount charged for garage doors. (Conclusions #29-33.) Even if Horn believed those amounts were owed, the Caravellas had already

paid over $138,000, (Findings #131), which was substantially *greater than the maximum amount they could possibly have owed* for the work completed. Additionally, Horn was seeking to collect another $105,000 through his mechanics lien foreclosure.

Finally, Horn's argument regarding a cost plus contract should be rejected, because it would require a revision of the relief afforded the Caravellas for breach of contract, and Horn did not file a cross appeal. Furthermore, the district court's findings and conclusions regarding the fixed price contract is supported by the evidence. (Exhibit N.)

E. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS THAT CARAVELLAS PROVED THE OTHER EIGHT ELEMENTS OF FRAUD

Horn asserts that he can challenge the district court's findings and conclusions that Caravellas had proven the other eight elements of fraud, despite the lack of a cross-appeal. While it is true that a party who prevailed on an issue can have that issue affirmed upon grounds not relied upon by the district court, however, the non-appealing party cannot obtain a reversal of facts or conclusions that would "change or add to the relief afforded below." *Walker v. Shoshone County*, 112 Idaho 991, 993, 739 P.2d 290, 292 (1987). Horn failed to enumerate any specific additional issues on appeal in a statement of issues required under I.A.R. 35(b)(4). (*See* Respondents' Brief, p. 1-2.) A failure to enumerate an issue in the statement of issues ordinarily precludes consideration of the issue on appeal, *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991), however, this rule might be relaxed if an additional issue is addressed by authorities cited or argument within the brief. *Crown v. State Dept. of Agric.*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994).

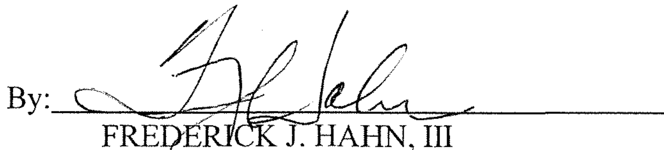
In this case, it is unclear from the arguments presented in Horn's brief exactly which additional elements are challenged with relation to each potential basis for fraud found by the district court. Accordingly, such additional issues challenging the district court's findings and conclusions regarding the other eight elements of fraud should not be considered. Nevertheless, Caravellas have attempt to address what they perceive as challenges to the other elements of fraud in the above arguments regarding the specific areas of fraud. Because there is substantial and competent evidence to sustain the district court's findings pertaining to the other eight elements of fraud, this Court should affirm the district court on those issues. *Sowards*, 134 Idaho at 707, 8 P.3d at 1250; *Lindberg*, 137 Idaho at 225, 46 P.3d at 521.

IV. CONCLUSION

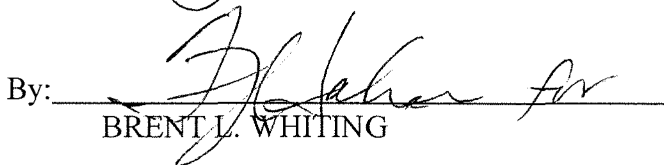
Caravellas respectfully submit that the district court erred in failing to conclude that the Caravellas had proven all the elements of fraud against Horn by clear and convincing evidence. Caravellas also respectfully submit that Horn should have been found personally liable for the judgment awarded to Caravellas against FDG, as an alter ego. Finally, because Horn failed to disclose the role of FDG in the transaction with Caravellas, he is liable under the contract as an agent for an undisclosed principal. Accordingly, Caravellas request that the district court be reversed on these issued, judgment entered in favor of the Caravellas against Horn personally, and that this Court award attorney fees on appeal.

DATED this 17th day of September, 2013.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED



By: ____________________
FREDERICK J. HAHN, III

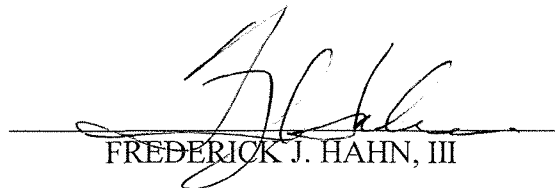


By: ____________________
BRENT L. WHITING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of September, 2013, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Michael J. Elia	(✓) *First Class Mail*
Craig D. Stacey	( ) *Hand Delivery*
MOORE & ELIA, LLP	( ) *Facsimile (208) 336-7031*
P.O. Box 6756	( ) *Via Overnight Mail*
Boise, Idaho 83707	



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FREDERICK J. HAHN, III